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Changing Responsibility for a Changing Environment: Revaluating the Traditional Interpretation of Article VI of the Outer Space Treaty in Light of Private Industry

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ABSTRACT

In recent times, private industry has made great advancements in the commercialization of outer space. Such advancement represents a monumental shift from a period in which outer space activities were the business of national governments. However, the traditional interpretation of Article VI of the Outer Space Treaty still assigns responsibility for private space activities to States despite private industry's increased ability to conduct outer space activities without government involvement or assistance. Ultimately, the blanket application of State responsibility associated with the traditional interpretation of Article VI may be unworkable or inequitable as private industry becomes a dominant force in outer space. Therefore, this Article evaluates the shortcomings of the traditional interpretation of Article VI and proposes a solution based on the customary law of State responsibility in order to ensure that both private and public actors in outer space are unhampered by an overly broad interpretation of Article VI.

KEYWORDS

Liability; State Responsibility; Outer Space; Attribution; Private Industry

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INTRODUCTION

Since the inception of the Outer Space Treaty, mankind's means of exploring and utilizing the resources of outer space has rapidly evolved. Not only are more countries able to develop robust space programs, but also more private entities are able to develop their own spacecraft and launch vehicles without government assistance. Pioneering companies such as SpaceX, Blue Origin, and Boeing have made significant monetary gains by winning lucrative contracts to further the interests of the United States government.[1] However, these same entities have contracted with other non-space faring companies to carry out private interests in outer space,[2] and have continued to develop technology that will hopefully allow for affordable space travel for the average citizen[3] and the extraction of valuable resources from asteroids and other celestial bodies.[4]

Despite great advances in the private commercialization of outer space, many space activities have been, and still are, propelled by the work of large government agencies such as NASA and Roscosmos.[5] Of course, this can be interpreted as the result of the historical formation of the Outer Space Treaty. When the Treaty was originally drafted, the exploration and use of outer space were almost exclusively occupied by the governments of the United States and the former Soviet Union.[6] Consequently, many of the basic premises found within the Treaty itself are centered upon a series of

[1] In 2016, Both SpaceX and United Launch Alliance (a joint venture between Boeing and Lockheed Martin) have provided launches for key missions for the United States government and the International Space Station. *See, OSIRIS-REx Asteroid Sample Return Mission at the Launch Pad*, NASA (Sep. 8, 2016), http://www.nasa.gov/image-feature/osiris-rex-asteroid-sample-return-mission-at-the-launch-pad (detailing mission in which United Launch Alliance launched spacecraft that will intercept an asteroid and transport samples back to Earth); *Completed Missions*, SpaceX, http://www.spacex.com/missions (listing SpaceX launches including those that have transported resupply payloads to the International Space Station).

[2] For prime example, SpaceX was to launch a satellite for Facebook that would have provided internet access to a large portion of sub-Saharan Africa. Though the rocket and payload were destroyed during a static engine test, such a mission demonstrates a commercial space company's financial ability to transact with large private entities rather than depending upon government contracts. *See* Brian Fung, *That SpaceX Explosion Blew Up One of Facebook's Most Ambitious Projects*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/09/01/that-spacex-explosion-blew-up-one-of-facebooks-most-ambitious-projects/.

[3] Both SpaceX and Boeing have revealed plans to transport private citizens to Mars. *See* Nicky Woolf, *SpaceX founder Elon Musk plans to get humans to Mars in six years*, THE GUARDIAN (Sept. 28, 2016), https://www.theguardian.com/technology/2016/sep/27/elon-musk-spacex-mars-colony. Julie Johnsson, *Boeing CEO Vows to Beat Musk to Mars*, BLOOMBERG (Oct. 4, 2016), https://www.bloomberg.com/news/articles/2016-10-04/boeing-ceo-vows-to-beat-musk-to-mars-as-new-space-race-beckons.

[4] *See, Asteroids*, PLANETARY RESOURCES, http://www.planetaryresources.com/asteroids/#asteroids-intro (detailing Planetary Resources goals of extracting resources from asteroids).

[5] *See Launch Services Program – Earth's Bridge to Space,* NASA (2012), https://www.nasa.gov/sites/default/files/LSP_Brochure_508.pdf (describing NASA's directorate that is in charge of launching expendable launch vehicles that satisfy both commercial and governmental interests).

[6] *See infra* note 34 and accompanying text.

compromises based upon the conflicting political ideologies of the two nations.[7] While the democratic and entrepreneurial United States foresaw the eventual private commercialization of outer space, the Soviet Union desired space activities to be under the control of national governments.[8] The resulting compromise from these competing ideologies can be seen in Article VI of the Outer Space Treaty which requires States to "bear international responsibility for *national activities* in outer space, including the [M]oon and other celestial bodies, whether such activities are carried on by governmental agencies *or by non-governmental entities . . . .*"[9]

In short, the traditional interpretation of Article VI attributed the activities of private actors in outer space to the State itself, thus obliging States to ensure that its space activities did not violate the Outer Space Treaty or rules of international law; if a private actor breaches these international obligations, then potential liability for such a breach is imputed to the State. Such an interpretation is ratified by the registration requirements contained in the component outer space treaties,[10] the long history of government activity in outer space, the regulation of outer space through domestic legislation and national space agencies, and the continued use of private space companies for governmental interests.

But, as stated previously, private entities have been able to make leaps and bounds in the arena of space exploration and have already begun to pursue endeavors without government involvement. Such a trend has also coincided with the rise of transnational corporations that are not necessarily tied to one national jurisdiction, but are rather subject to multiple arenas of jurisdiction. These continuing trends, with a potential to soon be the norm in commercial space efforts, begs the question: under what circumstances are States responsible for the potentially unlawful activities of private actors in outer space under Article VI of the Outer Space Treaty?

As private commercial endeavors in outer space continue to rapidly develop, it may become inefficient and inequitable to broadly assign State responsibility for private activities centered upon the basic schemas of State jurisdiction as enforced by the outer space agreements.[11] Indeed, not only have certain space companies been able to garner

[7] *See infra* note 35 and accompanying text.
[8] *See infra* notes 37-40 and accompanying text.
[9] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. VI, Jan. 27, 1967, 610 U.N.T.S. 205 (emphasis added) [hereinafter Outer Space Treaty].
[10] That is, the Liability and Registration Conventions. *See* Convention on the International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187 [hereinafter Liability Convention]; Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 1023 U.N.T.S. 15 [hereinafter Registration Convention].
[11] *See infra* notes 59-98 and accompanying text.

enough monetary resources to pursue completely private projects, but have also expanded across international borders becoming much like the traditional transnational corporation.[12] This evolution essentially blurs the lines of what constitutes a "national activity" or the "appropriate State" for the purposes of State responsibility, and thus calls for a more detailed analysis based upon the international law surrounding conduct attributable to the State.

To that end, the responsibility for private conduct is evaluated on a narrower scale when compared to the basic structure of Article VI and the outer space regime. In general, responsibility for private conduct, regardless of whether that private entity is tied to the State by some means of national jurisdiction, may only be attributable to the State if that conduct is somehow linked to the State's national government. In short, wrongful private actions not associated with carrying out governmental authority or functions cannot automatically impute liability to the State without further analysis. Ultimately, considering the shift of space activities from national governments to private enterprise, as well as the inherent difficulties of assigning the appropriate state for the purposes of responsibility under the Outer Space Treaty, Article VI should not be interpreted in an overly broad manner that prevents a more detailed analysis that is based upon the foundations of State attribution.

Such a bold proposition may seem like a call to abrogate or amend Article VI of the Outer Space Treaty and question the obligations of authorization and supervision contained therein, but such a criticism is not the case; a focus on international norms of State responsibility for breaches of obligations that span beyond the traditional notions of national jurisdiction does not require treaty amendments. Rather, an interpretation of Article VI that gives credence to international law surrounding State responsibility is not only consistent with the Treaty itself, but may allow private commercial efforts in outer space to flourish as national governments are not automatically burdened with potential liability based upon the basic principles of jurisdiction. Nonetheless, an interpretation that focuses on State attribution rather than national jurisdiction must be propelled via international law making mechanisms, specifically domestic legislation.

Therefore, Part I of this Article will recount the main legal principles behind State responsibility, and in turn, describe how these principles are relevant to the current interpretation and application of Article VI of the Outer Space Treaty – an interpretation that automatically attributes responsibility for any private space activity to the State. Part II will discuss the problems posed by this current interpretation and application of Article VI, especially in light of the evolving private nature of the space

[12] *See infra* notes 88-98 and accompanying text.

industry. Consequently, Part III will focus on how more detailed and narrow State attribution analysis that is specifically based on an evaluation of government control can provide a better framework in assessing responsibility. This Part will discuss international law-making mechanisms, particularly the use of domestic legislation, that may push States to accept an interpretation of Article VI that narrows State responsibility for activities in outer space.

1. STATE RESPONSIBILITY AND ARTICLE VI

The Outer Space Treaty is considered the foundational document of the space law regime. Its content establishes the key tenants of space law such as the prohibitions against sovereignty[13] and nuclear weapons in outer space.[14] The Treaty also establishes the basic structure of State responsibility via Article VI. In order to assess the application of Article VI, we first must understand the legal principles behind State responsibility. After such analysis, we may explore the history and formation of Article VI and how its structure interacts with the basic foundations of customary international law.

1.1 STATE RESPONSIBILITY

"Responsibility" in the legal sense "applies in particular to a person's answerability for compliance with his or her legal duties, and for any breaches thereof." [15] Thus, as many could presume, a State is legally responsible, and thus liable, for conduct in breach of its international obligations, regardless of what source of international law those obligations derive.[16] Consequently, it should be noted that "responsibility" and "liability" are different concepts, but are yet intertwined by the potential results of wrongful conduct. That is, States have a responsibility, or a duty, to comply with obligations under international law; a breach of that duty is of course considered to be wrongful conduct.[17] But generally, liability becomes relevant only when a breach of that duty results in damage. [18]

[13] *See* Outer Space Treaty, *supra* note 9, at art. II.
[14] *See id.* at art. IV.
[15] Bin Cheng, *Article VI of the Outer Space Treaty Revisited: "International Responsibility," "National Activities," and "The Appropriate State,"* 26 J. Space Law 7, 9 (1998) (citation omitted).
[16] *See* Anthony Aust, Handbook of International Law 378 (2d ed. 2010).
[17] *See* Cheng, *supra* note 15, at 9.
[18] *See* Factory at Chorzów (Ger. v. Pol.), Judgement, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation

The law that further expounds upon this basic premise of State responsibility is encapsulated by the International Law Commission's articles on the Responsibility of States for Internationally Wrongful Acts.[19] The articles, and the large amount of legal commentary that accompanies each provision, are generally accepted as a codification of customary international law.[20]

To that end, Articles 1, 2, and 3 provide that an internationally wrongful act of a State entails its international responsibility, but the particular action of the State is wrongful only when (a) the conduct is attributable to that State under international law and (b) the conduct constitutes a breach of international obligation of that State.[21] As the central focus of this Article is that of State responsibility for private activities in outer space, much of our attention will be focused on how exactly the conduct of private actors may be attributed to the State.

Now of course, a private entity like a human individual or a corporation may be held solely responsible for wrongful actions under international law.[22] But, there are several avenues in which a State can be held responsible for such wrongful actions.[23] First and most obviously, an entity's wrongful actions can be attributable to the State if that entity is considered to be an "organ" of the government, that is a direct arm of the government itself, or an agent of the government (i.e. "an entity acting under the direction, instigation or control" of a State organ).[24] This also includes individuals or entities that are empowered by a State's internal law to exercise elements of governmental authority.[25] Second, the conduct of a private entity may be attributable to

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which would, in all probability, have existed if that act had not been committed."). The exact definitions of responsibility and liability can differ with language or treaty construction. This particular nuance is central to tenants of responsibility and liability in the Outer Space Treaty as the Treaty is recorded in English, Russian, Spanish, French, and Mandarin. In French for example, there is only one word for "responsibility" and "liability." Cheng, *see supra* note 15, at 10.

[19] G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002) [hereinafter State Responsibility].

[20] *See e.g.,* Gabčíkovo–Nagymaros Project (Hung.v Slovk.), Judgment, 1997 ICJ Rep. 7, ¶ 39 (Sept. 25) (demonstrating how the International Court of Justice allowed the Article's provision on necessity control a dispute between Hungary and Slovakia).

[21] State Responsibility, *supra* note 19, at art. 2(b).

[22] *See e.g.,* Alien Tort Statute, 28 U.S.C. § 1350 (2012) (The district courts [of the United States] shall verify original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States) (alteration to original).

[23] *See infra* notes 24-31 and accompanying text.

[24] *See* Aust, *supra* note 16, at 379 (citing State Responsibility, *supra* note 19, at art. 4(1)(The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State)).

[25] *See* State Responsibility, *supra* note 19, at art. 5 (The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance).

a State if it was acting on the State's instruction, control, or direction.[26] "Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State." [27] Finally, if the conduct is not attributable to the State under the aforementioned avenues, a State may still be held responsible for the actions of a private entity if the State unequivocally acknowledges and adopts the conduct as its own.[28] This can be done by strongly endorsing and perpetuating particular private actions after such actions have occurred,[29] or, more basically, by assuming direct responsibility for certain actions via international agreements.[30]

Such avenues of State attribution can be collectively categorized as "direct" State responsibility as the private actions would be considered acts of the State itself. Some have held that direct responsibility is distinguishable from "indirect" responsibility in which a State always has a duty to ensure that all actions within its jurisdictional control do not violate the rights of other States.[31] "However, since the international wrong consists in reality in governmental officers failing to fulfil the State's international duty of protection and not in the initial acts of the individuals . . . so-called indirect responsibility . . . resolves itself into a case of direct State responsibility."[32] In other words, because a State always has a duty to not violate the rights of other States, a breach of an international obligation is a direct violation of its duty under international law.

1.2. HISTORY AND FORMATION OF ARTICLE VI

As mentioned previously, the Outer Space Treaty was drafted during the height of the Cold War in which the United States and the former Soviet Union were heavily engaged in space

[26] *See id.* at art. 9 (The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct).

[27] *Report of the International Law Commission to the General Assembly*, 2 Y.B. Int'l L. Comm'n, pt. 2, at 47 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

[28] *See* State Responsibility, *supra* note 19, at art. 11 (Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own).

[29] For example, in the *Tehran Hostages* case, the International Court of Justice held that the infamous student-led siege of the US Embassy in Iran was attributable to Iran because the government endorsed and perpetuated the actions of the students. *See* U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3 (May 24).

[30] Responsibility qualified via international agreement is especially pertinent in discussing the interpretation of Article VI of the Outer Space Treaty. *See infra* notes 52 and accompanying text.

[31] *See* Cheng, *supra* note 15, at 12 n. 10.

[32] *Id.* at 12.

activity.[33] As many know, these two nations were diametrically opposed when it came to matters of governance, and as a result, many sections of the Treaty were "drafted in such a way that allows [the Treaty] to bend to political ideology."[34] Article VI is no exception. The Article as it stands today states:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the [M]oon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.[35]

In sum, the assignment of State responsibility for both governmental and private space activities is a direct result of conflicting political views. That is, the United States, a democratic nation with a mixed economy, supported involvement of private entities in outer space activities.[36] However, this proposal was opposed by the Soviet Union, an authoritarian communist regime, which wanted only States to undertake space activities.[37] As seen above, Article VI "was drafted to allow private activity in outer space on the condition that the appropriate State exercises authorization and continuing

[33] *See* Joanne Irene Gabrynowicz, *Space Law: Its Cold War Origins and Challenges in the Era of Globalization*, 37 SUFFOLK U.L. REV. 1041 (2004).

[34] P.J. Blount & Christian J. Robison, *One Small Step: The Impact of the U.S. Commercial Space Launch Competitiveness Act of 2015 on the Exploitation of Resources in Outer Space*, 19 N.C. J. L. & Tech. (2016) (discussing the impact of the American-Soviet dynamic on the formation of Article II) (alteration to the original).

[35] Outer Space Treaty, *supra* note 9, at art. VI.

[36] *See* Rand Simberg, *Property Rights in Outer Space*, THE NEW ATLANTIS, http://www.thenewatlantis.com/publications/property-rights-in-space (last visited Oct. 26, 2016).

[37] *See* Paul Stephen Dempsey, *National Laws Governing Commercial Space Activities: Legislation, Regulation, & Enforcement*, 36 NW. J. Int'l L. & Bus. 1, 6 (2016) (citing Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on the Work of Its First Session, U.N. Doc. A/AC.105/C.2/L.2, at 4 (1962); Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on the Work of Its Seventeenth Session, U.N. Doc. A/5181, annex 3, at 8 (1962).

supervision over its non-governmental entities.[38] [Therefore,] [t]he State [was] made responsible for its national activities, even those by private parties."[39]

Despite this straightforward compromise of State responsibility, the changing nature of the space industry itself has left Article VI fraught with ambiguity. In other words, it may have been relatively simple to assign responsibility for space activities to States as such activities were predominated by direct State activity, but as the private space industry has developed, key phrases such as "national activities" and "the appropriate state" places into question as to exactly *which State* is responsible for *what specific* endeavors in outer space.[40] Nonetheless, many have held onto a traditional interpretation and application of Article VI that may be overly broad despite the immense progress of the private commercial actors in outer space.

1.3. STRUCTURE AND TRADITIONAL INTERPRETATION OF ARTICLE VI

All things considered, the traditional interpretation of Article VI holds that States must take responsibility for all activities in outer space. Specifically, by establishing responsibility, States party to the Outer Space Treaty take upon the duties of (a) assuring that State activities in outer space comply with the Treaty;[41] (b) assuring that non-governmental activities in outer space with a State's jurisdictional control comply with the Treaty;[42] and (c) to subject those non-governmental space activities to authorization and continuing supervision.[43] Many States have chosen to fulfill these duties through extensive licensing and compliance regulations.[44]

With that said, there is no controversy in regards to States imposing various laws and regulations to ensure that both governmental and non-governmental actors comply with their international obligations – the State is of course in the business of lawmaking. Consequently, the only possible controversy surrounding Article VI is what type of private space activities are States responsible for in the case of a breach of an obligation found in the Outer Space Treaty or elsewhere in international law.

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[38] The U.S.S.R. agreed it would be possible to consider the question of not excluding from the declaration the possibility of activity in outer space by private companies, on the condition that such activity would be subject to the control of the appropriate State, and the State would bear international responsibility for it. *Id.* (citing Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on the Work of Its Twenty-Second Session, U.N. Doc. A/AC.105/PV.22, at 23 (1963).

[39] Dempsey, *supra* note 37, at 6 (citation omitted).

[40] *See infra* §. II-A-B.

[41] *See* Outer Space Treaty, *supra* note 9, at art. VI.

[42] *Id.*; *see also supra* note 39 and accompanying text.

[43] *See* Outer Space Treaty, *supra* note 9, at art. VI.

[44] "At least 26 States - about 14% of the members of the United Nations - regulate space activities." Dempsey, *supra* note 37, at 15-16.

The plain text of Article VI would relay that only non-governmental "national activities" would be imputed to the "appropriate State." Though there is no exact working definition of "national activities" or the "appropriate State,"[45] the great compromise between the world's two leading space faring nations has led many noted scholars and publicists to conclude that all "non-governmental national space activities are assimilated to governmental space activities."[46] Essentially, a "[State is responsible for a thing that is done by such non-governmental entities and] is deemed to be an act imputable to the State as if it were its own act, for which it bears directly responsibility. Thus a breach of any provision of the Space Treaty by such a non-governmental entity involves immediately the State's direct responsibility, as if it were a breach by the State itself."[47]

This particular interpretation of Article VI, an interpretation that could be supported by the plain text of the provision and the intent of the drafters,[48] divorces the Outer Space Treaty from the more analytical avenues of State responsibility as outlined above.[49] Indeed, the same authors who have held fast to the *lex specialis*[50] nature of the outer space regime in interpreting Article VI have provided certain interpretations of key terms that are consistent with the notion that States have directly assumed responsibility for the potential breaches of its private actors.[51]

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[45] *See id.* at 7 n. 22.

[46] Cheng, *supra* note 15, at 14.

[47] *Id.*; *see also* P.J. Blount, *Renovating Space: The Future of International Space Law*, 40 Denv. J. Int'l L. & Pol'y 515, 530-31 (2011). ("By creating an affirmative obligation to authorize and supervise non-governmental actors in space in addition to making states responsible for the activities of these entities, Article VI makes it a high risk activity for a state to allow commercial actors to operate in the space environment. In the past legislation has been written so as to help states effectively fulfill Article VI obligations. Traditionally this has been through licensing regimes for nongovernmental actors."); *see also* Manfred Lachs, The Law of Outer Space: An Experience in Contemporary Law-Making 122 (Sijthoff 1972) ("States bear international responsibility for any activity in outer space, irrespective of whether it is carried out by governmental agencies or non-governmental entities. This is intended to ensure that any outer space activity, no matter by whom conducted, shall be carried on in accordance with the relevant rules of international law, and to bring the consequences of such activity within its ambit. The acceptance of this principle removes all doubts concerning imputability . . . States are under obligation to take appropriate steps in order to ensure that natural or juridical persons engaged in outer space activity conduct it in accordance with international law. States have taken upon themselves the explicit obligation that such activity will require their 'authorization and continuing supervision'").

[48] *See* Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 (outlining method of general and supplemental treaty interpretation).

[49] *See supra* notes 24-31 and accompanying text.

[50] *Lex specialis* is a Latin phrase which means 'law governing a specific subject matter' (emphasis added). *Lex Specialis Law and Legal Definition*, USLegal, http://definitions.uslegal.com/l/lex-specialis/. Of course, international space law is a prime example of a *lex specialis* regime. Article 55 of the Articles on State Responsibility make it clear that an international agreement such as the Outer Space Treaty can qualify or preclude the application of the methods of assigning responsibility to the State. State Responsibility, *supra* note 19, at art. 55. But as we will discuss later, the Outer Space Treaty in itself does not preclude the use of international custom in order to interpret the remaining ambiguities of the Treaty.

[51] *See infra* notes 59-98 and accompanying text.

For example, and as we will extensively discuss later in this Article, Bin Cheng, Frans G. von Der Dunk, and several others have retained that national activities are tied to the core means through which a State may assert jurisdiction.[52] In short, national activities and the appropriate state may be linked to (1) the registration requirements of the Registration Convention, (2) the liability associated with launch activities as evinced by the Liability Convention, or (3) the state or nationality of the entities involved.[53] Regardless of how a particular non-governmental space activity is associated with a certain State, it is clear that the assertion of absolute State responsibility for activities in outer space is tied to the main agreements of the outer space regime.

All things considered, the *lex specialis* nature of United Nations outer space agreements has allowed authors to assert narrow definitions of key treaty provisions based upon plain language and drafter intent. Therefore, the traditional interpretation of Article VI is not invalid. In fact, this interpretation has indeed been functional for activities in outer space as a great majority of such activities have had clear ties to national governments or have been identified by a distinct nationality.[54] Moreover, the requirements of the Registration Convention and schemas of liability contained within the Liability Convention are relatively straightforward, though of course subject to further interpretation.

Nonetheless, and as alluded to numerous times over, the nature of activities in outer space has dramatically changed in recent years, and will only continue to evolve. Though a direct assumption of State responsibility for space activities may have once been "revolutionary,"[55] it may soon be time for us to recognize the innovative nature of the Outer Space Treaty[56] and look to the more analytical legal foundations of State responsibility in order to better interpret and apply Article VI.

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[52] *See id.*

[53] *See id.*

[54] *See e.g., U.S. Private Space Companies Plan Surge in Launches This Year*, REUTERS (Feb. 23, 2016), http://www.reuters.com/article/us-space-launches-idUSKCN0VC2G7.

[55] *See* Cheng, *supra* note 15, at 15.

[56] *See supra* note 34 Blount & Robison ("[I]nnovation can be said to be a specific value that is embedded in international space law . Indeed, the Outer Space Treaty itself is an example of legal innovation").

2. DIFFICULTIES OF APPLYING THE TRADITIONAL INTERPRETATION OF ARTICLE VI

Again, the traditional interpretation of Article VI is not necessarily incorrect. However, as more countries and individuals are able to conduct space activities unhampered by the ideological battle of the Cold War, a battle that directly influenced the formation of the Outer Space Treaty, the application of Article VI may become inefficient. Indeed, as will be discussed here, this interpretation of Article VI has only led to more questions especially when more countries have participated in outer space activities. Difficulties associated with more actors in outer space are only exacerbated with the monumental shift of space activities from the hands of government to the hands of private space companies that are quickly spanning across the globe. Therefore, with this section, we will examine the current difficulties of applying the traditional interpretation of Article VI, and subsequently, the potential difficulties of applying the traditional interpretation to private actors.

2.1. PLAIN AMBIGUITY – NATIONAL ACTIVITIES AND THE APPROPRIATE STATE

The same authors that directly assign State responsibility to all space activities surprisingly concede that there are ambiguities within the text of Article VI that may make their broad interpretation of the provision difficult to apply. These ambiguities center mainly around two key phrases: "national activities" and "the appropriate state."[57] Though necessarily does not exist any patent ambiguity within these terms, the shifting nature of the space industry and the increased ability of multiple nations to conduct space activities does in fact create difficulties in its application. For simplicity, we will discuss each phrase in turn by exploring their application within the context of the traditional Article VI interpretation, and subsequently, demonstrate how such traditional applications is difficult, and will continue to be difficult to apply within the environment of a progresive space industry.

2.1.1. NATIONAL ACTIVITIES

As explicitly stated above, the meaning behind "national activities" is relatively straightforward within the context of the traditional interpretation of Article VI

[57] *See supra* note 9 Outer Space Treaty, at art. VI.

considering that all space activities are to be imputed to the State.[58] Nonetheless, there are multiple proposed avenues in which a certain space endeavor may be considered a "national activity" for the purposes of State responsibility, thus giving way to more uncertainty surrounding the meaning of Article VI. The first method of assigning State responsibility falls directly within the confines of the *lex specialis* space law regime as reflected by the requirements of the Registration and Liability Conventions.[59] Specifically, under Article II of the Registration Convention, "[w]hen a space object is launched into Earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the United Nations of the establishment of such a registry."[60] According to Article I of the same agreement, a "launching state" is a State which launches a space object, a State that procures a launch, a State from whose territory a space object is launched, or a State from whose facility a space object is launched.[61] Such a definition is reinforced by Article I of the Liability Convention, and as we have briefly mentioned, the interplay of responsibility and liability contained within international space law is crucial to our central question.[62]

This method of identifying the "national" space activities via registration is of course tied to quasi-territorial jurisdiction.[63] But the plain text of these provisions pose a particular problem in light of the broad application of State responsibility in outer space. Specifically, a component provision of the Registration Convention requires that "[w]here there are two or more launching States in respect of any such space object, they shall jointly determine which one of them shall register the object in accordance with paragraph 1 of this article . . . ."[64] Thus, it is possible for States and private entities alike to "forum shop" among bankrupt or less-regulated States for the malicious convenience of evading responsibility.[65] Though the drafters of the Registration Convention did not intend this possibility, simple registration cannot be the only criterion in determining "national activities" for the purposes of Article VI.[66]

The second method of identifying national activities concerns itself with the nationality of individuals involved. Indeed, this interpretation could be supported by

[58] *See supra* notes 48-49 and accompanying text.
[59] *See* Frans G. von der Dunk, *The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law*, Space and Telecommunications Law Program Faculty Publications, Paper 69, at 7 (2011), *available at* http://digitalcommons.unl.edu/spacelaw/69.
[60] Registration Convention, *supra* note 10, at art. II.
[61] *Id.* at art. I.
[62] *See supra* notes 16-17 and accompanying text.
[63] *See* AUST, *supra* note 16, at 43.
[64] Registration Convention, *supra* note 10, at art. II(2).
[65] *See* Cheng, *supra* note 15, at 22.
[66] *Id.*

Article IX of the Outer Space Treaty which refers to "activity or experiment planned by it *or its nationals* in outer space,"[67] or by the simple international principles that allow States to have jurisdiction over its nationals abroad.[68] This notion is even reflected in national space laws of the United Kingdom which claims jurisdiction over British nationals, whether they be individuals or corporations.[69] But much like the first method of identifying national activities, this method also has its shortcomings. The main pitfall of this interpretation is that it excludes the possibility of assigning responsibility by territory whether that be by a certain national being in another State's physical territory or on a space vehicle bearing another State's flag or registration.[70] Not only does this method possibly exclude those that should be responsible for space activities, but it also may unduly assign responsibility to multiple actors, thus possibly causing much confusion in the case of liability.

The third and final method of determining what constitutes a national activity falls under the coined concept of "jurisdiction" – a legal theory derived from interplay of "overriding" jurisdictions.[71] Jurisdiction in itself is defined as "the internationally recognized competence of a State concretely to set up machinery to . . . physically to exercise the functions of a State."[72] This competence is derived solely from the elements of territorial, quasi-territorial, or personal jurisdiction.[73] However, each form of jurisdiction is weighted against the other, with pure territorial jurisdiction being superior to both quasi-territorial jurisdiction and personal jurisdiction based on nationality.[74] For example, a national of State A travelling on a ship flying the flag of State B commits an internationally wrongful act in a port belonging to State C. In this scenario, State C would have the sole ability to arrest and prosecute the national for the internationally wrongful act. If the ship was traversing international waters while A engaged in illegal conduct, State B would have the power to act considering that the ship's quasi-territorial jurisdiction is superior to that of the personal jurisdiction of State A. Applying the basic premise of jurisdiction to the interpretation of national activities under Article VI is a deceivingly effective method of determining State responsibility in outer space. By allowing certain forms of jurisdiction having priority over the other, the "responsible" State can be readily identified. Nonetheless, proponents of applying the

[67] Outer Space Treaty, *supra* note 9, at art. IX (emphasis added).
[68] *See* Aust, *supra* note 16, at 43-44.
[69] Outer Space Act, c. 38 §§ 1-2 (1986).
[70] *See supra* note 64 and accompanying text (briefly describing quasi-territorial jurisdiction).
[71] *See* Gbenga Oduntan, Sovereignty and Jurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitation 92 (2012).
[72] Cheng, *supra* note 15, at 24.
[73] *See* Oduntan, *supra* note 71, at 92.
[74] *See id.*

premise of jurisdiction to State responsibility in outer space concede that "[e]ffective *jurisdiction* is when and where a State's jurisdiction is not overridden by that of any other State, and *may actually be exercised*."[75]

The need to come to effective jurisdiction when applying the theory of jurisdiction creates several shortcomings in the realm of outer space. First, because territorial and not extraterritorial jurisdiction is the supreme form of jurisdiction, there may be an undue emphasis on the "State from whose territory"[76] a space object is launched when identifying a national activity.[77] Though this scenario can be limited, or possibly cured, by other means of identifying a launching State under the Liability Convention,[78] it would be inequitable to assign liability for a potential disaster to the State from whose territory a space object is launched when the fault of disaster may lie with another State's spacecraft which the launching State sent into orbit (i.e. quasi-territorial jurisdiction) or with another State's national (i.e. personal jurisdiction). This inequitable assignment may be assuaged when a space object reaches outer space,[79] but then again, the system of jurisdiction may unduly assign liability based upon the quasi-territorial jurisdiction derived from a certain spacecraft's nationality when fault may be actually lie with a foreign national operating the spacecraft. As one can see from these scenarios, the theory of jurisdiction becomes extremely difficult to apply when multiple States are involved in one single space activity.

All in all, the main methods of determining whether a space activity is the "national activity" of one particular State fail to account for the fact that multiple States are often involved in an outer space mission. These methods may have been workable during a time in which many space activities were unilateral affairs under the direction of national governments, but such methods applied to the current nature of the space industry runs the risk of inequitable assignments of liability. The insistence upon assigning State responsibility to fit the initial interpretation that a State is always responsible for activities in outer space is only furthered when trying to interpret the term, "the appropriate state."

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[75] Cheng, *supra* note 15, at 24 (emphasis added).
[76] Liability Convention, *supra* note 10, at art. I(c)(ii).
[77] Indeed, "bias" in favor of territorial jurisdiction has, in the past, been instrumental in shaping international law. "However, increasing trends have challenged the effectiveness of territorial jurisdiction, thus making a system of jurisdiction increasingly unworkable in the modern world. For more information on this trend, especially in relation to its effect on transnational corporations", *see* generally Larry Cata Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18 Ind. J. Int'l L. 751 (2011).
[78] *See* Liability Convention, *supra* note 10, at art. I(c)(i).
[79] *Id.* at art. III.

2.1.2. THE APPROPRIATE STATE

Unlike "national activities," the ambiguous "appropriate State" has not been analyzed to a great extent in relevant academic literature. However, questions surrounding this term create similar difficulty in the application of Article VI. The most visible question is contained within the Treaty text itself, as the "appropriate State" is singular.[80] This may suggest that there could only be one appropriate State for responsibility, especially since Article II of the Registration Convention allows for a choice of registration when two or more countries launch a space object.[81] However, one can easily determine that such an interpretation would be unjustified as this would once again induce forum shopping and more importantly, unduly qualify State responsibility when multiple countries are involved in a single space mission.

Therefore, another approach within the strict confines of the traditional interpretation of Article VI has been to separate registration requirements from jurisdictional requirements. That is, a space object could be registered in one country, but there could be separate agreements or other means of assigning State responsibility.[82] However, this particular method would wrongfully remove registration as a means of quasi-territorial jurisdiction by divorcing registration requirements from "jurisdiction and control" under Article VIII of the Outer Space Treaty.[83] Ultimately, any singular notion of the appropriate State or a method that would allow for selective responsibility would be a dubious application of Article VI.

Considering these practical failures of shortsighted interpretations of "the appropriate State," it has been proposed that one should reference the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space - the precursor to the Outer Space Treaty.[84] Contained within the Principles appears the phrase "the State concerned" in regards to State responsibility.[85] In fact, it is possible that this term could replace the "appropriate State" considering that, as we have extensively discussed, more than one State can be involved in space activities. But

[80] *See* von der Dunk, *supra* note 59, at 8.
[81] *See also* Registration Convention, *supra* note 10, at art. II.
[82] *See* Cheng, *supra* note 15, at 27; von der Dunk, *supra* note 59, at 12-13.
[83] *See* Outer Space Treaty, *supra* note 9, at art. VIII. ("A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body").
[84] *See* von der Dunk, *supra* note 59, at 3. (citing G.A. Res. 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963) [hereinafter Resolution 1962]).
[85] *See* Resolution 1962, *supra* note 84, § 5 ("The activities of non-governmental entities in outer space shall require authorization and continuing supervision by the State concerned").

alas, there could be just as many interpretations for the "State concerned" as there are for the "appropriate State" or "national activities."

2.2. FURTHER COMPLICATION - PRIVATE INDUSTRY

As we can see, it becomes extremely difficult to apply the provisions of Article VI when it comes to multiple actors. These difficulties are only increased when we factor in private actors. Though the traditional interpretation of Article VI would hold that such a factor is irrelevant, its increased presence in the space faring world calls us to reevaluate the broad application of State responsibility in outer space. The beginnings of certain multinational projects such as the Sea Launch Company best illustrates how the difficulties of designating a "national activity" and determining the "appropriate State" are only exacerbated with the presence of multiple private actors.

The Sea Launch Company is a multinational spacecraft launch service that uses a mobile maritime launch platform for equatorial launches of commercial payloads on a Russian launch vehicle.[86] The Company itself was founded as limited duration company incorporated in the Cayman Islands, a British Crown colony.[87] The initial activities of the Company were supported by four different corporations, all from different countries: (1) RSC Energia of the Russian Federation; (2) the Boeing Company of the United States; (3) Kvaerner A.S. of Norway; and (4) NPO Yuzhnoye of Ukraine.[88]

The initial organization of the Sea Launch project clearly demonstrates inconsistencies in the blanket application of Article VI. That is, all methods of determining "national activities" and the "appropriate State" as outlined above would impute the actions of the Company to the United States, Russia, Norway, Ukraine, the country or company which may purchase the Company's services, and possibly, the

[86] *See About Sea Launch*, Sea Launch, http://www.sea-launch.com/about/11398.

[87] *See* Armel Kerrest, *Launching Spacecraft from the Sea and the Outer Space Treaty: The Sea Launch Project*, 1997 Int'l Inst. Space Law Proc. 264, 265.

[88] *Id.* In the beginning stages of the venture, the companies listed above came together to form a partnership that varied in shares and responsibilities. Kvaerner provided the launch platform and the Assembly and Command Ship (20%); RSC Energia supplied the third stage of the launch vehicle (and some parts of the first and second stages) and conducted launches (25%); NPO Yuzhnoye supplied the first and second stages of the launch vehicle (15%); and Boeing led the team, furnished the home port, some parts of the launcher and payload accommodation, and commercialized the launches via licensing in the United States (40%). *Id.* Unfortunately, the Sea Launch Company has not conducted a launch since 2014 due to reorganization of the company's corporate structure. *See Sea Launch Platform Stripped of Foreign Equipment, Ready to Leave US for Russia,* Space Daily (Oct. 9, 2019), http://www.spacedaily.com/reports/Sea_Launch_platform_stripped_of_foreign_equipment_ready_to_leave_US_for_Russia_999.html. More specifically, it appears that involvement from the United States will discontinue, while the Russian Federation assumes leadership. *See id.* Nonetheless, the Sea Launch Company still exists and stands as poignant example of multinational involvement in singular space activities.

United Kingdom.[89] This application does not take into account the variety of activities each company performs, the amount of ownership each company may have in the venture, or the relationship each country may have with a national government. Rather, the methods outlined above would simply look to basic notions of territorial, quasi-territorial, or personal jurisdiction, especially in regards to identifying the launching State.[90]

Ultimately, this lack of consideration for the level of involvement leads to potential consequences that further complicate the Article VI schema of State responsibility. For example, without considering the level of involvement in a space activity, liability resulting from a breach of an international obligation may not be fairly apportioned by joint and several liability requirements of Liability Convention Article IV.[91] Of course, such an occurrence could be controlled by the finding of fault,[92] but even this analysis could unfairly force the burden of responsibility onto one State and allow another State to suffer little consequence. For instance, Planetary Resources, an entity recently acquired by ConsenSys, Inc., is a pioneering American company planning to exploit natural resources from asteroids.[93] The government of Luxembourg invested a large sum of money in the Planetary Resources venture.[94] Though the government of Luxembourg benefits from the activities of the company, it is the burden of the United States to license, monitor, and shoulder the potential mistakes of Planetary according to the traditional means of assigning State responsibility in outer space.[95]

[89] *See* Kerrest, *supra* note 87, at 267-68.

[90] *See supra* notes 61-76 and accompanying text.

[91] *See* Liability Convention, *supra* note 10, at art. IV.

[92] *See id.* arts. I, II.

[93] *See Company*, Planetary Resources, http://www.planetaryresources.com/company/#timeline. (Planetary Resources should not be confused with Deep Space Industries. Deep Space Industries is a Luxembourgish company that places some of its operations in the United States.) *See Deep Space Industries Congratulates Luxembourg on Their Bold Legislative Action to Facilitate the Space Resources Industry*, Newswire (Nov. 16, 2016), https://www.newswire.com/news/deep-space-industries-congratulates-luxembourg-on-their-bold-legislative-action. As noted above, Planetary Resources was recently acquired by ConsenSys, Inc. (a.k.a. ConsenSys Space) in late 2018. *See ConsenSys Acquires Planetary* Resources, Planetary Resources (Oct. 31, 2018). Since the acquisition, it does not appear the ConsenSys has eradicated the original mission of Planetary Resources or divested itself of investment provided by the government of Luxembourg. *See also* Alan Boyle, *Why in the Universe is a Blockchain Company Buying the Assets of a Formerly High-Flying Asteroid Miner?*,GeekWire (Oct. 31, 2018), https://www.geekwire.com/2018/consensys-blockchain-studio-acquires-planetary-resources-asteroid-mining-venture/. (Though Planetary Resources has undergone significant corporate restructuring like the Sea Launch Project, the entity, and its associated capitalization, still remains as an excellent example of how the traditional interpretation of Article VI is challenged by the advent of outer space privatization. Please note that the name "Planetary Resources" is utilized throughout this article in place of "ConsenSys" for the sake of clarity).

[94] *See* David Z. Morris, *Luxembourg to Invest $227 Million in Asteroid Mining*, Fortune (June 5, 2016), http://fortune.com/2016/06/05/luxembourg-asteroid-mining/.

[95] *See supra* notes 61-76 and accompanying text. (This particular fact may of course change with new domestic space legislation recently passed in Luxembourg. That is, Luxembourg could choose to shoulder responsibility for Planetary Resources activities depending on how exactly Luxembourg chooses to assert its jurisdiction). *See also*, Deep Space Industries, *supra* note 93.

But aside from difficulties associated with determining the correct State for responsibility, the main dilemma surrounding the application of Article VI is the refusal to depart from the antiquated notion that States themselves are the sole actors in outer space. As repeated throughout this article, space is becoming an arena for private actors that are fueled by commercial profitability or quite simply, a spirit for adventure.[96] Soon, transnational corporate activity in outer space may become just as common as transnational corporate activity on Earth. And like the actions of those transnational companies on Earth, the actions of those same entities in outer space should not automatically be imputed to the State. Therefore, reevaluation of the application of Article 6 is necessary not only to assuage the difficulties associated with multiple actors, but to also ensure the creation of a regime that allows private ingenuity to take on the future of outer space exploration.

3. PATH FORWARD

Simply put, the broad application of Article VI will become increasingly difficult to apply as multiple private actors become a dominant force in the commercialization and exploration of outer space. Consequently, there must be a solution that eases the burden of assigning State responsibility when several entities are involved in a single space operation, and more importantly, ensures that States are not unfairly called upon to rectify the international wrongs of purely private actors. This solution lies with careful and concentrated State attribution analysis as outlined by customary international law rather than selecting the aforementioned methods that are confined by the broad interpretation of Article VI. Therefore, in discussing this solution, we will first examine how such analysis is effective in determining State responsibility in outer space. We will then examine whether such analysis is consistent with the Outer Space Treaty, and subsequently, how States may support a more narrow interpretation of Article VI via of domestic legislation.[97]

[96] *See supra* note 3 and accompanying text.

[97] Though indicated above, this article does not propose a new international legal regime for the governance of private outer space activities. Rather, this article simply provides a more modern and equitable method in assessing State responsibility and liability that still preserves the current Outer Space Treaty regime.

3.1. A VIABLE SOLUTION

We have extensively discussed the numerous consequences that come with attempting to apply the traditional interpretation of Article VI in a modern and continually evolving space industry. But a viable solution to this dilemma is ironically a traditional one rooted in customary international law. In fact, each method of equating private actions with actions of the State under customary international law can prove effective in fairly assigning State responsibility.

To that end, it would be relatively simple to assign State responsibility for space missions conducted by space agencies of national governments as such entities are clearly organs of the State.[98] In fact, as briefly mentioned before, the traditional interpretation of Article VI was quite viable and in little need of scrutinized interpretation during the early days of space exploration that was dominated by the United States and the former Soviet Union. Furthermore, the viability of the traditional interpretation of Article VI is also confirmed under the customary international law of State responsibility when a government contractor assists in furthering the interests of national governments in outer space.[99] In continuing this business custom, private government contractors like SpaceX or Boeing are under the direction of the national government that procures their services, and thus their actions are attributed to the contracting State party.[100] But as briefly mentioned, private space faring entities are gaining profit from other sources aside from still-lucrative government contracts.[101] This is where the traditional interpretation of Article VI fails to consider the varying corporate structures of a transnational space-faring company.

Fortunately, an application of the customary law surrounding State responsibility can allow us to consider corporate structure and government involvement when determining whether a private company's activities in outer space are justifiably attributable to the State. That is, by looking to Article 8 under the Articles on State Responsibility, we can look to whether the activity of a private entity in outer space is in fact a national space activity of the State via government control.[102] As we will discuss, this particular method of assigning State responsibility is broad enough to hold several States responsible for private activity, yet narrow enough to ensure that responsibility for such private activity is not unjustly imputed to national governments.

[98] *See supra* notes 5, 24 and accompanying text.
[99] *See supra* note 25 and accompanying text.
[100] *Id.*
[101] *See supra* notes 2-4 and accompanying text.
[102] *See supra* note 26.

As we may recall, Article 8 treats the actions of a private entity as actions of the State if it is found that a national government exercised a certain amount of "control" over the private action.[103] According to the Article Commentary, control can be exercised in a variety of ways such as allowing a private activity to be under the direction of a national government or allowing a certain business to become a State-owned entity.[104] Therefore, determining whether a national government exhibited the requisite amount of control needed for the actions of a private organization to be imputed to the State is, quite simply, fact-intensive.[105] As evidenced through several cases presented before several international tribunals, no particular method of attributing private conduct to the State is allowed to be absolutely dispositive in determining whether a national government asserted the requisite degree of control.[106] In fact, some international tribunals have gone as far as to separate individual actions of a private entity in order to fairly determine the extent of government control and liability.[107] Presumably, one might argue that not allowing any one factor to be dispositive in determining State responsibility is inefficient, and in the realm of space, no more useful than the variety of methods of assigning responsibility in accordance with the traditional interpretation of Article VI. However, the focus on government control allows us to assert a method of attributing conduct to the State that is neither overly broad nor narrow. Basically, though an emphasis on control allows one to focus on the facts of each individual case, an evaluation of such facts still rests upon the more concrete methods of attributing private conduct to the State that acts as the foundational rationale for control. For instance, in evaluating individual facts, we may look to how a particular corporation's

[103] *Id.*

[104] *See* Report of the International Law Commission to the General Assembly, *supra* note 27, at art. 8.

[105] *Id.* ("[C]onduct [may be] nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State").

[106] *See, e.g.*, Hyatt Int'l Corporation v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 72 (1985). In this particular case, Hyatt International Corporation litigated breach of contract claims against Iran claiming that the contracting entity in Iran, The Foundation for the Oppressed, was a State-controlled. The tribunal explored a number of details to determine that the Foundation was indeed directly controlled by the Iranian government. The tribunal discussed various factors such as how the Foundation was established and the identity of its corporate officers and leaders.

[107] For example, in the Military and Paramilitary Activities in and against Nicaragua case,

> the [International Court of Justice] rejected the broader claim of Nicaragua that all the conduct of the [American-backed] contras was attributable to the United States by reason of its control over them. It concluded that: '[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.' Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by [the United States].

See, e.g., Report of the International Law Commission to the General Assembly, *supra* note 27, at art. 8(4). (citing Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgement, 1986 I.C.J. Rep 14, ¶ 51 (June 27) (alterations to the original) (emphasis added).

structure is established in order to determine whether partial State ownership makes that particular corporation an organ of the State pursuant to Article 4.[108] Similarly, we can determine requisite government control by evaluating whether the activity of a private entity is exercising the authority of a national government pursuant to Article 5.[109]

This particular analysis can be especially useful, and should be applied in some capacity, in evaluating State responsibility for private activity in outer space. Let us return to our discussion of Luxembourg's direct investment in the American asteroid mining company, Planetary Resources.[110] According to the traditional interpretation of Article VI, we can see that the United States' responsibility for Planetary Resource's activities is exclusive, absent a different launching territory, because on the surface Luxembourg may not claim to have jurisdiction over the company by qualifying its amount of government ownership.[111] However, if we apply control analysis, we can abrogate the United States' responsibility for what is an objectively purely private commercial endeavor, while also ensuring that Luxembourg does not completely escape responsibility while reaping the benefits of Planetary Resources' activities. To that end, a certain number of factual scenarios in regards to the relationship between the company, the United States, and Luxembourg can be evaluated under the general guise of control.

For example, we can evaluate the basic corporate structure of Planetary Resources and determine whether the government of Luxembourg has significant control over the direction of the company.[112] On a similar note, we can also look to whether Planetary's services were directly procured or contracted for by either the Luxembourgish or American governments for a particular mission. But, in weighing

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[108] *See supra* note 24.

[109] *See supra* note 25. Admittedly, looking to Article 5 alone would do little to cure the shortcomings of the traditional interpretation of Outer Space Treaty Article VI as the dispositive element of authority asks us to consider whether the activity of the private entity could be considered "governmental". *See also* Report of the International Law Commission to the General Assembly, *supra* note 27, at art.5.

> In order to determine whether an act is governmental, the Commentary proposes to rely on the particular society, its history and traditions. According to an alternative approach, the assessment should be based upon a comparative standard and it should be determined from an objective point of view whether the act is normally regarded as governmental in a contemporary setting.

Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 Berkeley J. Int'l L. 142, 147-48 (2010) (citations omitted). Therefore, considering these two approaches to identify a governmental activity, it might be difficult to determine whether a certain space activity is indeed governmental given the recent trend of the increased privatization of space. But nonetheless, this difficulty in determining whether a space activity is a government function is beneficial as this would deter one from focusing on one dispositive factor to determine requisite government control for the purposes of assigning State responsibility.

[110] *See generally supra* notes 96-98 and accompanying text.

[111] *See supra* notes 97 and accompanying text.

[112] *See supra* note 108.

these considerations, it is important to ensure that the analysis remains a fact intensive one focused on overall control and does not cling to one particular method of State attribution as dispositive of the ultimate determination of State responsibility.[113] Otherwise, our careful and meticulous analysis of State responsibility in outer space would be no different from the traditional interpretation of Article VI that directly assigns responsibility on the basic notions of jurisdiction.

Again, one might argue that looking to a myriad of non-dispositive factors associated with government control supported by the customary international law surrounding State responsibility has little to no advantage over the traditional interpretation of Article VI considering that the traditional interpretation of Article VI provides multiple avenues of assigning State responsibility. But as stated, those who continue to advocate for such an interpretation limit factors of responsibility strictly to territorial, quasi-territorial, or national jurisdiction while ignoring the unique situations that are posed by transnational space-faring entities such as Planetary Resources, and the fact that space activities are no longer a "special function" of national governments. All in all, the notion that all space activities are attributable to the State may be satisfactory from an academic point of view, but an attribution scheme based on a clear set of non-dispositive factors "may prove to be [more] helpful in the future to deal with the growing number of private space activities in many different circumstances."[114]

3.2. CONTROL AND THE OUTER SPACE TREATY

Though we may have discussed a viable solution in correctly assigning State responsibility for outer space activities, we must discuss how such a solution may become integrated into the international space law regime. Therefore, we must first determine whether State attribution analysis that is consistent with customary international law is also consistent with the Outer Space Treaty.

From our extensive discussion of the traditional interpretation of Article VI, we know that the proponents of this interpretation cling to the intent of the drafters and hinge the application of Article VI upon key terms of "national activities" and "the appropriate State."[115] Many factors demonstrate that the traditional interpretation of Article VI is correct, but we must also remind ourselves that the *lex specialis* nature of the

[113] *See* AUST, *supra* note 16, at 380 ("The degree to which the State may be involved in an entity, such as owning or funding it, is not decisive").

[114] Karl-Heinz Bockstiegel, *The Term "Appropriate State" in International Space Law*, 37th PROC. COLLOQUIUM L. OUTER SPACE 77, 79 (1994). Dr. Bockstiegel essentially supports a "functionalist view" in determining the "appropriate State".

[115] *See supra* §. II-A-B.

outer space law regime does not completely exclude further consideration of the plain meaning of terms, and more importantly, the consideration of customary international law.[116]

In regards to basic treaty interpretation, we can see that the plain meaning of "national activities" in particular gives way to our proposed use of attribution analysis rooted in control. In the literal sense, "national" is an adjective used to describe an entity or function that is "of, relating to, or maintained by a nation as an organized whole or independent political unit:"[117]. Such a definition is indeed consistent with State attribution analysis that focuses on whether a particular private activity is a governmental activity, as "national" can refer to actions carried out by the government. This notion is strongly reinforced by international custom not only through the Articles on State Responsibility, but through extensive use of this analysis in regards to private corporations which could operate in a number of countries.

To that end, contrary to the premise of the main outer space agreements, the Articles on State Responsibility fundamentally proscribes against using the jurisdiction of a State as the sole means of attributing private conduct to that State. It is this proscription that has led to a more detailed analysis of State attribution that has been used to evaluate the conduct of corporations associated with the State. In fact, decisions from international tribunals such as the International Centre for Settlement of Investment Disputes (ICSID), have used a basic test of "structure, control, or authority" to determine whether private conduct carried out by a private corporation is conduct attributable to the State.[118]

Though the Outer Space Treaty does allow for the use of international custom to further interpret its application, custom surrounding outer space activities may still regard such activities as governmental, and thus always attributable to a particular State, regardless of the changing nature of the private space industry in which government involvement or control may be variable.[119] Therefore, it is necessary that we consult

[116] *See generally* Outer Space Treaty, *supra* note 9, at art. III ("States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, *in accordance with international law*, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding") (emphasis added).

[117] *National*, Dictionary, http://www.dictionary.com/browse/national?s=t (last visited Dec. 1, 2016).

[118] *See, e.g.*, Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award on Jurisdiction, 5 ICSID Rep. 396 (2000). In this case, the ICSID evaluated these factors in order to determine whether the actions of a State-owned entity were directly attributable to Spain in order to determine where the ICSID itself had jurisdiction over the investor dispute. Though this basic structure of "structure, ownership *or* control" would seem to lessen our emphasis on "control," we must remind ourselves that structure and authority are basic rationales that provide deeper analysis under the general guise of control. *See supra* notes 110-11 and accompanying text.

[119] *See supra* note 111.

other particular mechanisms of international law making in order to qualify the traditional notion that space activities are always attributable to one particular jurisdictionally appropriate State.

3.3. IMPLEMENTING CONTROL – DOMESTIC LEGISLATION

The current nature of the space industry characterized by the rapid privatization of space may still not be enough to demonstrate that space activities should not be considered exclusive functions of the State. Thus, because we are dependent upon the principles of control to determine whether the conduct of a private space company may be considered the action of the State, we must find another international law-making mechanism that may give credence to our innovative interpretation of Article VI.

One such method that has gained ground in recent times as being instrumental in the development of international space law is that of incremental law making in which States "engage in the process of fulfilling their treaty obligations" via domestic legislation.[120] Essentially, "[t]his means that international law grows incrementally as States act and react within legal lacunae."[121] This particular method of interpretation is particularly well-suited towards our proposed interpretation of Article VI as many States have implemented licensing and liability legislation in order to ensure that their private actors comply with international obligations imposed by the Outer Space Treaty.

Now, the institution of regulatory legislation for outer space activities is not an issue. States always have a duty to ensure that entities within its jurisdiction do not violate the rights of other States.[122] Rather, the main issue is that such legislation may be quite broad in order to conform the traditional interpretation of Article VI. In fact, the domestic space law of the both the United States and the United Kingdom assumes responsibility for any space activities in which it may assert its respective jurisdiction.[123]

But of course, calling for a sudden narrowing of domestic space legislation may cause controversy as such an action, if implemented too quickly, would amount to a State unfairly limiting its responsibility in case of breach of an international obligation by a private actor. Thus, because we have demonstrated concern mainly about the consequences of State attribution in case of a breach, we can focus upon the gradual

[120] *See* Blount & Robison, *supra* note 34.
[121] *Id.* For a more detailed description of the incremental lawmaking process, *see* W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984).
[122] *See supra* notes 32-33 and accompanying text.
[123] *See* 51 U.S.C. § 50101 (2012); Outer Space Act, c. 38 §§ 1-2 (1986).

narrowing of State legislation that focuses strictly on liability rather than legislation that deals with general licensing or registration procedures.

For example, both American and French law require that launching entities carry a certain amount of liability insurance when launching in their respective territories.[124] If the resulting damage exceeds the value of the required amount of liability, then the State government is required to pay the remaining value of damage in accordance with the outer space agreements' schema of responsibility.[125] In order to "push" the international community in viewing space activities as something other than a special government function, it could be possible for these States to vary amounts of liability coverage in order to not involve the State at all in case of damage. One might argue that such a method is inequitable or may reintroduce fears of forum shopping, but such a method only shifts responsibility for fault to a private party rather than automatically imputing fault to the State itself. Moreover, such shifting of reparation does not leave the violated party without relief – a party could seek relief in a domestic court of a State that has jurisdiction over a private space company or through international arbitration pursuant to a contract.[126]

All in all, no matter how exactly a State reforms its interpretation of Article VI, States must adopt a narrow interpretation of State responsibility for outer space activity in order to allow the foundational custom surrounding state responsibility to take hold. Put another way, States and other subjects of international law must begin to narrow the application of State responsibility for outer space activities in order to yield a more practical, equitable, and innovative, interpretation of Article VI.

CONCLUSION

Despite the great advancements of private industry in outer space, we are still far from private space activity being a commonplace phenomenon. In retrospect, it has only been in this last century that private industry has become a formidable player in the realm of outer space. As conceded early on, many space projects are still under the direction of national governments who were, and still remain, the leaders of developments in outer

[124] *See* 51 U.S.C. § 50914 (2012); Law 2008-518 of June 3, 2008 on Space Operations, Official Gazette of France, *available at* https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020719167&dateTexte.

[125] *See* Armel Kerrest, *Remarks on the Responsibility and Liability for Damages Caused by Private Activity in Outer Space,* 40th Proc. Colloquium L. Outer Space 134, 137 (1997) (discussing the legal parameters of conducting launches from French Guyana).

[126] *See id.* at 136.

space. Despite this fact, we do know that private space faring companies are indeed the future of outer space exploration. Therefore, it is not too early to begin discussing a time in which missions in outer space are not the special projects of national governments, but rather a natural product of private endeavors.

Consequently, we must begin to look towards a simple, yet thoughtful, legal regime that accounts for the future. As demonstrated, a focus on government control in accordance with the international customary law of State responsibility is a broad yet sufficiently narrow analysis that is better suited towards assigning State responsibility for outer space activities. The traditional interpretation of Article VI may serve well to resolve past and present legal dilemmas, but the evolving nature of the space industry presents new dilemmas that are unaccounted for in the application of the traditional interpretation of Article VI. But ultimately, a focus on State responsibility can be revolutionary insomuch that it not only accounts for the challenges of the future, but also preserves the foundations of the Outer Space Treaty.

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The Unacceptable Spectre of Under-Aged Forced Marriage in Turkey

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ABSTRACT

In many respects, Turkey is an exception among Muslim countries. Whilst being a secular democratic state, Turkey still struggles, however, with some remnants of its religious and socio-cultural heritage. The issue of forced marriage of children is one of those issues. Marriage is commonly defined as a union concluded by parties with their full and free consent. If consent is lacking, a forced marriage occurs. In the case of a forced marriage, consent is lacking because one of the prospective spouses does not give her/his consent freely, or sometimes because she/he is incapable of giving consent because of her/his age. As a founding member of the Council of Europe, Turkey not only ratified the European Convention on Human Rights (ECHR) in 1954 and Protocol Nr. 1, but it has also ratified many of the core international documents on human rights and the rights of children, such as the U.N. Convention on the Rights of the Child, the U.N. Convention on the Elimination of All Forms of Discrimination against Women. Nevertheless, the forced marriage of children is still a prevalent social problem in Turkey, and in the majority of cases, girls are the victims of such practices. This article examines the factors behind the forced marriage of children in Turkey, while exploring the current legal background and Turkey's international legal commitments to fight against such practices. Finally, the article suggests the reinforcement of available legal remedies in order to prevent the forced marriage of children.

KEYWORDS

Forced Marriage; Child Marriage; Women's Rights; Consent

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INTRODUCTION

According to the United Nations Populations Fund's (UNFPA) estimation, over 10 million child marriages occur in 107 low-income countries each year.[1] Furthermore, 14.2 million girls under the age of eighteen are expected to be married every year, which means that 39,000 girls marry every day.[2] Unfortunately, the vast majority of the aforementioned girls marry or enter into a union against their will, in many cases, with men who are much older than them,[3] and Turkey is not an exception. In Nevşehir, a city in central Anatolia, the Office of the Prosecutor filed a case against the alleged husband and the father of a fifteen-year-old girl for sexual molestation. The defendants argued that early marriage is a tradition in that part of Turkey and that many people get married in the same way.[4] Moreover, it was argued that they were not aware of the fact that their actions constituted a violation of the criminal code. The Nevşehir Court of Assize decided that there was no ground for prosecution on the basis that "[i]n the social and cultural atmosphere they live in, many children generally get married before appropriate age and early marriage is not

[1] United Nations Population Fund, Marrying Too Young: End Child Marriages 6 (2012), http://www.unfpa.org/end-child-marriage.

[2] *Id.*

[3] *See* Unicef, Progress for Children, A Report Card on Adolescents 5 (2012), https://www.unicef.org/publications/files/Progress_for_Children_-_No._10_EN_04232012.pdf (last visited Oct. 18, 2017).

[4] It is a fact that not all early marriages are made under force. However, statistics show that 46.8% of early marriages are decided by parents in Turkey, *see* Hacettepe Üniversitesi Nüfus Etütleri Mudurlugu, Türkiye'de Kadina Yönelik Aile Ici Siddet Araştirmasi [A Study On Domestic Violence Against Women In Turkey] 76 (2015), http://www.hips.hacettepe.edu.tr/KKSA-TRAnaRaporKitap26Mart.pdf, (last visited Oct. 19, 2017) ; *see also* Geetanjali Gangoli, Melanie McCarry and Amina Razak, *Child Marriage or Forced Marriage? South Asian Communities in North East England,* 23 Child. & Soc. 418, 426 (2009) (arguing although most of the children did not regret their marriage, they could have been forced to do so in the light of social mentality over women).

considered illegal or inconvenient. The defendants intended to set up a happy home. In this case, there is no sign of sexual molestation."[5]

As stated in this regrettable court decision, child marriage is still a social fact of life in Turkey. The problem is that there is sometimes a very thin line between forced marriage and marriage with the full and free consent of the children.[6] Given the fact that the existence of competent and informed consent is controversial where one of the prospective spouses is a child, the possibility of a forced marriage must be taken into consideration.[7] The forced marriage of children is commonly seen as a violation of human rights and of the rights of the children.[8]

According to Article 1 of the U.N. Convention on the Rights of the Child (hereinafter UNCRC), a child is defined as a person below the age of eighteen, unless the laws of a particular state set a lower legal age of consent. In the Turkish legal system, the age of majority is set at eighteen[9]. Under the age of eighteen every person is considered as a child.[10] Although Turkey has ratified the UNCRC, marriage of children is still a reality and statistics show that most of the victims are in fact girls.[11] It is worth stressing that Turkey was one of the sixty-nine states that ratified the U.N. Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW), also considering the request of the Committees of the CEDAW and the UNCRC to the member states "[n]ot to allow exceptions to minimum age of marriage even with consent."

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[5] Nevsehir Agir Ceza Mahkemesi [Nevsehir Court of Assize] 2010/142 E., 2012/20 K (Turk.).

[6] International documents overtly emphasize the importance of full and free consent. *See, e.g.*, International Covenant on Civil and Political Rights, art. 23(3), Dec. 16, 1966, 999 U.N.T.S. 171. (ICCPR), International Covenant on Economic Social and Cultural Rights, art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3. and Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art. 1(1), Dec. 10, 1962, 521 U.N.T.S. 231 state that marriage must be entered into with the free consent of the intending spouses.

[7] *See* Loretta M. Kopelman, *The Forced Marriage of Minors: A neglected Form of Child Abuse*, 44 J. L., Med. & Ethics 173, 174 (2016).

[8] *See, e.g.,* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; *see also* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Dec. 9, 1964, 521 U.N.T.S. 231; G.A. Res. 68/148, Child, Early and Forced Marriage (Dec.18, 2013); Eur. Parl. Ass. Deb. 29th Sess., Res. 1468 (Oct. 5, 2005); Forced Marriage, Travel.State.Gov (2018), https://travel.state.gov/content/travel/en/international-travel/emergencies/forced-marriage.html . *See also* United Kingdom Foreign & Commonwealth Office, the right to choose: multi-agency statutory guidance for dealing with forced marriage (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322310/HMG_Statutory_Guidance_publication_180614_Final.pdf [hereinafter Commonwealth]; *see also* Anti-Social Behavior, Crime and Policing Act 2014, c. 12 (Eng.); *see also supra* note 1.

[9] Türk Medeni Kanunu [TMK] [Turkish Civil Code] art. 11 (2002) (Turk.).

[10] Türk Ceza Kanunu [TCK] [Turkish Criminal Code] art. 6(b) (2005) (Turk.).

[11] In 2011, 31% of the women married under the age of 18. More specific 4.1% of women were under the age of 14; 23.9% were between the age of 15 and 17 when they married, *see* Turkiye Cumhuriyeti Aile Ve Sosyal Politikalar Bakanligi, Turkiye Aile Yapisi Arastirmasi Tespitler, Oneriler [The Study on Family Structure in Turkey: Recommendations, Suggestions] 121 (2014), https://ailevecalisma.gov.tr/uploads/athgm/uploads/pages/indirilebilir-yayinlar/67-turkiye-aile-yapisi-arastirmasi-2013-tespitler-oneriler.pdf, (last visited Nov. 5, 2017).

There are many factors behind the phenomenon of forced marriages, and specifically in the form it takes in Turkey. First of all, even though the age of majority is stated as eighteen, the Turkish Civil Code, also accepts the minimum age for marriage as seventeen and allows marriage of girls who are just seventeen years old upon the consent of their guardians.[12] In exceptional circumstances, the Turkish Civil Code allows for the marriage of future spouses who are sixteen years old upon a court's approval.[13] In addition to that, religious, social and economic factors play a key role in the creation of such a drawback. This is in the light of the fact that statistics show that 31% of girls under the age of eighteen got married, mostly with a religious ceremony that is not recognised by the Turkish legal system as a "legal marriage" since marriage ceremonies can be performed only by state officials.[14] Therefore, only the marriages which are regulated according to the Turkish Civil Code are recognised as legal.

It is remarkable that after the wave of Muslim immigration to different countries around the world, this problem tends to become a global issue.[15] The aim of this study is firstly to uncover the root causes of forced marriages in the form of child marriage, examining its historical legal background as well as elaborating on certain social facts related to Turkey. Then, the study focuses on the effect of these historical and social facts on the law. Lastly, in order to eliminate the practice of forced child marriage in Turkey, the study suggests a new legal approach to the problem and amendments to the existing laws.

[12] *See supra* note 9, art. 124(1).

[13] *Id.* art. 124(2).

[14] *See* Nazlan Ertan, *Early Marriage, Lifelong Abuse*, HURRIYET DAILY NEWS (Nov. 25, 2016), http://www.hurriyetdailynews.com/early-marriage-lifelong-abuse-106543.

[15] Over 3.4 million registered Syrians currently live in Turkey which is the largest host of the refugees in the world, *see* DISASTER AND EMERGENCY MGMT. AUTH., SYRIAN WOMEN IN TURKEY 27 (2014), https://data2.unhcr.org/en/documents/download/54512 (last visited Oct. 18, 2017); statistics and reports show that the frequency of early marriages among the female Syrians in Turkey is considerably high, *id est*, nearly 15% females in the 15-18 age group are married, mostly by reason of economical motivations, *see* Disaster and Emergency management Authority, Syrian Women in Turkey 27 (2014), https://data2.unhcr.org/en/documents/download/54512.

1. BACKGROUND

1.1. THE CONCEPT AND TERMINOLOGY REGARDING FORCED MARRIAGE FROM INTERNATIONAL AND TURKISH PERSPECTIVES

It can be argued that reaching a legal definition of forced marriage is rather problematic due to the divergent definitions in different parts of the world.[16] In fact, forced marriage is best defined negatively, with reference to examples of unions that do not constitute forced marriage such as arranged marriage which requires the consent of both parties.[17] On the contrary, in the study carried out by the Council of Europe, forced marriage is considered as an umbrella term to cover

> [S]lavery, arranged marriage, traditional marriage, marriage for reasons of custom, expediency or perceived respectability, child marriage, early marriage, fictitious, bogus or sham marriage, marriage of convenience, unconsummated marriage, putative marriage, marriage to acquire nationality and undesirable marriage – in all of which the concept of consent to marriage is at issue.[18]

Although different approaches have been taken for defining forced marriage, one main factor can be seen in all of them: lack of consent.[19] In this context, in the most widely-accepted definition, the Foreign and Commonwealth Office of the United Kingdom states that "[a] forced marriage is a marriage in which one or both spouses do not (or, in the case of some adults with support needs, cannot) consent to the marriage and duress is involved" (alteration to the original).[20]

In order to attain an explicit definition of forced marriage, the terms "marriage" and "forced" need to be clarified.[21] The first definition of marriage is contained in the U.N. Universal Declaration of Human Rights (hereinafter UDHR) which was proclaimed on 10 December 1948 as follows: "[m]arriage shall be entered into only with the free and full consent of the intended spouses."[22] Although various international and regional human rights documents contain provisions regarding basic standards of marriage, such as the equal right to enter into marriage, none of them provides a legal definition of

[16] *See generally* Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 6 J. Int'l. Crim. Just. 1013 (2008).
[17] *See, e.g.,* Frances Simmons & Jennifer Burn, *Without Consent: Forced Marriage in Australia*, 36 Melb. U. L. Rev. 970, 973 (2013).
[18] Edwige Rude-Antoine, Forced Marriages in Council of Europe Member States 7 (2005).
[19] *Id.* at 17.
[20] Commonwealth, *supra* note 8, at 8.
[21] Rude-Antoine, *supra* note 18, at 16.
[22] UDHR, *supra* note 8, at art. 16(2).

marriage.[23] Commonly, marriage is considered as a legal union between a man and a woman who are attached by an exclusive commitment.[24] Nevertheless, the way of understanding the concept of marriage in one society may not be the same in others. In this regard, the legal definition and consequences of marriage differ from one country to another.[25] Today, a new model of marriage, which considers marriage as a relationship, has been acknowledged by some academics.[26] In an effort to create a universal definition of marriage, it is highlighted that there is no need to categorize marriage as a legal contract between a man and a woman.[27] Hence, it is argued that defining marriage as "[a]ny union between two or more people which, in a specific society is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital or marital alike" seems appropriate in terms of dealing with any possible case.[28]

The second problem with the definition of forced marriage is the notion of consent and its relationship with the issue of duress.[29] In other words, girls are required to give their competent and informed authorization willingly.[30] Hence, a lack of consent concerns not only those who do not give consent but also those who cannot legally consent because they are underage, disabled, or incapable of giving informed consent.[31] Consent is lacking where the spouse gives her/his consent due to duress, misinformation, deception, fraud, or lies.[32] On this basis, a marriage may be based on different practices of duress, from external influences such as emotional pressure, to more extreme cases, such as abduction or rape.[33] In some cases, determining whether or not the parties have made a voluntary statement is a complex task, except in cases where

[23] *C.f.* Iris Haenen, Force And Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law 17 (2014).

[24] *See, e.g.,* Sherif Girgis, Robert P. George and Ryan T. Anderson, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245, 252 (2011).

[25] *See, e.g.,* Schalk and Kopf v. Austria, App. No. 30141/04, (2010) ECHR 1996, ¶ 62 (2010).

[26] *See generally* David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning Of Marriage*, 38 S. Tex. L. Rev. 1, 38 (1997); *see also* Milton C. Regan, *Law, Marriage, and Intimate Commitment*, 9 Va. J. Soc. Pol'y & L. l16 (2001).

[27] It can be argued that the attitude against cohabitation has changed. According to a study conducted by the British Social Attitudes, 61% of participants stated that a woman with no children should have the same rights as a married woman, when her relationship ends, *see* Anne Barlow, Simon Duncan, Grace James and Alison Park, Cohabitation, Marriage and the Law: Social Change In The 21st Century 81 (2005).

[28] Haenen, *supra* note 23, at 18.

[29] *See* Susan Edwards, *The Straw Woman' at Law's Precipice: An Unwilling Party*, *in* Participation in Crime: Domestic and Comparative Perspectives 70 (Alan Reed & Michael Bohlander eds., 2013).

[30] *See* Kopelman, *supra* note 7.

[31] *Id.;* Angela Vigil, American Bar Association Commission on Domestic and Sexual Violence Report to the House of Delegates (2014).

[32] *See* Kopelman, *supra* note 7.

[33] *See* Amrit Wilson, *The Forced Marriage Debate and the British State*, Race & Class, July 2007 at 25, 32.

duress is in the form of physical violence.[34] It is especially difficult to detect the nature of a marriage agreement between a forced and/or arranged marriage (where the bride and groom are pre-selected by their families) since considerable emotional pressure is involved.[35] In an arranged marriage, spouses give their full consent even though emotional pressure is involved.[36] However, in many cases, a woman knows that she cannot decline, otherwise she would have to face the consequences.[37] In addition to that, after marriage, a spouse may realize that she/he may have been forced to marry at the time of marriage.[38]

As stated under Article 142 of the Turkish Civil Code, the officer of marriage asks the bride and groom individually whether each individual wishes to "marry the other"; if both answer in the affirmative, they are pronounced married by mutual consent. Accordingly, despite the global tendency regarding marriage, it is defined as an agreement between man and woman in the Turkish legal system.[39] The basic problem which arises in relation to the concept of marriage is where the spouses only conclude a religious marriage that has no legal consequences in the current Turkish legal system.[40]

There is no legal definition of a "forced marriage" in the Turkish Civil Code.[41] The Code only accepts an action of annulment in case of duress.[42] If the spouse is coerced under duress that involves an immediate and serious danger towards her/his or one of the relatives' lives, health, honour or dignity, she/he can sue for annulment of the marriage.[43] In this regard, only the acts which violate the rights of a person such as life, health, honour and dignity are considered as duress and constitute a reason for claiming the annulment of the marriage.[44] The spouse who gave her/his consent under duress must bring a suit within six months after being subjected to duress, and five years after

[34] *See* Alexia Sabbe et. al., *Forced Marriage: An Analysis of Legislation and Political Measures in Europe*, 62 Crime, Law and Social Change 171, 173 (2014).

[35] *See generally* Geetanjali Gangoli & Khatidja Chantler, *Protecting Victims of Forced Marriage: Is Age a Protective Factor?*, 17 Feminist Legal Stud. 267, 269 (2009); *see also* Simmons & Burn, *supra* note 17, at 974.

[36] *See* Mahmood v. Mahmood, [1994] S.L.T. 599 (Scotland). (The Court annulled the marriage, but nevertheless Lord Prosser argues that "under pressure–and perhaps very considerable pressure—a party does indeed change his or her mind and consents to a marriage, with however ill a grace and however resentfully, then the marriage is in my opinion valid").

[37] *See* Kalwant Bhopal, *South Asian Women and Arranged Marriages in East London, in* Ethnicity, Gender And Social Change 117, 121 (Rohit Barot & Harriet Bradley & Steve Fenton eds., 1999).

[38] *See* Gangoli & Chantler, *supra* note 35, at 269.

[39] *See supra* note 9; Evlendirme Yonetmeligi (Evlendirme Yönetmeliği) [The Regulation Regarding Marriage], art. 14 (Nov. 7, 1985) (Turk.).

[40] *See* Gotthard Jäschke, *Imam-Ehe in der Türkei* [*Imam Marriage in Turkey*], 4 Die Welt Des Islams 164, 170 (1955).

[41] Pinar Ilkkaracan, *Law: Access to the Legal System: Turkey*, *in* Encyclopedia of Women and Islamic Cultures: Family, Law and Politics 383 (Suad Joseph & Afsaneh Najmabadi eds., 2005).

[42] *Supra* note 9, art. 151.

[43] *Id.*

[44] *See* Ayse Havutcu, *Mukayeseli Hukuktaki Gelismeler Isiginda Turk Medeni Kanunu Acısından Zorla Evlenme Probleminin Degerlendirmesi* [*The Evaluation of the Problem of Forced Marriage in terms of Turkish Civil Code in the Light of Development in Comparative Law*], 8 E-J. Yasar U. 1341, 1377 (2013).

the date of marriage in any case.[45] Therefore, the annulment of marriage under duress would be secured before a court i.e., family division of the court of first instance within the period of limitation, and only the spouse who gave her/his consent under duress can ask for the annulment of marriage. This provision requires critical analysis on two grounds. The first one is regarding the legal understanding of the concept of duress. The Turkish Civil Code defines acts by third parties which directly violate personal rights as duress; but this definition excludes the physiological pressure of the families as well as social pressure.[46] The second critique targets the annulment claim. After five years from the date of the marriage, the victim of duress can no longer ask for the annulment of the marriage. Therefore, the victim of forced marriage could be subjected to duress during the aforementioned five years in order to continue the marriage which might have become intolerable for her/him.[47] This is related to the annulment claim which should not be limited over time, this only allows to continue a marriage which may have become intolerable for the other party.

1.2. LEGAL MODERNIZATION OF TURKEY: THE STORY OF WESTERNIZATION

Until 1923, Turkey was ruled by the Ottoman Empire and its legal system was based primarily on Islamic law and the *Hanafi* legal school,[48] which was the official doctrine in the empire since the middle of the sixteenth century.[49] Although the Ottoman Empire was based on the Islamic law, the sultans were active lawmakers. The sultans concentrated their attention on criminal, tax and land law, issuing numerous decrees (*Kanunname*) aimed at filling the gaps (while respecting Islamic law) of the legal system of an empire which was composed of a multitude of culturally, religious and ethnically diverse peoples.[50] These rules were perceived, in Islamic terms, as part of the "customary law" or "common law" of the community (*Orfi Hukuk*). The sultan's decrees did not concern, however, the establishment of rules in the field of private law, which was instead based on the Millet system, based on the religious affiliation of the members of the different populations of the empire rather than on a territorial basis. In other words, the fundamental classification of private law was based on religion, on the one

[45] *Supra* note 9, art. 152.
[46] Havutcu, *supra* note 44, at 1377-1378.
[47] *Id.*
[48] *Hanafi* school was one of the four major Sunni legal schools of which composed of *Hanbali, Hanafi, Maliki* and *Shafi'i.*, *see* Christopher Melchert, The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E. 156 (1997); *see also* Judith E. Tucker, Women, Family, and Gender in Islamic Law 14 (2012).
[49] *See* Paul J. Magnarella, *The Reception of Swiss Family Law in Turkey*, 46 Anthropological Q. 100, 101 (1973); *see also* Halil Cin & Gül Akyilmaz, Tuürk Hukuk Tarihi [Turkish Legal History] 90 (2011).
[50] *See* Carter Vaughn Findley, *The Tanzimat*, *in* Turkey in the Modern World 9, 18 (2008).

hand, there was Islamic law that was applied only to Muslims and on the other, there was the specific religious law that was applied to the non-Muslim population[51]The Ottoman legal system therefore provided that Islamic law was applied in private law disputes among the Muslim population, while non-Muslims had their own religious and customary law. There was also the aforementioned *Orfi Hukuk* that was set up by the sultans in order to solve the current problems of the empire . Hence, the fundamental classification of private law was generally based on religion, on one hand there was Islamic law which was applied only to Muslims and on the other there was the specific religious or customary law that was applied to the non-Muslim population of the Empire.[52]

At the end of the seventeenth century, the idea of being part of the Western civilization gathered momentum in order to save the empire from collapse.[53] Indeed, the period of *Tanzimat* (reorganization)[54] from 1839[55] to 1876[56], the era of modernisation of the empire,[57] opened the way for the education of women and the questioning of a repressive system against them.[58]

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[51] *See* Esin Orücü, *Turkey: Reconciling Traditional Society and Secular Demands*, 26 J. Fam. L. 221, 236 (1987); *see also* Pinar Ilkkaracan, *Customary: Turkey*, *in* Encyclopedia of Women and Islamic Cultures: Family, Law and Politics 426, 427 (Suad Joseph & Afsaneh Najmabadi eds., 2005); Alan Watson, *The Evolution of Law: Continued,* L. & Hist. Rev. 537, 550 (1987); Arzu Oğuz, *The Role of Comparative Law in the Development of Turkish Civil Law*, 17 Pace Int'l L.Rev. 373, 376 (2005); Roderic H. Davison, Reform in the Ottoman Empire 1856-1876, at 12 (Princeton University Press, 1963) (The main community of non-Muslims were the Orthodox Greeks, Gregorian Armani and Jews).

[52] *Id.*

[53] Ergun Ozbudun, Turk Anayasa Hukuku [Turkish Constitutional Law] 25 (Yektin, 2010). In fact the treaty called *Sened-i Ittifak* (Charter of Alliance) signed in 1808 between the government and the representative of the local governing authorities (*Ayans*) which was considered the first constitutional phase of the Ottoman Empire and for the first time in the history of the Empire the power of the Sultan was limited. According to this treaty only officials of empire could interfere in the affairs of government and the grand vizier contributed to the administration and as a result he was responsible for his actions. However, this treaty had an interesting feature, because it was not recognized a mechanism to ensure its execution. *See generally* KEMAL GÖZLER, TÜRK ANAYASA HUKUKUNA GİRİŞ [INTRODUCTION TO TURKISH CONSTITUTIONAL LAW] 10 (2013).

[54] The word of *Tanzimat* derives from an Arabic word "order" and means also "reform", *see* Davison, *supra* note 51, at 42; *see also* Findley, *supra* note 50.

[55] Sultan recognized the fundamental principles such as security of life, honor and property for the first time in the edict of *Tanzimat. See* Bernard Lewis, The Emergence of Modern Turkey 107 (1968); *see also* Gulnihal Bozkurt, Bati Hukukunun Türkiye'de Benimsenmesi [The Adoption of Western Law in Turkey] 48 (1996); Davison, *supra* note 51, at 40; Ilber Ortayli, İmparatorluğun En Uzun Yüzyili [The Longest Century of The Empire] 99 (2006).

[56] *See* Ergun Ozbudun, The Constitutional System Of Turkey: 1876 To Present 2 (Springer, 2011). (Even though the *Tanzimat* reforms had no effect on the powers of sultans, it leaded the way in the first Constitution of Ottoman Empire in 1876. The period of *Tanzimat* ended with the enactment of the Constitution).

[57] *See* Linda T. Darling, *Islamic Empires, The Ottoman Empire and the Circle of Justice*, *in* Constitutional Politics In The Middle East, With Special Reference To Turkey, Iraq, Iran And Afghanistan 23 (Said Amir Arjomand ed., 2008); Findley, *supra* note 50, at 13.

[58] *See* Zuhal Yeşilyurt Gündüz, *The Women's Movement in Turkey: From Tanzimat Towards European Union Membership,* 9 Perceptions 115, 115 (2004); *see also* Darling, *supra* note 57; Findley, *supra* note 50, at 13.

It is worth mentioning that the principles of *Tanzimat* had been interpreted in such a way that the rules were applicable to the entire population of the Ottoman Empire, both Muslim and non-Muslim.[59] In addition, the *Islahat Fermanı* (reform edict), enacted in 1856, finally settled that the laws were equal for all without any distinction of religious affiliation.[60] In this context, a need arose to enact a series of reforms[61] with a special emphasis on contract law and commercial law, to fill-in the legislative gaps in a progressively dynamic world influenced by the increasing trade relations with European countries.[62] Under this wave of reform, the Ottoman Criminal Code (*Qanun al-jaza' al-Humayuni*), a translation of the 1810 French Code Pénal [C. Pén.] [Penal Code], came into force in 1859.[63] Nevertheless, the translation is a modified version since some Islamic norms and customs were added to the Code. In addition, in later years, more provisions were modelled on Islamic standards.[64]As a part of this phase of the reforms, a codification entitled "*Mecelle*"[65] which regulated commercial law, law of civil procedure, property law and contract law was completed.[66] Nevertheless, *Mecelle* is not considered as a civil code typical of western codifications of the nineteenth century, since the matters regarding law related to individuals, family law and inheritance law were not regulated by it.[67] The text in question was also criticized for not reflecting the spirit of its time and for having a strong Islamic imprint.[68]

[59] *See* Bozkurt, *supra* note 55, at 49; *see also* Ozbudun, *supra* note 53, at 26.

[60] *See* Davison, *supra* note 51, at 55; *see also* Bozkurt, *supra* note 55, at 49; Ozbudun, *supra* note 53, at 26; Findley, *supra* note 50, at 18; Darling, *supra* note 57; Erik J. Zürcher, Turkey: A Modern History 51 (3rd ed. 2004).

[61] *See* Hifzi Veldet Velidedeoglu, *Les Facteurs De Codification Dans L'Empire Ottoman Et Les Causes De La Réception Du Code Civil Suisse Par La Turquie Républicaine,* Annales de la Faculté de Droit d'Instanbul, Sept. 1961, at 21, 24-25 (as a starting point such gaps were filled partly with the enactment of the Commercial Code in 1850 which consisted of the first two chapters of the French Code and supplemented with appendices. In 1881, moreover, taking as a model of the French Code de procédure civil [C.P.C.][Civil procedure code] of 1807, the Code of Civil Procedure which replaced the decree of the procedure of commercial courts in 1860 was enacted); *see also* Bozkurt, *supra* note 55, at 357; Lewis, *supra* note 55, at 110; Paul J. Magnarella, *East Meets West: The Reception of West European Law in the Ottoman Empire and the Modern Turkish Republic*, 2 J. Int'l L. & Prac. 281, 284 (1993) (arguing in order to apply the new European originated codes, mixed tribunals composed of Muslim and non-Muslim judges were constituted).

[62] For a deep analysis on relations with European countries we refer to, Ortayli, *supra* note 55, at 114. With the introduction of these reforms, the efficiency of both in the commercial field and administrative one increased; their goal was to change the social and cultural customs of the people, *see* Kurt Lipstein, *The Reception of Western Law in Turkey, the Purpose and the Results of the Meeting of International Association of Legal Science Held in Istanbul in September*, Annales de la Faculté de Droit d'Instanbul, , at 225, 229 (1955).

[63] *See* Velidedeoglu, *supra* note 61, at 24; *see also* Lewis, *supra* note 55, at 109; Bozkurt, *supra* note 55, at 344; Ortayli , *supra* note 55, at 179.

[64] *See* Sulhi Dönmezer & Sahir Erman, Nazarî ve Tatbikî Ceza Hukuku [Theoretical and Practical Criminal Law] 126 (1997).

[65] The full name of the codification is "*Mecelle-i Ahkâm-ı Adliye*".

[66] The codification was approved between 1869 and 1876 and consisted of 16 books. *See* Lewis, *supra* note 55, at 123; Velidedeoglu, *supra* note 61, at 26; Bozkurt, *supra* note 55, at 159.

[67] In fact there was no need for such areas of law to regulate because they were governed by Islamic law for Muslims and their own religious law for non-Muslims, *see* Bozkurt, *supra* note 55, at 161-162.

[68] *See* Lewis, *supra* note 55, at 123; Seval Yıldırım, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 Pace Int'l L. Rev. 347, 353 (2005).

The period from the foundation of the republic in 1923 to the adoption of the Western civil codes in 1926, was revolutionary both legally and politically for the Republic of Turkey.[69] Indeed, this period is of particular importance given the fact thatthe caliphate, the office of *shaykh al-islam*[70] and the sharia courts were abolished in 1924.[71] In the same year secular courts were introduced.[72] Thus, the old system was completely abandoned and the new legal system was established by the reception of the western European codes.[73] In 1926, the incumbent government decided to fully adopt[74] the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907,[75] which revolutionised the lives of Turkish women. Indeed, by the virtue of this code, polygamy was abolished, marriage under the age of fifteen for women and seventeen for men was forbidden, and legal equality of women with men as recognised.[76] Nevertheless, this code has been criticised for neglecting true gender equality in relation to family law.[77] The enactment of the new Turkish Civil Code in 2002, which established a new gender regime based on equality of men and women in relation to marriage and divorce, is considered as an important development for women's rights in Turkey.[78] Following the birth of the

[69] It is also claimed to be a very good example of revolutionary and radically reformist social engineering through laws, *see* Orücü, *supra* note 52, at 222.

[70] Giving consultancy in matter of legality of the matters, *shaykh al-islam*, chief mufti was at the second highest rank of governance after the caliph himself, *see* Wael B. Hallaq, *Juristic Authority vs. State Power: The Legal Crises of Modern Islam*, 19 J.L. Religion 243, 253 (2003-04).

[71] *See* Yildirim, *supra* note 68, at 356; Jean-Paul Garnier, Osmanli İmparatorluğu'nun Sonu: II. Abdülhamit'ten Mustafa Kemal 'e [Dissolution of the Ottoman Empire] 312 (2007). However Islam was officially the religion of the Turkish state until 1928 and the principle of secularism was recognized and inserted in the Constitution in 1937 for the first time. *See* GÖZLER, supra note 53, at 29. In order to constitute a state control mechanism, the authority of the Religious Affairs Directorate was established which licenses preachers, supervises the content of their sermons, appoints all the muftis in the provinces and if asked, gives an occasional opinion on religious law, *see* Tolga Köker, *The Establishment of Kemalist Secularism in Turkey*, 2 Middle E.L. Governance 17, 32 (2010).

[72] The Constitution of 1924 granted to the independent courts the exercise of judicial authority in the name of nation, *see* Köker, *supra* note 71, at 30.

[73] *See generally* Gülnihal Bozkurt, *The Reception of Western European Law in Turkey (From the Tanzimat to the Turkish Republic, 1839-1939)*, 75 Der Islam 283 (1998).

[74] After the foundation of the republic, the theocratic feature of *Mecelle* was not adequate with the new revolutionary mentality. The committees were formed in order to prepare a new Civil Code, but they failed to free from the mindset of Islamic law, Velidedeoglu, *supra* note 61, at 33.

[75] Besides the Civil Code, a range of Western codes was adopted in this period. In 1926 both the Code of Obligations of 1911 and the Code of Civil Procedure and the Bankruptcy and Enforcement Code were adopted from Switzerland yet, the Commercial Code and the Code of Criminal Procedure were adopted from Germany.

[76] The Civil Code of 1926 also outlawed the practice according to which husbands could end their marriages by repudiation. *See* Zehra F. Kabasakal Arat, *Women*, *in* The Routledge Handbook of Modern Turkey 259, 260 (Metin Heper & Sabri Sayan eds., 2012). The Code granted women the right to choose their spouses, initiate divorce, and maintain certain maternal rights after divorce. Orücü, *supra* note 52, at 224; Ilkkaracan, *supra* note 52, at 426.

[77] According to the Turkish Civil Code of 1926, the husband was designated as the head of the household and the representative of the family; therefore, the husband was solely in charge of the administration of the matrimonial property, *see*, Yildirim, *supra* note 68, at 359; *see also* Cengiz Koçhisarlıoğlu, *Aile Hukukunda Eşlerin Eşitliği* [*Equality of Spouses in Family Law*], 40 Ankara Üniversitesi Hukuk Fakültesi Dergisi 251, 254 (1988).

Republic, the first Turkish Criminal Code of 1926, a translation of the 1889 Italian Codice Penale [C.P.] [Criminal Code] Jun. 30, 1889, was adopted and was in force until 2005.[79] Despite the protective nature of the Code in terms of basic rights, certain provisions were against gender equality.[80] The new Turkish Criminal Code of 2005 was praised by scholars and lawyers for its innovative perspective in terms of women's rights.[81] Article 3 of the Code succinctly emphasized that, in the implementation of the Criminal Code, no one shall receive any privileges and there shall be no discrimination against any individual on the basis of their race, language, religion, sect, nationality, colour, gender, political (or other) ideas and thought, philosophical beliefs, ethnic and social background, birth, economic and other social positions. [82] In fact, the male dominant character of the former Turkish Criminal Code was abrogated; however, the discriminatory practice of courts stands as an undeniable fact. It was rightly argued that judges and state officials act under the effect of what is customary within the Turkish society.[83]

1.3. TURKEY'S OBLIGATIONS EMERGED FROM INTERNATIONAL LAW BASED ON ELIMINATION OF FORCED MARRIAGES OF CHILDREN

Under international law, a number of instruments have been introduced in order to criminalize forced marriage. One of the core international instruments, which demonstrates the European approach against forced marriage, is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic

[78] Ilkkaracan, *supra* note 41, at 383; Gül Aldikaçti Marshall, Shaping Gender Policy In Turkey: Grassroots Women Activists, The European Union, And The Turkish State 93 (2014).

[79] The reason behind the adoption of such a code is that *Zanardelli Code* was considered the most liberal example of its time, *see generally* Zeki Hafizoğullari & Muharrem Özen, Turk Ceza Hukuku Genel HukümLer [Turkish Criminal Law General Part] (2015).

[80] *See* Gülriz Uygur & Türkan Yalçın Sancar, *Law, Women's Subordination and Changing Face of the Turkish Legal System in the Example of Article 434 of the Turkish Criminal Code*, E. Eur. Community L. J., at 30, 34 (2005) (for instance, defloration by promise of marriage was regulated under a special criminal provision based on customs that attached importance to the women's virginity).

[81] *See Türkan Yalçin Sancar, Türk Ceza Hukukunda Kadin* [Woman in Turkish Criminal Law] 191 (2013).

[82] *Supra* note 10, art. 3.

[83] Uygur & Sancar, *supra* note 80, at 35. Similarly, the European Court of Human Rights observed that *" the alleged discrimination at issue was not based on the legislation per se but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims"*. Opuz v. Turkey, App. No. 33401/02, (2009) Eur. Ct. H.R. 870, ¶ 192 (2009). For example, in some cases, the Turkish Court of Cassation decided on the reduction of the sentence of the accused for committing murder against his partner by reason of unjust provocation. The Court held that there was an unjust provocation against the husband by the wife who declined drinking the fruit juice offered by him. *See* Yargitay [YARG] [TURKISH COURT OF CASSATION] March 31, 2009, 9687/1691.

Violence (Istanbul Convention)[84] ratified by Turkey on March 14, 2012.[85] Article 37 of the Convention places State parties under an obligation to take necessary legislative measures to criminalize forced marriage.[86]

In addition, Turkey has ratified various other international human rights instruments, some of which pertaining to women's human rights. On 2 December, 1985, Turkey became a state party to the CEDAW[87] by means of pertinacious demand of the feminist movement in Turkey.[88] Article 16 of the CEDAW places state parties under an obligation to take appropriate measures to ensure that women have the right to freely choose a spouse and to enter into a marriage only with their free and full consent. In the same vein, the ECHR, ratified by Turkey in 1954,[89] ensures some of the basic rights that may be violated in a forced marriage. It also puts the responsibility firmly on the public officials in terms of preventing such violations. State parties are under a specific obligation to secure the basic rights which are violated by a forced marriage; Article 3 of the ECHR guarantees prohibition of torture, and Article 8 which concerns the right to respect for private and family life could be applicable in such cases.[90]

Turkey has also ratified the UNCRC in 1995. Unlike the UNCRC, which does not contain any specific article regarding the marriage of child, the CEDAW, in Article 16(2) states that "[t]he betrothal and the marriage of a child shall have no legal effect" and requires the member states "[t]o specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory".[91] Nonetheless, the UNCRC significantly requires member states to *abolish* "[t]raditional practices prejudicial to the

[84] Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, Aug. 1, 2014, C.E.T.S. 210.

[85] Approved by the Parliament on Nov. 24, 2011, published in the Official Gazette on March 8, 2012.

[86] Council of Europe, *supra* note 84. Unfortunately, Turkey is not a state party to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. The Convention is a vital tool in terms of fighting against child and forced marriages. According to the Convention, No marriage shall be legally entered into without the full and free consent of both parties, and all state parties must set a minimum age for marriage.

[87] United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. CEDAW has been described as a powerful international human rights instrument that reflects a global determination on the part of the international community to achieve gender equality through advancing women's rights. For an overall view of CEDAW see generally Andrew Byrnes et al., Women's Human Rights: CEDAW in International, Regional and National Law (Anne Hellum & Henriette Sinding Aasen eds., 2013); see also U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and their Dissolution), U.N. Doc. CEDAW/C/GC/29 (Oct. 30, 2013).

[88] *See* Gündü z, *supra* note 58 at 119.

[89] As a founding member of the Council of Europe, Turkey ratified the ECHR with Law No. 6366, published in the Official Gazette No. 1567 on March 10, 1954.

[90] *See* Shazia Choudhry, *Forced Marriage: the European Convention on Human Rights and the Human Rights Act 1998*, *in* Forced Marriage: Forced Marriage: Introducing a Social Justice and Human Rights Perspectives 67, 72 (Aisha K. Gill & Sundari Anitha eds., 2011).

[91] *Supra* note 12, art. 16(2).

health of children" as well as to protect children from "all forms of sexual exploitation and sexual abuse". Furthermore, the UNCRC Committee has persistently scrutinised child marriage in its Concluding Observations to member states which have ratified the UNCRC.[92] The CEDAW and the UNCRC Committees have recommended state parties to "[r]aise the minimum age of marriage for both women and men" and "[n]ot to allow exceptions to minimum age of marriage even with consent". In this regard the marriage of minors cannot be justified with their consent. Another recommendation of the Committees is to "[p]rovide for sanctions against perpetrators of early marriage and ensure the investigation of cases as well as the prosecution and punishment of perpetrators".

2. TURKEY'S CHALLENGES OF MARRIAGE LAW, RELIGIOUS, SOCIO-CULTURAL AND LEGAL PRACTICES ON MARRIAGES OF CHILDREN

As stated above, prior to the republic, Turkey was ruled according to Ottoman law, which was based on Islamic law until the legal revolutions of the Turkish Republic. Yet, family law was the core of the Islamic law, which governed the lives of the Muslim population of the empire over centuries.[93] It is remarkable that Islamic family law was replaced by family law based on the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, in a country which had almost 98% of the Muslim population in that time.[94] Also today, the majority of the society in modern Turkey defines itself as Muslim.[95] Therefore, being part of the history of the country, Islamic law has also inevitably a large application in people's daily life at present, and the act of marriage is one of its manifestations.

According to Islamic law, marriage is a legally binding contract that can only be concluded between a man and a woman[96] who had the capacity of judgement and had reached puberty.[97] Different schools of Islam established minimum ages of marriage based on gender. According to *Hanafi* school (official legal doctrine of Ottoman Empire)

[92] *See generally UN CEDAW and CRC Recommendations on Minimum Age of Marriage Laws Around the World,* Equality Now (2013), https://www.scribd.com/document/325592767/UN-Committee-Recommendations-on-Minimum-Age-of-Marriage-Laws (last visited Oct. 18, 2017).

[93] *See* Magnarella, *supra* note 61, at 285.

[94] *Id.*

[95] According to a study in 2017, 86% of people calls themselves Muslims, and 92% of population believes the existence of Allahs *see* Mak Danismanlik, Mehmet Ali Kulat, Turkiye'de toplumun dine ve dini degerlere bakisi [Turkish public opinion toward religion and religious values] 4 (2017).

[96] *See* Tucker, *supra* note 48, at 41; *see also* Magnarella, textit *supra* note 61, at 294.

[97] *See* Cin & Akilmaz, *supra* note 49, at 378; *see also* M. Akif Aydin, Osmanli Aile Hukuku [Ottoman Family Law] 52 (2017).

the minimum age of marriage was nine for girls and was twelve for boys.[98] Under these age groups nobody was assumed to have reached puberty, therefore, could not marry.[99]

The necessity of consent of women who fulfilled the requirements for marriage was also discussed among *Hanafi* scholars. According to some scholars of the *Hanafi* sect, women who reached puberty and had the capacity of judgement could give their consent for their own marriage without any need for the consent of their legal guardians.[100] Nevertheless, according to the others, the women who had the capacity of judgement and had reached puberty could not get married without the consent of their legal guardians.[101] The first interpretation was applied predominantly between 941 and 1544 in the Ottoman territories.[102] In 1544, the Ottoman Sultan (as Lord of the Caliphate) adopted the second reading which was applied in the Ottoman territories until the end of the Empire.[103] However, the application differed depending on whether the women had previously been married or not. Even though *Hanafi's* school did not let the legal guardians of the bride who reached puberty conclude a marriage agreement without her consent[104], the same religious school would let the legal guardians of the children, boys or girls, who did not reach puberty conclude a marriage agreement without consulting them.[105] Yet, the legal guardians referred to above were a very large category of the family members such as fathers, grandfathers, brothers and their sons, paternal uncles and their sons.[106]

At the time, the minimum age for marriage, set at nine for girls and twelve for boys, was regulated under the codification regarding family was the law entitled *Hukuk-i Aile Kararnamesi* (the Ottoman Family Law Ordinance) as part of the codification movement of the *Tanzimat* period. It entered into force in 1917 and remained in force for twenty

[98] *See* Cin & AkIlmaz, *supra* note 49, at 378.
[99] *Id.*
[100] *See* Aydin, *supra* note 97, at 53.
[101] *Id.*
[102] *Id.* at 54.
[103] *See* Tucker, *supra* note 48, at 60; *see also* Aydin, *supra* note 97, at 55.
[104] Cin & AkIlmaz, *supra* note 49, at 381.
[105] Nevertheless if the marriage concluded by the legal guardians except father and grandfather, the minors (girls or boys) could request the annulment of marriage from the court when they reached the puberty, called *khiyar al-bulug-* option of puberty. See Magnarella, *supra* note 49, at 43; Cin & AkIlmaz, *supra* note 49, at 382. However the application differed on the basis of gender, more clearly the men could ask the annulment anytime during their life but the women should declare their intention of annulment of the marriage as soon as they reached the puberty; otherwise they could never request the annulment of the marriage from the court. Furthermore according to imperial sharia court records, the number of women who exercised the right to request the annulment of marriage after reaching the puberty is much less than the number of men. Cin & AkIlmaz, *supra* note 49, at 383.
[106] Cin & AkIlmaz, *supra* note 49, at 382.

months in the Ottoman Empire.[107] Accordingly, it was an innovation for Ottoman family law that the aforementioned law banned concluding a marriage agreement under these ages by legal guardians. [108]

The fundamental sources of Islamic law[109] stated that a marriage contract should be concluded through the participation of the parties and witnesses. Nonetheless no requirement was stated regarding the participation of legal officers or religious figures.[110] However, as an administrative custom, in many Ottoman cities it was customary to register marriages in the court and this practice was strengthened by the decree of the Sultan in the sixteenth century, which necessitated the registration of all marriages.[111] However, in the successive centuries the practice varied in different parts of the Empire. For example, in Rumelia, the local *imam* (religious representative) generally concluded the marriage without recourse to the court.[112] Yet, *imams* could not conclude the marriage without an authorization of marriage, which was given by the court upon a request by the prospective spouses.[113] After the abolition of the Sharia courts in 1924 and prior to the enactment of the Turkish Civil Code of 1926, the court of peace was appointed to grant authorization to *imams* to conclude a religious marriage ceremony.[114]

In the contemporary Turkish legal system, marriage is defined as an agreement concluded upon mutual and verbal declaration of wills of the prospective spouses (*consensus facit nuptias*).[115] Any other kind of union (*de facto* unions) has not been legally recognised in the Turkish legal system, thus has no legal effects.[116] After the legal reform of 1926, the civil marriage ceremony became compulsory and the religious marriage ceremony lost its legal effectiveness.[117] Thus, in order to conclude a marriage agreement, the prospective spouses are required to declare their own intentions in

[107] *Id.* at 370. It must be underlined that *Hukuk-i Aile Kararnamesi* was the first codification regarding family law in Islamic countries which is still in force in Lebanon and remained in force in Syria until 1953, in Jordan until 1951 for Sunni populations *see* Aydin, *supra* note 97, at 53.

[108] Aydin, *supra* note 97, at 195 (It was written on the preamble of this codification that the marriages of minors were forbidden because of creating a lot of problems in family life).

[109] The most important source is Qur'an and the second important source is *sunna, i.e.* the practises and the sayings of the Prophet Muhammed, *see* Tucker, *supra* note 48, at 12.

[110] Aydin, *supra* note 97, at 61; Magnarella, *supra* note 61, at 294.

[111] Tucker, *supra* note 48, at 60.

[112] Most of the marriages were registered in Jerusalem but the records of marriages were varied in Syria and Palestines *see* Aydin, *supra* note 97, at 65; Tucker, *supra* note 48, at 60.

[113] Aydin, *supra* note 97, at 67; Jäschke, *supra* note 40, at 170.

[114] Jäschke, *supra* note 40, at 176.

[115] *Supra* note 9, art. 142.

[116] Therefore the couples did not have rights and obligations in relation to property, inheritance and maintenance payments following a separation. Turkey does not allow same-sex couples to get married or register their partnership in any way.

[117] Magnarella, *supra* note 61, at 103; Orücü, *supra* note 52, at 225; Tugrul Ansay, *Family Law*, *in* Introduction to Turkish Law 111, 116 (Tugrul Ansay & Don Wallace Jr. eds., 2007).

presence of two witnesses and the officer of marriage.[118] The officer of marriage is the mayor or the officer appointed by the mayor,[119] not the religious representative (*imam*).[120] Consequently, the ceremony, which is performed by an *imam,* is not recognised by the civil law and has only religious significance.[121] Even though the Turkish Civil Code does not recognise the religious marriage as a legal one, Islamic marriage is still performed both alongside a legal marriage and separately from a civil marriage.[122] While fundamental Islamic sources and the practice of the Ottoman Empire illustrated that the participation of a religious representative was not compulsory in order to conclude a marriage in Islamic law, it became a social practice in Turkey which is still a matter of debate within contemporary society.[123] In fact, a draft bill recently passed by the Grand National Assembly (Turkish parliament) to grant permission to "*muftis*" (who are religious civil servants within the body of Turkey's Directorate of Religious Affairs) in order to conclude a civil marriage[124] divided Turkish society into two blocks: religious conservatives in favour of the bill and the secular population against it.[125] In the Turkish legal system, the capacity to marry requires certain

[118] *Supra* note 9, art. 142.

[119] However also the Minister of Interior shall appoint officers among foreign representatives of Turkey. The Regulation Regarding Marriage, *supra* note 39.

[120] Jäschke, *supra* note 40, at 180.

[121] *Id.*; 3 Mustafa Alper Gümüş, Mustafa Dural & Tufan Öğüz, Türk Özel Hukuku: Aile Hukuku [3 Turkish Private Law: Family Law] 74 (2010) (Turk.).

[122] According to the statistics of 2012 of Turkish Statistical Institute, 93,7% of couples concluded both civil and religious marriage, 3,3% of couples concluded only civil marriage and 3% of couples concluded only religious marriage. İstatistiklerle Aile [Statistic on Family], Turkish Statistical Institute http://www.tuik.gov.tr/PreHaberBultenleri.do?id=13662 (last visited Oct. 2, 2017).

[123] Orücü, *supra* note 52, at 226; Halil Cin, İslâm ve Osmanli hukukunda evlenme [Marriage in Islamic and Ottoman Law] 313 (1988). In the survey which conducted in the 1970s of Turkey showed that the religious marriage ceremony performed by *imam* with the participation of two male witnesses, and two male representatives for the spouses. The ceremony is realizing as follows:

> After the imam had read passages from the Quran, he turned to the bride's representative and said, "In the name of Allah and in accordance with the exalted traditions of the Prophet, you have been named representative of so and so's daughter." The imam then asked him three times: "By Allah's command, did you give this girl?" The representative responded three times: "By the power of my office, I gave her." The imam then turned to the groom's representative and asked: "By Allah's command, did you take this girl?" He, too, responded affirmatively three times. The imam then solemnly said, "Amen," and together those present recited the Fatiha-the Quran's opening chapter].

See Magnarella, *supra* note 61, at 294.

[124] The bill passed by the Turkish Parliament on Oct. 18, 2017. *See*, *Marriage Authority Passed to Mufti of Parliament*, Turkey Telegraph (Oct. 18, 2017), http://www.turkeytelegraph.com/breaking/marriage-authority-passed-to-mufti-of-parliament-h13580.html.

[125] *See* Mahmut Bozarslan, *Bill Allowing Turkish Muftis To Perform Civil Marriages Stokes Concern Read More*, AL-MONITOR (Aug. 9, 2017), https://www.al-monitor.com/pulse/originals/2017/08/turkeys-muftis-to-conduct-marriages.html; *Turkish Parliament Passes Law Allowing Muftis To Register Civil Marriages*, DAILY SABAH TURKEY (Oct. 18, 2017), https://www.dailysabah.com/turkey/2017/10/18/turkish-parliament-passes-law-allowing-muftis-to-register-civil-marriages.

qualifications[126] such as majority and capacity of judgement. A person, who has the capacity to choose and has reached the age of marriage *i.e.* eighteen years old, can marry without any consent or court approval.[127] It is worth noting that pursuant to the Turkish Civil Code of 1926, the minimum age for marriage differed on the basis of gender. More clearly, unless the woman had reached fifteen years of age and the man seventeen years old, the prospective spouse could not marry upon consent of her/his guardian.[128] In such circumstances, the guardian could not declare the intention of marriage, only the prospective spouse could do so, but the guardian could only have declared her/his consent for the marriage.[129] It is only in exceptional circumstances that the woman who had reached fourteen years of age and the man who had reached fifteen years old could get married upon a court's approval.[130]

The Turkish Civil Code of 2002, however, adopted a new perspective of gender equality and changed the minimum age for marriage. In order to be able to marry, the future spouses must have reached eighteen years of age, i.e. the age of consent. Hence, the spouses could only marry when they had reached seventeen years of age upon consent of her/his guardian.[131] Furthermore, the court could allow a "[m]arriage of a person (both men and women) of the age of 16 in case of exceptional circumstances".[132] According to Article 11 (2) of the Turkish Civil Code, a person is then recognised as an adult upon marriage, consequently a person under the age of 18 receives the same rights and responsibilities as an adult. There is no specific definition regarding "exceptional circumstances" in the Turkish Civil Code of 2002. Hence, the Civil Code grants wide discretion to judges.[133] The Turkish Court of Cassation, in a recent decision in 2015, reversed the judgement which allowed a marriage involving a sixteen year old girl, affirming that living together as husband and wife did not constitute an exceptional circumstance.[134] It is regrettable to find that the Turkish Court of Cassation approved marriages - thus evaluated positively the existence of exceptional circumstances - when the girl was under the age of seventeen, and not the boy.[135] However, sadly, in most

[126] *Supra* note 9, art. 124-125.
[127] Gümüş & Dural & Öğüz, *supra* note 121, at 51.
[128] *See* Turk Medeni Kanunu (1926 tarihli Türk Medeni Kanunu) [ETMK] [Turkish Civil Code], art. 88(1), (1926) (Turk.).
[129] Gümüş & Dural & Öğüz , *supra* note 121, at 52-53.
[130] *Supra* note 128, art. 88(2).
[131] *Supra* note 9, art. 124(1).
[132] *Id.*
[133] *See, e.g.,* Turgut Akintürk & Derya Ateş Karaman, Türk Medeni Hukuku: Aile Hukuku [Turkish Civil Law, Family Law] 69 (2012).
[134] Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, May 6, 2015, 2015/3626 E., 2015/9331 K. (Turk.).
[135] *Id.*; *see* Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, March 21, 2013, 2012/7078 E., 2015/7749 K. (Turk.).

cases, the Court reversed the judgement due to the fact that the girls concerned did not even reach the age of sixteen, which is required for application for judicial approval.[136] These cases illustrate the fact that unfortunately the girls under the age of sixteen were already married with a religious marriage ceremony, and thereafter their legal guardians sought the judge's approval for a civil marriage.

Moreover, in Swiss law, the age of consent is eighteen[137] in contrast to the Turkish law. The prospective spouses must have reached eighteen years of age in order to get married .[138] Yet it is worth noting that until 1996, the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, used to allow marriage under the age of eighteen based on exceptional circumstances.[139] Upon the revision of the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, which entered into force on January 1, 1996, both the provisions which allowed marriage under the age of eighteen upon a court decision pursuant to exceptional circumstances and the provision which recognised as of age the person who got married under the age of 18 were abrogated.[140]

3. SOCIO-CULTURAL AND ECONOMIC DETERMINANTS OF FORCED MARRIAGES OF CHILDREN IN TURKEY

The majority of child marriages in Turkey take place as a result of cultural and social norms. In many cases, especially in the eastern part of Turkey, girls have no choice but to marry the man chosen for them by their parents because of the societal pressure, even though in certain cases they are consulted for their consent.[141] In order to maintain family reputation, a girl has to get married before having the opportunity for

[136] *Supra* note 135; *see* Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, May 3, 2011, 2011/4235 E., 2011/7649 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, March 30, 2011, 2010/3710 E., 2011/5584 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, June 7, 2010, 2009/9099 E., 2010/11210 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, Nov. 8, 2010, 2009/16479 E., 2010/18720 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, Apr. 29, 2010, 2009/4262 E., 2010/8639 K. (Turk.).

[137] *See* Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code], Dec. 10, 1907, SR 210, RS 210, art. 14 (Switz.)

[138] *Id.* art. 94.

[139] *Id.* art. 94(2).

[140] Jean-Christophe A Marca, Pascal Pichonnaz, Bénédict Foëx & others, Code civil I: Art. 1-359 [C.C.], Commentaire (Commentaire romand) [Civil Code I: Art. 1-359 [C.C.], Commentary] Art. 94, N. 15 (2010) (Fr.).

[141] *See* Pinar Ilkkaracan, *Exploring the Context of Women's Sexuality in Eastern Turkey*, Reprod. Health Matters, Nov. 1998, at 66, 70.

inappropriate romantic affairs, and hence, be swayed by sexual feelings.[142] According to this, girls are considered marriageable after experiencing menarche, as their virginity is a matter of life and death.[143] The main reason is that premarital sexual intercourse is a taboo in respect of social norms. Hence, an unmarried woman is potentially placing her family honour in danger since an ingenuous woman could put her decency in danger by making mistakes.[144]

Cultural phenomena could emerge in different fashions, although most of them are very rare nowadays. Endogamy is a common practice among Turkish society; official statistics from 2011 indicate that 21,3% of all marriages in Turkey are consanguineous.[145] Within consanguineous marriages, the marriage between cousins[146] is the most common type.[147] The main factor is that a marriage between relatives is considered to be more long-lasting since families share the same values.[148] The economic considerations are also directly related to this tradition. The reason being that the bride's family would not demand a high dowry from the groom because of the blood-relationship. In addition to cousin marriages, statistics indicate that 0,3% of marriages were *berdel,* a custom based on the exchange of brides by two consenting families instead of paying a dowry.[149] By the same token, in terms of economic effects, this is an option for poor families, where affording a dowry is not an option.

The issue of forced marriage of girls in Turkey also stems largely from economic factors. A survey conducted by the Ministry of Family and Social Policies indicates that 15,6% of marriage agreements in Turkey are reached on the ground of dowry *(başlık parası).*[150] The figures increase up to 43% in rural areas, particularly in the eastern part of the Country.[151] According to the custom of dowry, a certain amount of money is paid to the bride's family, mostly her father, by the groom's family for the consummation of

[142] *See* Meliksah Ertem, Gunay Saka, Ali Ceylan, Vasfiye Deger & Sema Ciftci, *The Factors Associated with Adolescent Marriages and Outcomes of Adolescent Pregnancies in Mardin Turkey,* 39 J. Comp. Fam. Stud. 229, 237 (2008).

[143] *See* Meliksah Ertem & Tahire Kocturk, *Opinions on Early-age Marriage and Marriage Customs among Kurdish-speaking Women in Southeast Turkey*, 34 J. Fam. Plan. and Reprod. Health Care 147, 149-51 (2008) (the importance of virginity constitute an important part of cultural rituals, such as displaying the bloodied sheets of the marriage bed to inlaws to prove the worthiness of the wife). *See* Aysan Sever & Gokcecicek Yurdakul, *Culture of Honor, Culture of Change: A Feminist Analysis of Honor Killings in Turkey,* 7 Violence Against Women 964, 975 (2001).

[144] *See, e.g.,* Ertem & Kocturk, *supra* note 143, at 149.

[145] Turkiye Cumhuriyeti Aile Ve Sosyal Politikalar Bakanligi, *supra* note 11, at 132.

[146] According to article 129 of the Turkish Civil Code (2002), *"[m]arriage between lineal relatives and between siblings or halfsiblings, whether related to each other by parentage or adoption, between aunts and nephews, between uncles and nieces is prohibited".*

[147] Ertem & Saka & Ceylan & Deger & Ciftci, *supra* note 142, at 235.

[148] *See, e.g.,* Ertem & Kocturk , *supra* note 143, at 150.

[149] Ertem & Saka & Ceylan & Deger & Ciftci , *supra* note 142, at 235.

[150] *Id.* at 238.

[151] *Id.*

marriage. Under this perverse understanding, girls are merely considered as commodities. The economic dimension of forced marriage is that dishonesty on a woman's part induces refund of the dowry as she is bound by the agreement.[152] Another issue is that the payment of the dowry by the husband shapes his attitude towards the bride on the proviso that the control of sexuality and fertility are granted to him by means of the agreement.[153] The phenomenon of dowry leads to forced marriages, mostly in the form of child brides. The dowry increases the risk of marrying a child bride to an older man.[154] In Turkey, 72% of such marriages are conducted without the consent of the girl concerned and 45,7% of the girls in reality are married off in exchange for money.[155] Lastly, the economic considerations may trigger child marriages since pecunious families force their children (generally cousins) to marry as soon as possible in an effort to keep the wealth within the family.[156]

4. SUGGESTION: REARRANGEMENT OF LEGAL REMEDIES AGAINST FORCED MARRIAGE OF CHILDREN

The question as to how the legal system must react to forced marriages has been discussed and scrutinized among practitioners and academics for a long time.[157] In terms of dealing with forced marriages, some maintain that criminal prosecutions have to be utilized, while opponents argue that protection of women is best secured through the civil law mechanism. Putting separate examples as in the case of the United Kingdom (UK) and many other European countries which have adopted special provisions on criminalizing forced marriage such as Germany,[158] Switzerland,[159] Austria[160] and

[152] *See* Sever & Yurdakul, *supra* note 143, at 989.
[153] *Supra* note 139, at 69.
[154] *See generally* Anita Raj, *When The Mother Is a Child: The Impact of Child Marriage on the Health And Human Rights Abuse,* 95 Archives of Disease in Childhood 931 (2010).
[155] Hafizoğullari & Özen, *supra* note 79, at 242.
[156] *See* Ertem & Kocturk, *supra* note 143, at 151.
[157] *See generally* Teertha Gupta & Khatun Sapnar, *The Law, the Courts and Their Effectiveness*, *in* Forced Marriage: Introducing a Social Justice and Human Rights Perspectives 158 (Aisha K. Gill & Sundari Anitha eds., 2011); *see* Brigitte Clark & Claudina Richards, *The Prevention and Prohibition of Forced Marriages – A Comparative Approach*, 57 Int'l Comp. L. Q. 501 (2008); *see* Yener Ünver, *Kinderbräute in der Türkei* [*Children brides in Turkey*], *in* Strafrechtlicher Reformbedarf: Materialien eines deutsch-japanisch-polnisch-türkischen Tagung im Jahre 2015 in Rzeszów und Kraków (Polen) [Criminal Law Needs Reform: Materials from a German-Japanese-Polish-Turkish Conference in 2015 in Rzeszów and Kraków] 159 (2016) [Criminal law needs reform: Materials from a German-Japanese-Polish-Turkish conference in 2015 in Rzeszów and Kraków] (2016); Sabbe & Temmerman & Brems & Leye, *supra* note 34; Gangoli & Chantler, *supra* note 35; Haenen, *supra* note 23.
[158] *See generally* Schweizerisches Strafgesetzbuch [STGB] [Criminal Code] Dec. 21, 1937, art. 181(a) (Switz.).
[159] *See generally* Strafgesetzbuch [STGB] [Criminal Code], May 15, 1871, art. 237 (1871) (Ger.).
[160] *See generally* Strafgesetzbuch [STGB] [Criminal Code] Jan. 23, 1974, art. 106(a) (Aus.).

Belgium.[161] However, it is worth mentioning briefly the pros and cons of criminal intervention, in particular, to illustrate whether it is a necessity to adopt the same approach in the Turkish criminal system.

The main argument of the opponents against a special criminal provision is that the majority of the victims do not want their parents to be prosecuted and ultimately faced with imprisonment.[162] As a result, those against criminalisation state that victims may decide not to come forward.[163] Although victims seek legal protection, the possible isolation from their social relations may induce them to realign with their families.[164] Another point to consider is that criminal proceedings may be found ineffective on the basis that the higher burden of proof required by criminal prosecution will make civil cases more advantageous. The conviction of offenders seems more unlikely because of the required proof beyond reasonable doubt in criminal cases.[165] In addition, it may be argued that perpetrators could already be charged for the offences committed in the duration of a marriage, such as assault, sexual abuse and abduction. In this context, it is argued that codification of such a special provision means nothing but a symbolic gesture.[166]

In order to argue in favour of criminalizing forced marriage, the key argument is that the prosecution could call the attention of not only citizens, but also government officers, on the intolerability of these violations.[167] By doing so, victims would be given the opportunity to question their parents and seek legal assistance.[168] The assumption, based on the unwillingness of victims, could turn out to be inaccurate since some of them may take action for emancipation from the authority of their parents.[169] In the southeast of Turkey, the office of the prosecutor filed a public claim against the parents of a girl for attempting sexual molestation after the report of the girl as she was forced into marriage.[170] In fact, the best interest of a child is the primary consideration under Article 3 of the UNCRC.[171] According to the Convention, the state parties are under the obligation to protect the child from abuse while in the care of parents. The UK's Select Committee on Home Affairs emphasized that the deterrent power of criminalization is

[161] *See generally* Code Pénal [C.Pén.] art. 391(e) (Belg.).
[162] Sabbe et. al., *supra* note 34, at 177.
[163] Gangoli & Chantler, *supra* note 35, at 272.
[164] *See, e.g.,* Gupta & Sapnar, *supra* note 157, at 171.
[165] Simmons & Burn, *supra* note 17, at 994.
[166] Sabbe et. al., *supra* note 34, at 178.
[167] *See, e.g.,*Clark & Richards, *supra* note 157, at 504.
[168] Haenen , *supra* note 23, at 252.
[169] *See* Mohammad Shams Uddin, *Arranged Marriage: A Dilemma for Young British Asians,* 3 Diversity & Equality in Health and Soc. Care 211, 214 (2006).
[170] Hilal Oztürk, *Cocuk Gelinler Konusunda Ornek Dava*, SacitAslan (Jan. 8, 2012), http://www.sacitaslan.com/cocuk-gelinler-konusunda-ornek-dava-haberi-67482.
[171] UNCRC, *supra* note 8.

another key reason stated by the victims.[172] It may be argued that criminal law has already afforded sufficient apparatus to fight in defence of women as most of the offences are punishable acts under current criminal provisions.[173] Nevertheless, this argument disregards the fact that a forced marriage violates some of the very basic human rights standards set by national and international documents. Physical, psychological, financial, sexual and emotional force against the victim may be seen as a form of coercion in a forced marriage.[174] In this sense, only a special provision could be sufficient to address such a simultaneous violation of numerous fundamental rights.

The former Turkish Criminal Code took a leading position regarding forced marriages. One of the most controversial regulations was Article 434, which relates to reduction of the period of imprisonment for sexual offences.[175] According to the said Article "If the abducted or detained girl or woman and one of the accused or convicted get married, the public prosecution initiated against the husband or if the sentence has been pronounced, the punishment shall be suspended."[176] The present provision had constituted an incentive for a forced marriage, since in many cases the victim was coerced to marry the offender in order to assure family honour.[177] In fact, many women were raped and then forced to marry by families on the basis that marriage is the way to abrogate the disgrace as no one would acquiesce to a defective good other than the offender.[178]

The New Turkish Criminal Code includes no specific offence of forcing someone to marry, although binding international mechanisms have previously been adopted. Under the current legislation, forced marriage could be challenged, pursuant to a list of provisions in the Turkish Criminal Code such as human trade (Article 80), threat (Article 106) and child molestation (Article 103).[179] Turkish criminal scholars and lawyers have criticized the lack of a special provision on the basis that the above mentioned offences

[172] *See* UNITED KINGDOM HOUSE OF COMMONS, HOME AFFAIRS SIXTH REPORT (2008).
[173] Clark & Richards, *supra* note 157, at 505.
[174] Geentanjali Gangoli, Khatidja Chantler, Marianne Hester & Ann Singleton, *Understanding Forced Marriage: Definitions and Realities, in* FORCED MARRIAGE: FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVES 25 (Aisha K. Gill & Sundari Anitha eds., 2011).
[175] In fact, a bill, relates to overturn sex offenders' conviction in return of marriage, was proposed by the Government in 2016. By the opposition of the NGOs, the bill was withdrawn due to lack of public consensus. *See Fury at Turkish Bill to Clear Men of Child Sex assault if They Marry Victims*, THE GUARDIAN (Nov. 22, 1990), https://www.theguardian.com/world/2016/nov/18/turkish-bill-to-clear-men-of-child-sex-assault-if-the-marry-their-victims.
[176] 1926 TARIHLI TURK CEZA KANUNU [ETCK] (Tarihli Türk Ceza Kanunu) [TURKISH CRIMINAL CODE OF 1926], art. 434 (1926) (Turk.).
[177] *See* Canan Arin, *Turkey*, *in* 2 ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURE 409 (Suad Joseph & Afsaneh Najmabadi eds., 2005).
[178] *See generally* SANCAR, *supra* note 81, at 137.
[179] *Id.*

are not adequate to bring justice for the victims of forced marriage, which violates multiple rights at the same time.[180]

In practice, Turkish national courts have, in the past, prosecuted forced marriage perpetrators on the basis of sexual crimes. In many cases, girls under the age of fifteen are married to men over the age of fifteen by the mutual consent of their parents.[181] Under Article 103 of the Turkish Criminal Code, regardless of whether the victim gives consent or not, all kinds of sexual attempt against children who are under the age of fifteen constitute child molestation. Sexual acts committed against other children (between the age of fifteen and eighteen) by force, threat, fraud or other reasons affecting the willpower of the victims is also a violation of Article 103. Therefore, the alleged husbands have been sentenced to no less than sixteen years imprisonment, in case of performance of sexual abuse by inserting an organ or instrument into a body.[182] Moreover, the Turkish Court of Cassation held that parents of victims and offenders would be subjected to an appropriate penalty to the offence that was committed for incitement.[183]

Sexual intercourse between/with persons who have not attained the lawful age of consent is another sexual crime for penalizing the offenders of forced marriage. According to Article 104 of the Turkish Criminal Code, any person who has sexual intercourse with a child who reached the age of fifteen, without using force, threat and fraud is sentenced to a term of imprisonment from two to five years upon the filing of a complaint. This clearly illustrates that, in opposition to child molestation, sexual intercourse must occur under the consent of the victim. In terms of protection of the victim the said provision is problematic on two grounds. Firstly, it is worth mentioning that sexual acts besides sexual intercourse, such as oral sex or penetration of a non-sexual organ, do not violate Article 104. For instance, the Turkish Court of Cassation stated that penetration of a finger into the vagina of a girl by a woman cannot be interpreted as sexual intercourse since such a relationship is possible only by penetration of penis by a man into the vagina or anus.[184] Secondly, a criminal case against the offender is possible only if the victim submits a claim related to the crime to the office of the public prosecution, or the offices of the security forces. In certain cases, the court of the first instance shall dismiss the case, on the grounds

[180] *See, e.g.*, Meral Ekici Şahin, *Ceza Hukuku ve Zorla Evlendirme* [*Criminal Law and Forced Marriage*], 2 Prof. Dr. Nevzat Toroslu'Ya Armağan 395, 425-26 (2015).

[181] Consensual sexual intercourse of two children between the age of 15 and 18 is not a criminal offence under Turkish criminal law.

[182] *See, e.g.*, *supra* note 10, art. 103/2.

[183] *See* Yargitay [YARG] [TURKISH COURT OF CASSATION] Fifth Chamber of Criminal Division, Feb. 28, 2007, 2007/29 E., 2007/1609 K. (Turk.).

[184] *See generally* Yargitay [YARG] [TURKISH COURT OF CASSATION] Fourteenth Chamber of Criminal Division, Apr. 21, 2014, 2012/6729 E., 2014/5373 K. (Turk.).

that the right to file a complaint is the preserve of the parents concerned, notwithstanding the victim's resolve. However, in the opinion of the present authors, the Turkish Court of Cassation rightly held that the court of first instance is under an obligation to continue the adjudication if the victim demanded to do so.[185]

In spite of the general acceptance of the High Court on preventing forced marriage by sentencing offenders for sexual offences, courts of first instance may decide on no grounds for prosecution in consideration of mistake of the law. In Nevşehir, as stated above, the court of assize found that the defendant lacks the awareness that he is acting unlawfully since early marriage is not considered illegal or inconvenient in the eyes of the society.[186] In the same manner, some Turkish academics did concur with the conclusion of the court.[187]

The findings of the Court indeed invite criticism in two main respects. Firstly, the defence on the unawareness of criminalization of early marriage is baseless since nationwide campaigns against forced and child marriage have been running by NGOs for women's rights for a considerable time. Additionally, international organisations such as the UNICEF runs training programmes with the collaboration of the Ministry of Family and Social Policies.[188] Therefore, the act cannot be considered a reasonable mistake to make as the defendants must have known the illegality of their acts. Arguments based on ignorance of the illegality of child marriage cannot be deemed reasonable in the modern age.[189] Secondly, the judgement of the Court, which rests on the social and cultural factuality, fails to comply with the developmental effect of the judiciary. Instead of making decisions in line with social narratives, the Court should have served solving social problems by judicial activism. It cannot be denied that social norms are highly influential in formulating criminal law.[190] Crime control becomes possible only if a criminal law contains moral codes reflecting the community it rules.[191] However, these norms may also encourage violation of the laws as in the case of forced marriage.[192]

[185] *Contra* Yargitay [YARG] [TURKISH COURT OF CASSATION] Fourteenth Chamber of Criminal Division, May 7, 2015, 2013/7341 E., 2015/6190 K. (Turk.).

[186] *Supra* note 5.

[187] *E.g.*, Mahmut Koca & Ilhan Üzülmez: Türk ceza hukuku özel hüküмler [Turkish Criminal Law Private Part] 319 (2015).

[188] *See Child Marriage,* UNICEF (2020), https://www.unicef.org/turkey/en/child-marriage.

[189] *See generally* Fahri Gökçen Taner, *Anayasa Mahkemesi'nin Çocukların Cinsel İstismarına ve Evlenmenin Dinsel Törenini İlişkin İptal Kararlarinin Ardindan Cok Katmanli Bir Cozum Onerisi* [*A Multiple Layered Solution Proposal After the Decision of Constitutional Court Related to Child Sexual Abuse and Religious Ceremony of Marriage*] Türkiye Barolar Birliği Dergisi [TBB], at 221, 240 (2016).

[190] *See generally* Wayrne R. Lafave, Criminal Law 14 (2003).

[191] *See* Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive versus Normative Crime Control,* 86 Va L. Rev. 1839, 1841 (2000).

[192] For instance, the findings show that cultural acceptance of violence triggers use of violence in the future. *See* Jennifer E. Lansford & Kenneth A. Dodge, *Cultural Norms for Adult Corporal Punishment of Children and Societal Rates of Endorsement and Use of Violence*, 8 Parenting: Sci. and Prac. 257, 265 (2008).

Although criminal law cannot change the acceptance of the community, it can shape social norms and the understanding of individual morality.[193] The coercive power of criminal law is a key factor in terms of dealing with forcing girls to get married.

Another related point to the subject is the effect of religious marriage performed by *imams* on underage marriages. Although it may be argued that there is no connection between religious rituals and such marriages, statistics indicate the contrary. According to surveys, 62,7% of underage marriages are performed by religious representatives (*imam*) and therefore, have only religious significance but no legal effect, given the fact that the civil law marriage has not been concluded.[194] The main reason is that, as stated above, the Turkish Civil Code states, as a rule, that the age of marriage as eighteen, the age of seventeen upon consent of the legal guardians and the age of sixteen in case of exceptional circumstances upon a court's approval. The victims are mostly under the age of sixteen. Hence, the legal impossibility of a civil marriage under the age of sixteen leads the society to religious marriage and opens the way to sexual abuse.

In terms of coping with early marriages, the Turkish lawmaker introduced Article 230, which penalized having a religious marriage performed by an *imam* prior to a civil marriage. The main reason for the aforementioned legislation is abrogating backward understanding within the society.[195] Persons who hold a religious marriage ceremony without an official marriage shall, therefore, be sentenced to a penalty of imprisonment for a term of two to six months. In other words, couples are required first to marry in a civil ceremony before having a religious marriage. It can be strongly argued that such a precaution was adopted to prevent polygamy as one of the wives can marry in a civil ceremony. In contrast, the others can only marry through a religious ceremony.[196] It is worth noting that in the case of polygamy, the other wives do not obtain an official status, hence cannot obtain a certain number of rights such as the right of inheritance.[197] Moreover, in terms of averting plural marriage, any person who administers a religious marriage ceremony without issuing a document verifying an official marriage which has been concluded in accordance with the law shall be sentenced to a penalty of imprisonment for a period of two to six months. Therefore, religious representatives may also be punished by law, since a religious ceremony is merely secondary and optional.

[193] Robinson, *supra* note 191, at 1868.
[194] Hacettepe Üniversitesi Nüfus Etütleri Mudurlugu, *supra* note 4, at 76.
[195] Taner, *supra* note 189, at 240-241.
[196] Ilkkaracan, *supra* note 141, at 69.
[197] *See* Jenny B. White, *State Feminism, Modernization, and the Turkish Republican Women*, The Nat'l Women's Stud. Ass'n. J., Fall 2003, at 145, 156 (2003).

The Turkish Constitutional Court overruled the two clauses of the aforementioned Article on the basis of privacy of private life[198] and freedom of religion and conscience.[199] The Court held that the principle of rationality was violated since, although living together and having children without a civil marriage is not criminalized, the present Article penalizes the right to have a religious marriage.[200] The findings of the Court completely disregard the logic behind the codification of such an Article. The legislature has aimed to encourage monogamy and to secure the rights of women under marriage agreements by stipulating the importance of civil marriage in Turkey. Paradoxically, the law which was recently passed by the Turkish parliament regarding the authorization the *muftis* need to conclude a civil marriage illustrates the intention of the law makers in favour of recognising legally religious marriage but not recognising *de facto* unions.

As stated above, two provisions of the Turkish Civil Code lead to applications for marriages under the age of eighteen in Turkey. The first one is Article 124 (1) of the Turkish Civil Code, which sets the minimum age of marriage as seventeen. The second one is Article 124 (2) of the Turkish Civil Code which allows marriages at the age of sixteen upon a court's approval in the case of exceptional circumstances. Considering the international obligations of Turkey derived from the CEDAW and UNCRC; the first scenario should result in a comprehensive revision of these provisions in the immediate future. Accordingly, the minimum age of marriage must be amended to eighteen, compatible with the age of consent. More importantly and urgently, Article 124 (2) regarding marriage at the age of sixteen in case of exceptional circumstances, should also be amended. Furthermore, Article 11 (2) of the Turkish Civil Code, which recognises as of age the person married under the age of eighteen must be abrogated, due to the fact that this provision puts the married child into the shoes of an adult. As a rule, under the age of eighteen, children may only enter into obligations or give up the rights with the consent of their legal guardians in the Turkish legal system.[201] However, just after the marriage, Article 11 (2) of the Turkish Civil Code allows a married child of seventeen or sixteen years old to enter into obligations or give up the rights without the consent of her/his legal guardians. On the one hand, the Turkish legal system considers a person under the age of eighteen as a minor and protects her/him even from her/his acts such as entering into obligations and requires her/his legal guardians consent to do so, but on the other hand it allows a person of sixteen or seventeen years old to marry upon

[198] *See* Turkiye Cumhuriyeti Anayasasi [TCA] (Türkiye Cumhuriyeti Anayasası) [THE CONSTITUTION OF THE REPUBLIC OF TURKEY] art. 20 (1982) (Turk.).
[199] *Id.* art. 24.
[200] *See generally* Anayasa Mahkemesi [AM] [CONSTITUTIONAL COURT] , Official Gazette June 10, 2015 - 29382, 2014/36 E., 2015/51 K. (2015) (Turk.).
[201] *Supra* note 9, art. 16.

her/his legal guardian's consent or court approval, and assumes her/him as an adult after the marriage ceremony.

If these amendments of the Turkish Civil Code cannot be realised, the second scenario should target the courts. Considering Article 90 (5) of the Turkish Constitution, which states that in the event of a conflict between an international agreement and the domestic law that regards fundamental rights and freedoms, the judge has the discretion to apply the international agreement.[202] Judges determine the conflict between Article 124 (2) of the Turkish Civil Code and international agreements in relation to the fundamental rights and freedoms such as those conferred by CEDAW and UNCRC. Judges must directly apply the international law and must dismiss the cases regarding court approvals for the marriages under the age of sixteen in exceptional circumstances. Yet, these cases can be the subject of individual applications before the Turkish Constitutional Court.

In this second scenario, judges cannot consider marriages of persons at the age of seventeen because it does not require a judge's approval; the prospective spouses must only submit the legal guardian's written and notarised consent when they apply for the marriage[203] Therefore the judge cannot determine whether a conflict between the domestic law and the international law has taken place because the judge in question is not in charge of the application procedure and the marriage ceremony. The only solution is to revise the current law in order to prevent marriages at the age of seventeen and to take measures accordingly.

Whilst considering the origins of the Turkish Civil Code, the revision of the Swiss Civil Code against forced marriage can provide a very close model. In Switzerland, besides the abrogation Jan. 1, 1996, of the provision which allowed marriage under the age of eighteen based on exceptional circumstances, a Federal Law on Measures to Fight against Forced Marriages also entered into force on July 1, 2013.[204] The provisions of the

[202] According to Article 90 of the Turkish Constitution of 1982,

> [I]nternational agreements duly put into effect have the force of law. No appeal to the Turkish Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

[203] *Supra* note 9, art. 136.

[204] *See, e.g.*, French version is available athttps://www.admin.ch/opc/fr/federal-gazette/2012/5479.pdf; *e.g.*, German version is available at https://www.admin.ch/opc/de/federal-gazette/2012/5937.pdf (last accesses October, 18 2017); Switzerland ratified the Istanbul Convention in May 2017. No legislative alteration is necessary since Switzerland has already met the standards of the Convention. *See Switzerland ratifies the Istanbul Convention,* HUMANRIGHTS.CH, https://www.humanrights.ch/en/switzerland/internal-affairs/ratifications/switzerland-ratifies-istanbul-convention (last accessed 26.10.2017).

Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, in relation to the annulment of marriage and the civil registrar's preparatory procedure for marriage have been revised. In view of that, the civil registrar must examine firstly, the age of the future spouses.[205] This is the first barrier in order to prevent a marriage of persons under the age of eighteen.[206] The civil registrar, secondly, examines whether there are any circumstances that illustrate that the request clearly does not reflect the free will of the prospective spouses.[207] Despite this barrier,[208] if a forced marriage were to occur, the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, would adopt a new regime of annulment of marriage without time limitation on two grounds.[209] The first one is related to the case where one of the spouses did not conclude the marriage with her/his free will and the second is related to such cases where one of the spouses did not reach the age of eighteen at the time of the marriage.[210]

Moreover, Article 152 of the Turkish Civil Code regarding the annulment of marriage in case of duress must also be revised. The current provision is problematic on two grounds. Firstly, only marriages which are concluded with the consent of the spouse under duress that creates a serious and immediate danger to directly her/his or one of her/his relatives' fundamental rights such as life, health, honour and dignity can be annulled. Therefore, this provision does not outline psychological or social pressure as duress. Secondly, the provision clearly stipulates a time limitation for the annulment of the marriage, such as six months starting with the end of duress and five years after the marriage was concluded. In order to protect the victims of forced marriages, the concept of "force" should be redefined, and the psychological and social pressure has to be included and the claim of the annulment of marriage should be off the time limitation.

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[205] Federal Law on Measures to Fight against Forced Marriages revised also the Swiss Schweizerisches Strafgesetzbuch [STGB] [Criminal Code], Dec. 21, 1937 and inserted a new norm concerned the forced marriage and forced registered partnership into the Code as follows:

> [A]ny person who, by the use of force or the threat of serious detriment or other restriction of another's freedom to act compels another to enter into a marriage or to have a same-sex partnership registered is liable to a custodial sentence not exceeding five years or to a monetary penalty.

"Consequently, the register authorities are obliged to report to the competent authority the cases of coercion and the other offenses that come to their attention while carrying out their official duties", according to article 43 (3) of the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907.

[206] *See generally* Andreas Bucher, *L'accueil des mariages forces*, AJP/PJA 1153, 1154 (2013).

[207] *Supra* note 137, art. 99(1)(3).

[208] The civil registrar may have some difficulties in order to understand whether the prospective spouses manifest their free will or not, *see* Bucher, *supra* note 206, at 1155.

[209] According to art. 106(1) of the Swiss Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907

> an action for annulment is brought ex officio by the competent cantonal authority at the domicile of the spouses; in addition, any interested party is entitled to bring such action. Provided this is compatible with their duties, the federal and cantonal authorities shall contact the authority competent for the action if they have reason to believe that there are grounds for annulment.

[210] *See supra* note 137, art. 105.

CONCLUSION

Even though Turkey experienced a radical law reform which represents the move from a legal system based on religious law to a legal system built on secular and democratic values after the foundation of the Turkish Republic in 1923, the country still struggles with its religious and socio-cultural legacy and the forced marriage of children is one of the problems created by this background. Unfortunately, statistics illustrate that most victims are girls.

Forced marriage is considered as a marriage or a union alike which lacks full and free consent of at least one party and duress is involved. Even though the union is not recognized as a civil marriage, like religious marriages in Turkey, if one of the party's consent is lacking or she/he is forced to marry; the aforementioned union must be considered as a forced marriage. In fact, statistics show that underage marriages are generally performed by religious representatives i.e. *imams* in Turkey.

In cases where a future spouse is a child, her/his consent is contradictive, whether she/he did or could give her/his informed consent to marriage or not. Adopting this approach, the Committees of the CEDAW and the UNCRC have recommended to the member states "[n]ot to allow exceptions to minimum age of marriage even with consent".

The phenomenon of forced marriage of children in Turkey has two faces like a medallion; on the one hand, there is a socio-cultural and economic background and on the other hand, there is a legal environment which allows marriages under the age of eighteen and does not criminalize forced marriage. In many cases, girls have no choice but to marry the man chosen for them by their parents in order to safeguard the family's honour since a young girl may put her purity in danger by making mistakes.

Yet, the Turkish Civil Code adopts a controversial position by allowing a marriage of a child who is seventeen years old upon the consent of her/his legal guardian and sixteen years old upon a court's approval in exceptional circumstances according to Article 124 of the Turkish Civil Code. Religious marriages are part of the socio-cultural practices and have no legal effect. Granting authorization to *muftis/imams* to perform civil marriages cannot prohibit[211] underage religious marriages due to the fact that the muftis will be allowed to conclude a marriage which requires at least the spouses at the age of seventeen with the consent of their guardians or the spouses at the age of sixteen with the court's approval according to the Turkish Civil Code. However,

[211] *See* Raf Sanchez, *New Turkish Marriage Law Prompts Fear of Child Weddings*, THE TELEGRAPH, (2017), https://www.telegraph.co.uk/news/2017/11/03/new-turkish-marriage-law-prompts-fears-child-weddings/.

under these circumstances, there is no legal prohibition to conclude religious marriages by the *imams*.

The present authors are of the opinion that serious measures must be taken in order to fulfil the international commitments of Turkey in terms of civil and criminal standards. First of all, the Turkish lawmaker must change the Civil Code to forbid marriages under the age of eighteen, without envisaging any exceptions. Secondly, a special criminal provision must be included in the Turkish Criminal Code to prevent forced marriages, as seen in criminal codes in other European jurisdictions. Lastly, perhaps most importantly, the social dynamics on sexual taboos and the position of women in Turkey must be ameliorated through educating society since the problem of forced marriage cannot be prevented merely by passing laws against it.

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Why Ricardo's Theory of Comparative Advantage Regarding Foreign Trade Doesn't Work in Today's Global Economy

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ABSTRACT

Paul Samuelson, an esteemed economist, asserted that the principle of comparative advantage was the most beautiful idea in economics. However, he took this position at a time when America was a leader in global trade, not when we were running an overall trade deficit of $566 billion and a trade deficit with one country, China, of $375 billion. Thus, there was little impetus to examine the underlying basis of Ricardo's theory of comparative advantage.

Once Riccardo's theorem is examined in its entirety, two under-identified factors stand out: that Ricardo assumed that capital would be loyal to the country of origin and that adjustments in the value of currencies would eventually even out imbalances in trade. Even here, he recognized that, when one country consistently runs a trade deficit, there is a transfer of wealth from that country. Ricardo's example of cloth and wine also did not involve dual-use technologies that have not just industrial uses but military uses as well.

When capital is free to move around the world in search of higher returns and when the conventional wisdom is that the purpose of a corporation is to maximize shareholder value, and not worker well-being, international trade turns into labor arbitrage and jobs are shipped from the importing nation to the exporting nation. As a consequence, the United States has lost much of its manufacturing base. From 2000 to 2009, the United States lost over five million manufacturing jobs, almost one-third of the total.

While it has been argued that these job losses have been caused by automation, when entire industries, such as the wood furniture industry examined in this article, move offshore to a nation with low labor standards, it is labor arbitrage and not automation that is the culprit. And when Boeing contracts out portions of its planes to countries and companies that arguably have no more technical superiority than Boeing, in order to obtain sales from such countries, this transfer of jobs is not caused by automation, but rather by the desire to enhance sales, corporate profitability, and shareholder wealth.

This article first analyzes Ricardo's theorem, not just his argument in favor of comparative advantage, but also the conditions that are necessary for the theory to work, namely, that capital is loyal to the country of origin and that currencies will adjust to level out imbalances in trade. It

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then traces the flow of foreign direct investment into China and the basis for that flow – cheap labor. It then analyzes China's manipulation of the yuan and the changes in the relative valuation of currencies.
The next section of the article addresses China's entry into the World Trade Organization and its failure to live up to its agreement and move to a market-based economy. China's reliance on state-owned enterprises, its subsidization of export and high-tech industries, and its direct and indirect coercion of technological transfer and know-how from the U. S. and other countries - all stand in opposition to the principles to which other countries have agreed in connection with their participation in the World Trade Organization.
A critical factor that has not been understood in connection with global trade is that the transfer of dual-use technology to China also carries with it national security implications. The next sections look at forced technology transfer and China's military goals, including its policy to be both industrially and militarily self-sufficient (something the United States should aim at as well). This leads to a discussion of industrial policy. China has clearly articulated its industrial policy and the steps that it will take to implement it. The United States cannot afford to be dependent upon products originating from, or supply chains running through, other countries – particularly when such countries are hostile to the United States. It cannot afford it from the standpoint of providing good paying jobs for its citizens, from the standpoint of being a leader in research and development, nor from the standpoint of national security.
The conclusion asserts that Sen. Rubio's "Made in China 2025 and the Future American Industry" may be the opening for a critically necessary dialogue that assesses the nature of, and the need for, an industrial policy for the United States. Just relying upon the mantra that free trade benefits all, and supporting such mantra on the basis that it is "proved" by Ricardo's theorem of comparative advantage, is to put our head in the sand and ignore the evidence set forth in this article.

KEYWORDS

Global Trade; Comparative Advantage; Labor Arbitrage; Technology Transfer; Industrial Policy

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INTRODUCTION

Advocates of "free" trade generally refer to David Ricardo's "proof" as laid out in his 1817 book, On the Principles of Political Economy and Taxation[1] in which he postulated his theory of comparative advantage in foreign trade. Using English cloth and Portuguese wine as an example, he "proved" that both countries would be better off if the English focused upon cloth and the Portuguese on wine, even though it was cheaper in terms of labor to produce both in Portugal.

This theory has been a standard item in basic economics textbooks[2] and a prime justification for advocates of free trade.[3] With President Trump threatening a trade war, the benefits of "free" trade are broadly espoused by businesses, academia and the

[1] David Ricardo, On the Principles of Political Economy and Taxation (Library of Economics and Liberty 3rd ed, 1999) (1817).

[2] *See e.g.*, N. Gregory Mankiw, Brief Principles of Macroeconomics (8th ed. 2017) ("The gains from specialization and trade are based not on absolute advantage but on comparative advantage. When each person specializes in producing the good for which he or she has a comparative advantage, total production in the economy rises. This increase of the in the size of the economic pie can be used to make everyone better off").

[3] *Id.* at 3-3b. "Yet, contrary to the opinion sometimes voiced by politicians and pundits, international trade is not like war, in which some countries win and others lose. Trade allows all countries to achieve greater prosperity".

media.[4] However, there is a fundamental difference between "free" trade and "fair trade" and that foreign trade, as well as its effects, are a matter of political and military, and not just economic, concern. Moreover, those who routinely parrot the notion that Ricardo's theory of comparative advantage demonstrates that foreign trade is necessarily beneficial to both countries have never read Ricardo and fail to be aware of the caveats he asserted in order that foreign trade be mutually beneficial. In short, Ricardo's proof of mutual benefit is conditioned upon capital being loyal to the country of origin and the value of a country's currency being a function of the relationship between imports and exports. Part I of this article focuses on Ricardo's theorem and the conditions for its applicability.

Part II considers the reality today. In no way is capital loyal to the country of origin, but rather flows around the world in search of the best return. The net effect of this, as Ricardo implicitly recognized, is labor arbitrage. Moreover, using China as an example, the yuan has not risen in value to reverse the huge trade deficit for the U.S. versus China. This is, at least in part, due to manipulation by the Chinese government. Thus, Part II develops these factors which demonstrate that the underpinnings upon which Ricardo based his theory do not exist today. Consequently, the "assured mutual benefits of global trade" are illusory.

One basis for competitive and comparative advantage is technological superiority. This, supposedly, is one of the major advantages that the United States enjoys. However, this technological advantage dissipates when it is stolen. And, today, we know that some of our trading partners, such as China, not only do not enforce the patent and copyright laws that protect our technological advantage, but also engage in piracy and theft to steal our technological advances, as well as requiring technological transfer as a condition of doing business in China. Thus, the benefits of foreign trade are undercut by the misfeasance and malfeasance of foreign governments.

Part III then examines the policy implications of so-called free trade. Some of the basic tenets of free trade are respect for the rule of law, including intellectual property rights, and the non-existence of governmental barriers to trade or subsidization of domestic manufacturing. These basic tenets have never been observed by China. By such abuses, China has appropriated technological know-how from other countries and used its export subsidies to destroy industries in other countries. It makes no sense to retrain workers for jobs that will only exist in another country.

[4] *See e.g.*, Robert E. Rubin, *Why the World Needs America and China to Get Along*, N. Y. Times (Jan. 2, 2019), https://www.nytimes.com/2019/01/02/opinion/america-china-climate-change-nuclear-weapons.html.

Part IV then begins an examination of the policy implications of the foregoing for the United States. Much of our technical know-how was developed as a result of taxpayer funding, which raises the question as to the entitlement of American businesses to give this away in exchange for market share, to the detriment of American workers. In addition, transfer of this know-how has serious national security implications.

Part V continues the policy examination by examining the national security consequences of having transferred, voluntarily or involuntarily, so much technology and manufacturing know-how to China. Much of technology is dual-use, that is, it has both industrial and military applications. In about twenty years, the United States has transformed China into a manufacturing and military powerhouse, with serious national security implications for the United States. This does not mean that China might not, on its own, have eventually arrived where it is today. But our technology transfers have accelerated the process. At the same time, we have established our dependence on China as an integral part of the supply chain for the technology and raw materials that are essential for our industrial development and military security.

Part VI asserts that it is essential that the United States itself establish an industrial policy. "No decision" is actually a decision. We are probably the only major country in the world that does not have an industrial policy. The mantra of free trade in the United States has been that we can give away low-tech jobs and divert our resources and workers into high-tech jobs. But China does have an industrial policy and it is determined to be a leader, not just in low-tech manufacturing, but also in high-tech industrial and military activities. Unless we focus our attention upon maintaining a manufacturing base, we are going to be second to China in not just solar energy but many other industries as well and, from a military standpoint, will have lost much of our leverage to ensure peace in the world.

For the most part, the focus of this article is upon China because even Chinese researchers acknowledge that the industrial policy of China was initially to create a low-wage, export driven industrial base and then expand into high-tech areas. The trade imbalance between the United States and China dwarfs that of other countries. As the Appendix at the end of this article illustrates, the United States trade deficit with China has steadily risen from just over $33 billion in 1995 to over $375 billion in 2017. The deficits with Germany and Mexico rose from about $15 billion in 1995 to around $70 billion in 2017. The deficit with Japan rose from about $60 billion in 1995 to hold relatively steady at between $70 and $80 billion through 2017. The trade deficit with Canada rose from about $17 billion in 1995 to almost $80 billion in 2008 and recently has dropped back to about $17 billion. Moreover, these countries observe the rule of law, do

not manipulate their currencies, and embody labor rates that, except for Mexico, are comparable to those of the United States.

From the standpoint of reversing the trade deficit with China by the supposed market discipline of a higher yen or a reversal of China's low-wage policy, any developments in these areas will not change the reality that the Chinese policy has already captured dominant market share in many industries and has short-circuited the time necessary for high-tech development by appropriating technology and manufacturing know-how from the United States and other countries.

The conclusion asserts that, in effect, the horse is out of the barn and that closing the barn door will not return the horses. Rather, what the United States must do is to adopt an industrial policy to rebuild manufacturing capability, particularly in the industries of the future and those industries that are essential for national security.

1. DAVID RICARDO AND COMPARATIVE ADVANTAGE

David Ricardo was the first "economist"[5] to articulate the theory of comparative advantage in his 1817 work On the Principles of Political Economy and Taxation.[6] Paul Samuelson, a leader in economic thought in the twentieth century, has argued that "the principle of comparative advantage is the most beautiful idea in economics."[7] According to one current academic, "during the past two centuries, no one has proposed a legitimate counterargument to comparative advantage as the basis for mutually beneficial exchange."[8] The principle of comparative advantage "is the stated logic for negotiating, drafting, implementing, and enforcing rules to liberalize trade on a multilateral, regional, or bilateral basis."[9] It is "a shattering insight that continues to form the basis of conventional international trade theory today."[10]

[5] While Ricardo was not formally trained as an economist's experience in business gave him insights about the functioning of England's economic system and he wrote prodigiously about these matters.

[6] Ricardo, *supra* note 1, ch.7 "On Foreign Trade".

[7] Robert G. Gilpin et al., Realism: Restatement and Renewal (Benjamin Frankel ed., Frank Cass 1996), *see also* Robert G. Gilpin, *No One Loves a Political Realist*, 5 Security Stud., Dec. 24, 2007 ("As Nobel laureate in economics Paul Samuelson has argued, the principle of comparative advantage is the most beautiful idea in economics since it supports the crucial liberal belief in a harmony of interests uniting all people") (Mr. Gilpin was a professor at Princeton University where he focused upon international political economy).

[8] Roger White, Making Sense of Anti-Trade Sentiment 3 (Palgrave Macmillan 2014).

[9] Raj Bhala, International Trade Law: Interdisciplinary Theory and Practice 207 (3d ed. 2008).

[10] Michael Trebilcock, Robert Howse & Antonia Eliason, The Regulation of International Trade 3 (4th ed. 2012).

What is comparative advantage and why is this principle so important? Consider an illustration used by one author involving the legal profession:

> When the world champion typist goes to law school and receives a law degree he has time to handle his new law business and type his own briefs. As he becomes also the best lawyer in town, he finds it impossible to accept all the legal business offered and, at the same time, continue to do his own typing. He decides that he is better off specializing in legal work, which is more profitable to him, and hires a secretary to type his briefs, even though her typing may not be nearly as good as his.[11]

To understand the principle of comparative advantage, one must first contrast that with the principle of absolute advantage. In the foregoing example, if our typist, after establishing his law practice, found a typist whose skill exceeded his own, he would hire her because she had an absolute advantage in typing and he had an absolute advantage in legal work. Prior to Ricardo, absolute advantage was thought to be the basis for trade.[12]

Under the concept of comparative advantage, however, the assumption is that everyone will be better off producing products they produce relatively best.[13] This is illustrated in the above example by the fact that, even if the lawyer could type faster than any secretary he could hire, he is better off doing legal work rather than deferring legal work to type his own briefs.

Advocates of free trade, in a somewhat Pollyannish manner, utilize this principle as an argument that trade must of necessity be beneficial to both countries:

> When free trade is allowed to occur, the trading countries will find incentives in specializing in the production of those commodities in which they enjoy comparative advantage – that is, commodities in the production of which they incur the least opportunity cost viz.-a-viz other nations. Lowest opportunity cost implies a maximum productivity and cost-efficiency. When nations undertake production and export activity on the basis of their comparative advantage, they choose to operate on the most optimum path of economic growth and scarce resources owned by them get allocated most efficiently. This maximizes global output, economic

[11] Rudolph W. Trenton, Basic Economics 416 (4th ed. 1978).
[12] Gary E. Clayton, Economics: Principles & Practices 469 (2003).
[13] *Id.* at 470.

> prosperity and welfare. In short, free trade maximizes economic gains through efficient allocation of resources.[14]

However, those who assume that the doctrine of comparative advantage assures mutual benefits to both countries are often unaware of some of the limitations that Ricardo himself placed upon his doctrine. This will be considered in the next section.

1.1. RICARDO'S MODEL

Ricardo developed his theory of competitive advantage[15] by using the following model: assume that, in England, it takes 100 men, working one year, to produce a given quantity of cloth (say 200 units) and 120 men, working one year, to produce a given quantity of wine (say 100 units); assume further that, in Portugal, it takes 90 men, working one year, to make the same quantity of cloth (200 units) and 80 men, working one year, to make the same quantity of wine (100 units). Further assume that, in both countries, 200 units of cloth and 100 units of wine are needed.

In the above model, it can be seen that Portugal has an absolute advantage, that is, is more efficient, in producing both cloth and wine. If absolute advantage were the key to international trade, Portugal would buy neither cloth nor wine from England since it is more expensive. Note that this assumes that wages are the same in both countries.

However, England is more efficient in producing cloth than in producing wine; conversely, Portugal is more efficient in producing wine than cloth. This is where comparative advantage comes in. If England were to specialize in making cloth, and divert manpower from the making of wine, it would then be able to produce 2.2 times as much quantity of cloth (namely, 440 units) as before. Conversely, if Portugal were to specialize in producing wine, it could divert manpower from the making of cloth and could produce 2.125 times as much wine (namely 212.5 units) as before.

Thus, when the two countries specialize, there will be an increase in the total amount of both cloth and wine produced by the two countries. In England, cloth requires 0.5 man-years to produce one unit of cloth, whereas wine requires 1.2 man-years to produce a unit of wine. Therefore, wine costs 2.4 times as much as cloth and cloth costs 0.42 times as much as wine. Thus, to replace the 100 units of wine that it has forgone,

[14] Renita D'souza, Free Trade a Win-Win for All: Making Competitive Advantage Work, (Jun. 28, 2018) (Observer Research Found). The author does recognize that, "in the short run, adjustment costs will have to be incurred by some stakeholders." However, "increased competitiveness and efficiency will increase the profits of these stakeholders in the long-run." As discussed later in the article, free trade is not a win-win situation, but rather there are losers.

[15] Ricardo, *supra* note 1, ch.7 "On Foreign Trade".

England would be willing to trade 240 units of cloth. If it sent 240 units of cloth to Portugal, it would still have 200 units of cloth left.

In Portugal, on the other hand, cloth requires 0.45 man-years to produce a unit of cloth and 0.8 man years to produce a unit of wine. Therefore, wine costs 1.78 times as much as cloth and cloth costs 0.56 times as much as wine. Thus, to replace 200 units of cloth that Portugal has diverted into the making of wine, Portugal would be willing to pay 112 units of wine and would trade 112 units of wine for 200 units of cloth. Consequently, Portugal could trade its 112 units of wine and still have 100 units of wine left, together with 200 units of cloth.

At this point, it looks as though both countries are in the same place because of trade. However, Portugal would not need to trade 112 units of wine to obtain 200 units of cloth from England because England would trade 200 units of cloth for 84 units of wine. Similarly, England would not need to trade 240 units of cloth to obtain 100 units of wine because Portugal would trade 100 units of wine for 178 units of cloth. Consequently, a trade equilibrium would be established whereby England transferred less than 240 units of cloth to Portugal and Portugal would transfer less than 112 units of wine to England.

For example, if England transferred 220 units of cloth to Portugal, Portugal might transfer 105 units of wine to England. In this case, both countries would have both more wine and more cloth than if trade did not exist.

Thus, according to the theory of comparative advantage, everybody is better off by specializing.

1.2. RICARDO'S LIMITATIONS ON HIS MODEL – LOYALTY OF CAPITAL

In looking at the foregoing model produced by Ricardo, since it assumes that production and income could be transferred from producing wine to producing cloth, why wouldn't the owners of capital, instead of switching resources in England, simply move all production to to Portugal which is more efficient in producing both wine and cloth.

One response to this, from a common-sense standpoint, is that Ricardo was working at a time when production was constrained, among other factors, by geography and climate. It could be that the cloth producing area in Portugal is elevated and there is a limited amount of elevated land on which to raise sheep for cloth.

However, Ricardo explicitly addressed the possibility that capital should move to Portugal where both cloth and wine can be produced more efficiently:

> It would undoubtedly be advantageous to the capitalists of England, and to the consumers in both countries, that under such circumstances, the wine and the cloth should both be made in Portugal, and therefore that the capital and labor of England employed in making cloth should be removed to Portugal for that purpose.[16]

Ricardo, however, rejected this possibility on the basis that capitalists, namely, men of property, are loyal to their country of birth, even though a greater profit might be made elsewhere:

> Experience, however, shews that the fancied or real insecurity of capital, when not under the immediate control of its owner, together with the natural disinclination which every man has to quit the country of his birth and connexions, and intrust himself with all his habits fixed, to a strange government and new laws, check the emigration of capital. These feelings, which I should be sorry to see weakened, induce most amount of property to be satisfied with a low rate of profits in their own country, rather than seek a more advantageous employment for their wealth in foreign nations.[17]

It goes without saying that Ricardo's view of the loyalty of capital is not only utterly incorrect today, but would be regarded as foolishness by most business managers and business academics.

One comparative advantage that the United States once had was its supply of capital but, as discussed below, such advantage has been squandered by the investment of capital by American bankers and American businesses in low-wage countries.

1.3. RICARDO'S ANALYSIS OF THE IMPACT OF UNBALANCED TRADE ON THE RESPECTIVE WEALTH OF COUNTRIES

At the time Ricardo was writing, gold and silver were the medium of exchange in international trade:

> Gold and silver having been chosen for the general medium of circulation, they are, by the competition of commerce, distributed in such proportions amongst the different countries of the world, as to accommodate themselves

[16] Ricardo, *supra* note 1, at 4, 10.
[17] *Id.*

> the natural traffic which would take place if no such metals existed, and the trade between countries was purely a trade of barter.[18]

When trade is balanced, that is, exports and imports are equal in value, Ricardo's analogy of the situation to barter works well and there is no change in the relative wealth of the two countries:

> If the markets be favorable for the exportation of wine from Portugal to England [and of cloth from England to Portugal], the exporter of the wine will be a seller of a bill, which will be purchased either by the importer of the cloth, or by the person who sold him his bill; and thus without the necessity of money passing from either country, the exporters in each country will be paid for their goods. Without having any direct transaction with each other, the money paid in Portugal by the importer of cloth will be paid to the Portuguese exporter of wine; and in England by the negotiation of the same bill the exporter of the cloth will be authorized to receive its value from the importer of wine.[19]

But when one country stops exporting, say Portugal, there is a transfer of wealth from that country to the other country, England. Ricardo assumes that, if there is an improvement in the process of making wine in England such that the price of wine in England falls from £50 pounds to £45, England will no longer import wine from Portugal. Thus:

> [I]f the prices of wine were such that no wine could be exported to England, the importer of cloth would equally purchase a bill; but the price of that bill would be higher, from the knowledge which the seller of it would possess, that there was no counter bill in the market by which you could ultimately settle the transactions between the two countries; he might know that the gold or silver money which he received in exchange for his bill must be actually exported to his correspondent in England, to enable him to pay the demand which he authorized to be made upon him, and he might therefore charge in the price of his bill all the expenses to be incurred, together with his fair and usual profit.[20]

Ricardo then concludes:

> If then this premium for a bill on England should be equal to the profit on imported cloth, then the importation would of course ease; but if the

[18] *Id.* at 4-5.
[19] *Id.* at 5.
[20] *Id.*

> premium on the bill were only two per cent, if to be enabled to pay a debt in England of £100, £102 to should be paid in Portugal, whilst cloth which cost £45 would sell for £50, cloth would be imported, bills would be bought, and money would be exported, till the diminution of money in Portugal, and its accumulation in England, have produced such a state of prices as would make it no longer profitable to continue these transactions.[21]

What Ricardo asserts, and what advocates of "free" trade – who assert that comparative advantage means that any trade is always desirable – fail to recognize, is that when one country is a net exporter and another country is a net importer, there is a transfer of wealth from the importing country to the exporting country. And that is what is happening in the China/U.S. trade situation. As Ricardo states: "Estimated in money, the whole revenue of Portugal would be diminished; estimated in the same medium, the whole revenue of England would be increased."[22]

We no longer have gold or silver as the medium of exchange in foreign trade and transactions. Rather, we have a system of floating currencies that, supposedly, reflect the market demand for particular currencies. Again, taking the China/United States trade situation as an example, since the United States has a substantial trade deficit with China, there should be a great demand for Chinese yuan to enable United States companies and individuals to purchase Chinese goods, which should increase the value of the yuan vis-à-vis the United States dollar. As the yuan would increase in value and the dollar decrease in value, the cost of Chinese exports would also increase and the cost of United States exports would decrease, thereby bringing the China/United States trade into balance.

But, if the Chinese government manipulates the value of the yuan vis-a-vis the United States dollar, there will be no self-regulating mechanism to restore the balance of trade between the two countries. This, and the fact that capital is not loyal to the country of origin will be more fully developed in the next section.

[21] *Id.*
[22] *Id.*

2. FOREIGN TRADE TODAY DOES NOT MEET RICARDO'S CONDITIONS FOR COMPARATIVE ADVANTAGE

2.1. SINCE CAPITAL IS NOT LOYAL, INVESTMENT BY U.S. COMPANIES IN CHINA LEADS TO LABOR ARBITRAGE

At one time, in the aftermath of World War II, the United States was the leading exporter of goods in the world. From the seventies until the nineties, the United States basically shared that status with Germany and Japan. However, after China achieved most favored nation status with United States and was admitted to the World Trade Organization, Chinese exports rose rapidly and United States exports dropped, as a percentage of total world exports:[23]

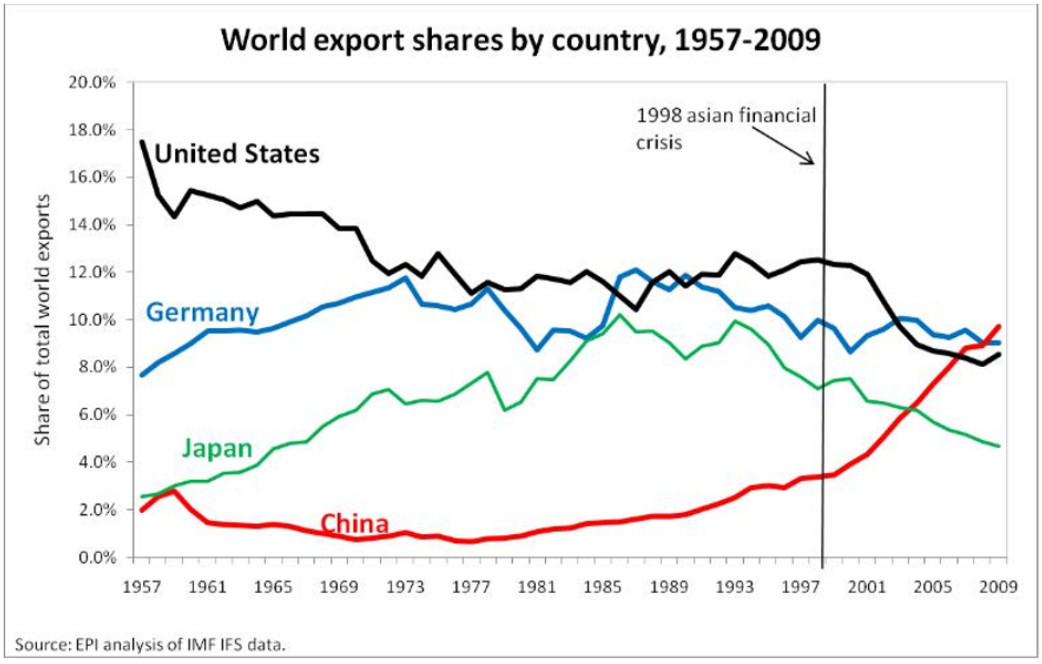

Chart 1: *(Source: see footnote 23)*

Recall that one of the assumptions by Ricardo in arguing that trade was always beneficial, even if one country had an absolute advantage (could produce both hypothetical products more efficiently than the other country), was that capital was loyal and would not flee to the low-cost producer. That assumption in nowise holds true today. The following graph reflects the pattern of foreign direct investment in China from 1978-2010:[24]

[23] World Export Shares by Country, 1957-2009: Hearing on Chinese State Owned Enterprises and U.S.-China Bilateral Investment Before the U.S.-China Economic Security Review Commission, 112th Cong. 71 (2011), https://www.uscc.gov/sites/default/files/transcripts/3.30.11HearingTranscript.pdf.

[24] *Id.* at 67.

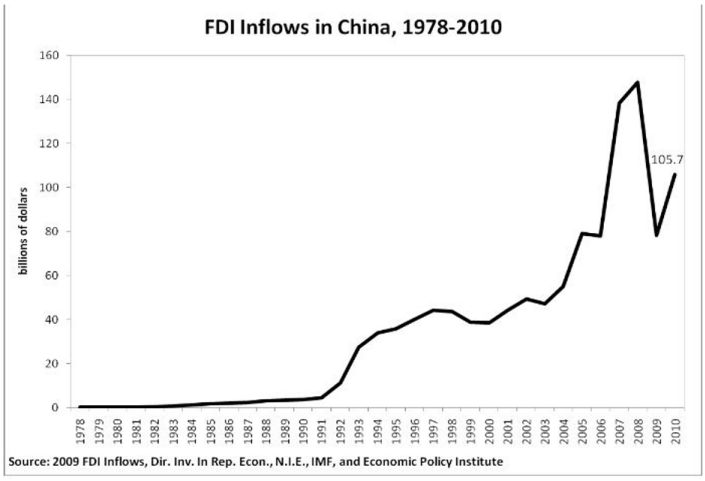

Chart 2

Now, consider the investment of U.S. companies in China from 1990 to 2017, illustrated in the graphs below. The first graph reflects data from the Rhodium Group:[25]

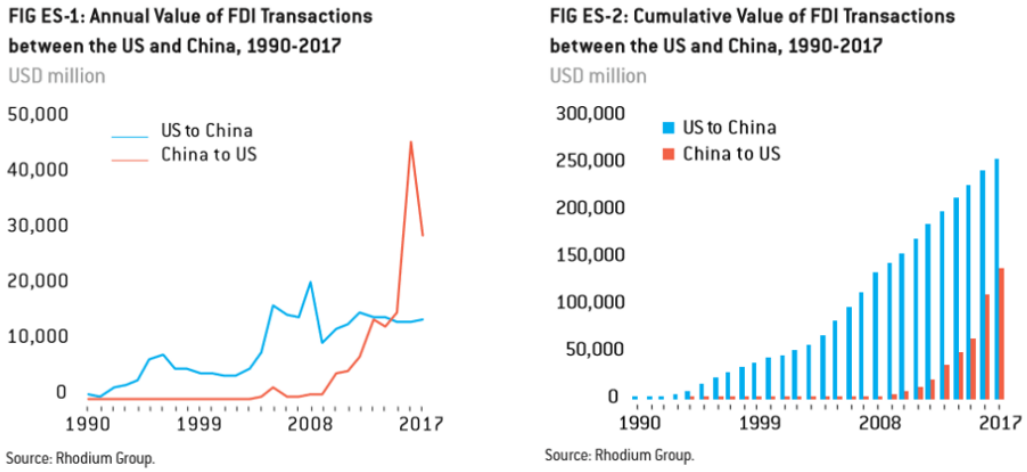

Chart 3

According to the Rhodium Group,[26] by the time that China was admitted to the World Trade Organization, United States companies had already invested about $50 billion into the Chinese economy, and subsequent thereto have invested about another $200 billion. Note however that it shows United States investment in China to be

[25] Thilo Hanemann, Daniel H. Rosen & Cassie Gao, Two-Way Street: 2018 Update US-China Direct Investment Trends, Rhodium Group (Apr. 10, 2018).

[26] According to its website, the Rhodium group "has the most highly respected independent China research team in the private sector. For more than twenty years our principals and staff have used a multidisciplinary approach to produce path-breaking analyses and insights on China."

relatively flat at around $15 billion from 2005 to 2017, and that the cumulative investment was a relatively constant slope upward.

Another study sets forth somewhat different figures – a study by Yuqing Xing sets forth the value of foreign direct investment in China from 1985-2008 as $854.3 billion, of which the United States was responsible for $55.1 billion or 6.4%.[27]

Table 3: Major Sources of FDI in China, 1985-2008

Major Sources of FDI in China, 1985-2008

	1985-1990		1991-2000		2001-2008		1985-2008	
Sources	Value (Billion USD)	Share (%)	Value (Billion USD)	Share (%)	Value (Billion USD)	Share (%)	Value (Billion USD)	Share (%)
The World	15.9	100.0	327.7	100.0	510.7	100.0	854.3	100.0
Hong Kong	9.7	60.9	159.0	48.5	178.2	34.9	346.9	40.6
Taiwan	0.0	0.0	25.8	7.9	21.4	4.2	47.2	5.5
Japan	2.2	13.6	25.2	7.7	37.4	7.3	64.7	7.6
Korea	0.0	0.0	10.5	3.2	31.5	6.2	42.0	4.9
Singapore	0.2	1.3	16.8	5.1	20.6	4.0	37.6	4.4
USA	1.9	12.1	27.6	8.4	29.5	5.8	55.1	6.4
Germany	0.2	1.3	6.1	1.9	9.2	1.8	15.5	1.8
UK	0.2	1.2	8.4	2.6	6.9	1.4	15.5	1.8
France	0.1	0.9	4.0	1.2	4.4	0.9	8.6	1.0

Chart 4: *(Source: see footnote 27)*

Now consider that a relatively pro-trade group, the Peterson Institute for International Economics, bemoaned the fact that U.S. foreign direct investment in China *in 2012* was *only* "around $54 billion" and that that "represented only about 1.2 percent of the $2.2 trillion of total FDI in China."[28] In contrast, the Rhodium Group graph above indicates that the foreign direct investment in China by the United States in 2012 was less than $15 billion, and was generally less than that in the period between 2005 to 2017.

While these data sources reflect a substantial difference, consider now the testimony of Dr. Robert E Scott of the Economic Policy Institute at the China hearings, where he asserted that the U.S. foreign direct investment in China "reached $162 billion in 2008, about 16.6% of total FDI in China."[29] Total cumulative foreign direct investment in China by 2010 was about $1 trillion;[30] the pattern indicated by Chart 4 above. The chart below sets forth Dr. Scott's analysis of U.S. foreign direct investment in China:[31]

[27] Yuqing Xing, *Facts about Any Impacts of FDI on China and the World Economy*, 8 CHIN : AN IN . J. 309, 27 (2010).
[28] Peterson Institute For International Economics, Towards a U.S.-China Investment Treaty (2015).
[29] CHINA HEARINGS, *supra* note 23, at 59.
[30] *Id.* at 60.
[31] *Id.* at 69.

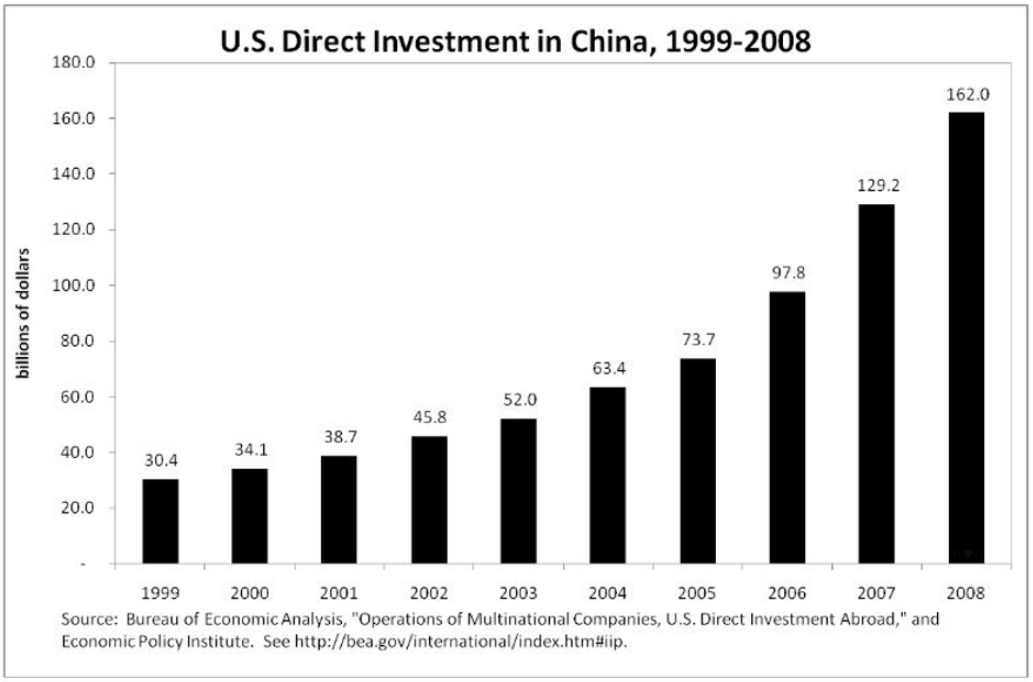

Chart 5

What the above data illustrates is the variance of opinion on a very fundamental and politically and economically significant fact, namely the amount and sources of direct foreign investments in China. Part of the uncertainty arises from the fact that much money flows through financial intermediaries. For example, Luxembourg is one of the leading countries in foreign direct investment, as is Hong Kong. Much of this money is undoubtedly redirected to other countries, since these jurisdictions cannot absorb internally all the foreign direct investment that is made to them. In addition, "[f]unding for construction of a new factory in China can flow directly from the home company in the United States, from retained earnings abroad, and from borrowed capital [from Chinese banks]."[32] Moreover, capital can indirectly come from guaranteed orders from a "parent" company in the United States that is outsourcing its manufacturing.

Be that as it may, the foregoing conclusively demonstrates that capital is not loyal to the country of origin, but will flow wherever costs are low and returns are high, which basically is labor arbitrage.

[32] *Id.* at 59.

2.2. LABOR ARBITRAGE AS REFLECTED IN LOW CHINESE WAGES DRIVING AN EXPORT ORIENTED ECONOMY

As asserted in the previous section, if capital is free to move from one country to another, then global trade may become nothing more than labor arbitrage, if there are significant differences in labor costs from country to country. In the case of China, its explosive export growth initially had been driven by low-wage manufacturing of consumer goods.[33]

According to a study that was jointly funded by the International Labour Organization and the National Natural Science Foundation of China,[34]

> China's rapid growth in industrial output has owed much to the impacts of globalization, in particular, influx of foreign capital. Exploiting low-cost labour has been described in the literature as one of the key motivations for foreign direct investment (FDI) into China. The primary objective behind the early FDI that came from overseas Chinese in the 1980s was to exploit China's low-cost labour in the manufacture of consumer products for export. Later on, in the late 1990s, the major Japanese and Western MNCs [multinational corporations] entered China with significant FDI for the same cost-based reasons. Surveys regarding the motivation of MNCs to establish R & D facilities in China also confirm that most of the FDI has pursued cost reduction by using more local raw materials as well as labour.[35]

As with much information about China, data about wages is often inconsistent and of questionable validity. The more recent data, to the extent reliable, suggests that wages in China have been rising substantially in the last decade, increasing from about $3500 a year or $300 a month in 2008 to about $9000 a year or $750 a month in 2017:[36]

(See Chart in the next page)

[33] Jici Wang & Lixia Mei, *Dynamics of labour-intensive clusters in China: relying on low labour costs or cultivating innovation?* (Int. Institute for Labour Studies, Discussion Paper No. 1, 2009). The International Institute for Labour Studies is also known as the International Labour Organization.

[34] The funding by this latter organization should give credibility to the conclusions and data incorporated in the study.

[35] Wang & Mei, *supra* note 33, at 1.

[36] *China Average Yearly Wages in Manufacturing Chart*, TradingEconomics.com, https://tradingeconomics.com/china/wages-in-manufacturing.

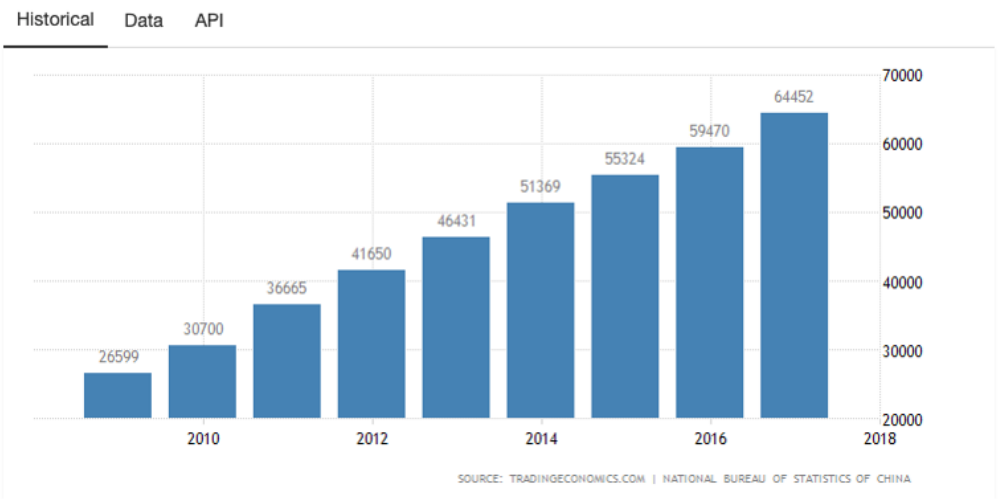

Chart 6: *(Source: see footnote 36)*

However, manufacturing wages prior to 2008 were markedly lower, as reflected in the extension of the above chart:

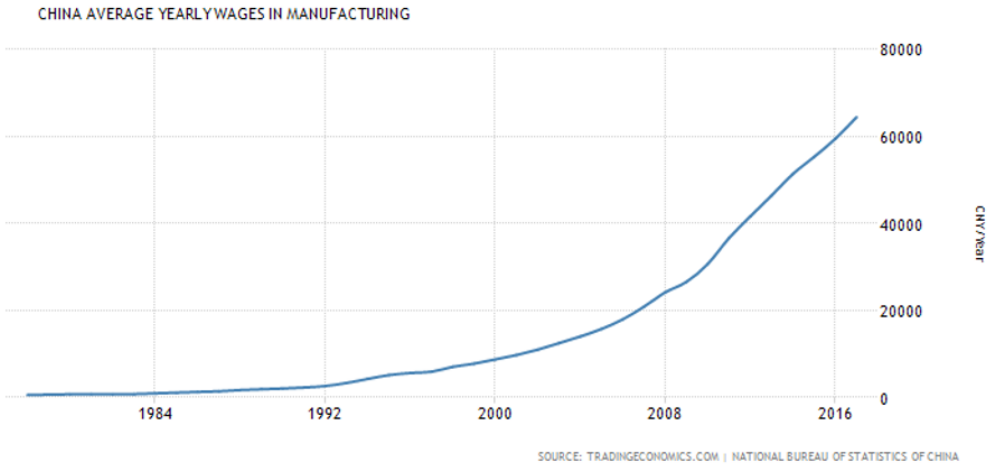

Chart 7: *(Source: see footnote 36)*

From 1995 through 2005, the exchange rate for the yuan was about 8.3 yuan to the dollar. Since the above tables are in yuan, annual wages approximately ranged from $1,000 per year in 1995 to $1,700 in 2005, or from about $80 per month in 1995 to $140 per month in 2005.

By way of comparison, the same source reports U.S. manufacturing wages as slightly over $21/hour or over $42,000/year for a 2,000-hour year.

The low wages and dismal working conditions are confirmed by another source, China Labor Watch. In a 2007 report by this organization which discussed labor violations at a furniture manufacturer employing 3000 workers, the report set forth monthly wage rates of 1700 yuan (a little over $200) during the busy season – about half the year – and 1000 yuan (about $125) during the slow season.[37] However, the workers were required to work 12 hour days, six hours a week during the busy season and a nine hours a day six days a week during the slow season. Migrant workers resided in a factory dormitory room which usually housed about 10 workers with one toilet.[38]

Another recent source, The Conference Board, setting forth its data in terms of unit labor costs, also supports the difference in wages between China and other industrialized countries:[39]

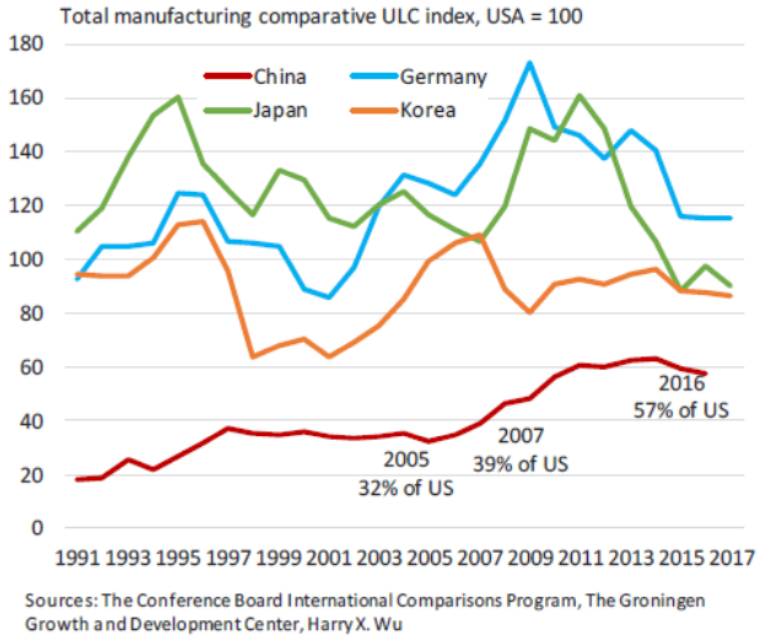

Chart 8: *(Source: see footnote 39)*

[37] Ju Qian, Furniture Factory Report (2007). (Founded in 2000, China Labor Watch (CLW) is an independent not-for-profit 501(c)(3) organization. Over the past 17 years, CLW has collaborated with unions, labor organizations, and the media to conduct in-depth assessments of factories in China that produce toys, bikes, shoes, furniture, clothing, and electronics for some of the largest multinational brand companies. CLW's New York office creates reports from these investigations, educates the international community on supply chain labor issues, and pressures corporations to improve conditions for workers. CLW's China office in Shenzhen interacts closely with factory workers, providing a free hotline service that offers advice and counseling to workers facing perceived violations in the workplace. This office also further supports the labor movement in China by organizing labor rights, collective bargaining, and capacity-building training programs for workers and labor rights advocates).

[38] *Id.* at 4.

[39] Siqi Zhou, Rising Unit Labor Costs Threaten China's Export Competitiveness (2018).

The above chart indicates that unit labor costs from 2005 to 2007 in China were 32% to 39% of those in the U.S. But the wage data discussed above indicates that Chinese wages were less than 5% of U.S. wages. Conceivably, the difference could be attributable to higher worker productivity in the U.S. and exchange rate differences, but such a large variation is hard to reconcile.

The above chart also demonstrates that unit labor costs in Japan and Germany were actually higher than in the U.S., while those in Korea averaged about 90% of those in the U.S.

2.3. LABOR ARBITRAGE INVOLVES NOT JUST COMPENSATION, BUT ALSO WORKING CONDITIONS

Low monthly wages are only one part of the labor arbitrage issue with respect to investment in China. The International Labour Organization, in a report co-funded by the National Natural Science Foundation of China, reported:

> A research report on "China's rural migrant workers" conducted by the Research Office of the State Council of China (2005) concluded that the average monthly wages of rural migrant workers was between 500 – 800 yuan RMB (about U.S. $60-100) at that time. However, for this sum, workers within many labour-intensive clusters worked over 10 hours a day, sometimes either 6 or 7 days a week, in some cases without overtime pay, which reduced their average hourly wage. That is compared with the U.S. minimum wage of $5.15 per hour at the same. (Although since then, the U.S. federal minimum wage was raised to $7.25 per hour as of 24 July, 2009 according to the U.S. Department of Labor).[40]

By way of comparison, it should be noted that manufacturing workers in the United States are not paid the minimum wage, but rather several times the minimum wage. Assuming a wage $20 per hour, a factory worker in the United States would make $3,440 per month, as opposed to the $60-$100 per month wages for a Chinese worker reported in the above study. Even at the then federal minimum wage of $5.15 per hour, a worker in United States would make about $900 per month.

The above report also noted:

> Delayed wage payment had become so widespread in many locations and sectors, that the Premier Wen Jiabao signed a series of official documents in

[40] Wang & Mei, *supra* note 33, at 19.

> 2004 designed to protect rural migrants' basic right to receive their wages on time. The central government intervention helps large numbers of rural migrant workers in China to receive their earned wages.[41]

Poor working conditions have been a long-standing problem in China. In a 1994 report, the author stated:

> [L]abor exploitation and oppression have progressively worsened over the past 15 years. Long working hours, unreasonable wage cuts and remuneration, poor living conditions, a dangerous working environment, lack of health provisions, arbitrary dismissals, harsh and abusive treatment are the common problems.[42]

In commenting upon the plight of workers in developing nations and the lack institutional concern by those who argue for the benefits of international trade, William Greider, an investigative reporter, stated:

> The lawyerly contradiction in this is profound: global commerce insists on a legal system that will protect the contractual rights of capital but treats the same rights for individual workers as an impediment to economic progress or a luxury that is reserved only for the wealthy nations. The same opinion leaders who celebrate the virtues of free competition among firms are strangely silent on the subject of free labor. The trade lawyers who lobby for liberalizing terms of trade are oblivious to the repressive, manipulative terms in which people are employed in many markets. The lawyers might insist that there is no contradiction since they are serving the interests of their clients, the multinational producers. Whatever the rationale, a barbaric transaction is still barbaric, regardless of local culture and political realities.[43]

This pattern hardly reflects a level playing field against which American workers should be expected to compete.

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[41] *Id.*

[42] William Greider, One World, Ready or Not: The Maniac Logic of Global Capitalism 406 (1997) (Referencing Trini Wing-yue Leung, EPZs in China, a report prepared for the International Confederation of Free Trade Unions, August 1994. This latter report has also been referenced at https://www.cambridge.org/core/journals/international-labor-and-working-class-history/article/contesting-class-organization-migrant-workers-strikes-in-chinas-pearl-river-delta-197820101/A00EEFC54483FA8C7B2444FE94CCA4F8).

[43] *Id.* at 408.

2.4. LABOR ARBITRAGE AS IT HAS PLAYED OUT IN ONE LOW-TECH INDUSTRY

While it might seem paradoxical to the American reader that there could be a problem of labor shortages in China giving rise to increases in wages, this was one of the themes of the joint report of the International Labour Organization and the National Natural Science Foundation of China. Consider the furniture industry as an example. Around 2005, one of the case studies in the report discussed the fact that Lecong, a town of 100,000 and the "capital of the furniture trade of China," which is located in one of the industrial sectors along the eastern area of China, needed to import over 110,000 migrant workers, nearly half of whom worked in the furniture industry.[44] At that time, workers were paid 1000 Yuan, or about $125 a month. However, governmental policies with regard to the western provinces encouraged many of these migrant workers to stay home. As one worker from the Sichuan province stated:

> I have to work for more than 12 hours a day and very adverse conditions, only to get about 1000 Yuan in Lecong; however, now the Central Government, [sic] and I can earn almost 1000 Yuan in my hometown without any transportation fee, and what's more, I can stay with my family more often. Of course I prefer to work locally.[45]

This caused employers to raise wages and some sought to relocate to inland China to reduce costs. However, the inland location, though cheaper, did not have the synergies available from the cluster style industrial network along the coast.[46]

Consider now the impact of the foregoing "problem" encountered by employers in the furniture industry in China. Wages of $125 a month in the furniture industry were considered problematic. How could American manufacturers and American workers compete with foreign companies that employed such cheap labor. And labor was even cheaper in the preceding 10 year period.[47]

Now consider the impact the foregoing competition had upon the furniture industry in the United States during a comparable 10 year period, 1995-2005. But, first, go back a decade earlier:

> Back in the early 1980s, most of the Taiwanese exporters were novices at furniture-making, especially where the finishing process was concerned. But how long it would last was anybody's guess. U.S. furniture workers were

[44] *Id.* at 22.
[45] *Id.*
[46] *Id.*
[47] TradingEconomics, *supra* note 36.

> averaging $5.25 an hour, while the Taiwanese made $1.40 an hour, and the Chinese labored for $.35. The Far East may not have had the machinery or the lightening-fast conveyor belts that the Bassett Speed Lines did, but when it came to throwing labor at a problem, no one worked harder, longer, or cheaper than the Chinese.[48]

Smaller items, like coffee tables[49] and chairs, were the first to be impacted by Chinese imports in the late 1980s. A Queen Anne dining chair made by an American company was selling for $220. An Asian import first sold for $50, and $39.[50]

During this period, many furniture manufacturers sold out, often in leveraged buyouts, with the result that cash generated by profits was used to pay off debt, rather than modernize the equipment. The unhappy aftermath was chronicled as follows:

> From their faraway corporate perches, these executives aim to teach the slow-drawling Southerners new ways of merchandising and marketing, reaping giant profits for all. They bought out family owners of profitable businesses in an industry they knew nothing about, promising to leave the local management alone except when they felt their financial expertise was required. The honeymoon ended when the profits had been milked to meet a corporation's earnings targets, and usually after management had demeaned the local guys and sapped initiative on the factory floor. When the conglomerates sold or spun off their acquisitions, citing "poor performance" or "failure to meet profit goals," the businesses parted ways for good.[51]

Takeovers, even when unsuccessful, were problematic from a financial perspective. One furniture executive, who asked how much it would cost to ward off the takeover, was told: "At least two million, came the reply, and worse: Goldman Sachs needed him to pay a retainer of $465,000 by the next day."[52]

By 1998 imports of wood furniture accounted for 30% of the market and concern was raised for the future of North Carolina's number two industry and its 70,000 jobs.[53] However, at that time, notwithstanding cheap Asian labor, negligible environmental regulations and foreign governmental support, the manufacturers of bulky items, such

[48] Beth Macy, Factory Man 148 (2014).
[49] Scott Andron, *Furniture Imports the Talk of Market*, Greensboro News and Record, May 3, 1998 (industry segments such as coffee tables and dinettes, once dominated by American companies, were taken over by foreign firms years ago).
[50] Macy, *supra* note 48, at 168.
[51] *Id.* at 166.
[52] *Id.* at 167.
[53] Andron, *supra* note 49.

as bedroom furniture, were less threatened because of the expense and time delay in shipping such bulky items from China to the U.S. Moreover, manufacturers of high-end products did not believe the Chinese could match their quality.[54]

Such complacency proved faulty. By 2001, China was admitted to the World Trade Organization and was selling high-quality bedroom suite for $400, whereas one of the cheapest American versions cost twice that amount to produce, without factoring in any profit.[55] This led some of the domestic manufacturers to pursue an anti-dumping claim against the Chinese and the imposition of tariffs. The U.S. manufacturers claimed that the "wave of Chinese-made wooden furniture swamped the U.S. market beginning in 2000 [with the result that] about 35,000 employees or 27% of the total workforce at U.S. woodworking factories have lost their jobs."[56]

But not all American companies favored the imposition of tariffs. Large retailers, such as Crate & Barrel, JCPenney Co., and Berkshire Hathaway's Nebraska Furniture Mart campaigned against the tariffs because it was profitable to sell the Chinese imports.[57] In addition, some American manufacturers had also imported Chinese furniture to take advantage of what they anticipated to be higher profit margins.[58]

One Taiwanese businessman told John Bassett III, the owner of a family business in the industry, that "[i]f the price is right, you [Americans] will do *anything*. We have never seen people before you who are this greedy – or this naïve." He continued "[w]hen we get on top . . . don't expect us to be dumb enough to do for you what you've been dumb enough to do for us."[59]

Not all furniture manufacturers were "this greedy." When John Bassett was told by a Communist Party official, He Yun Feng, that the Chinese would be happy to provide Bassett with the dressers he was manufacturing at a fraction of the cost that Bassett

[54] *Id.* (The Thomasville president stated that: "Not every factory over there is capable of doing what we can do").

[55] MACY, *supra* note 48, at 232.

[56] Wall Street Journal Staff Reporter, *Chinese Furniture Faces U.S. Tariffs*, WALL ST. J., June 17, 2004.

[57] *Id.* (Furniture stores that buy heavily from China have waged a counterattack against U.S. furniture makers that supports the trade duties. At least 15 retailers across the U.S. have removed Mr. Bassett's products from their stores or if stopped ordering new styles from him, Mr. Bassett said, "wiping out $8 million in orders." "Why support anyone who is trying to hurt me?", said Jake Jabs, owner of American Furniture Warehouse, a nine-store chain based in Englewood Colorado, that has banished products from four U.S. suppliers that are pushing for the tariffs. About two-thirds of the wooden furniture he sells is imported. Of those imports, two-thirds comes from China").

[58] MACY, *supra* note 48, at 246 ("As American furniture makers flew to check out the possibilities of ordering from the Taiwanese, the fledging Asian companies flattered them, asking them constantly for advice. Once the Americans became customers, the advice morphed into full-bore instruction, far beyond helping convert inches to centimeters on design sketches. 'It just snowballed,' Tothill said, 'it wasn't that the Asians came over to take our business. We went over there, and, before we knew it, we had *given* it to them").

[59] *Id.* at 4.

incurred,[60] instead of taking the offer he instituted an investigation into the Chinese selling furniture below cost,[61] which ultimately led to the imposition of tariffs[62] and the Byrd amendment,[63] which directed the tariffs to the affected manufacturers. The following sets forth Bassett's motivation:

> Close his factories? John Bassett pictured the whole lot of his hard-charging forbearers turning en masse in their graves. He thought of his 1730 workers – plainspoken mountain types, many of whom had followed their parents and grandparents into the factories – standing in unemployment lines instead of assembly lines. He thought of the smokestacks that for a century had borne his family's name and of the legacy he wanted to leave his kids.[64]

As another furniture manufacturer, this one located in Mississippi, reported: "... I may not be the brightest bulb, but I know that when my people don't have a job in Columbus, Mississippi, they're out of work forever," he told me. "There's nothing here for them to retrain for."[65]

It is hard for the one-percenters – who run large corporations, engage in financial engineering, and live in gated communities, and who grasp at cheap Chinese imports to improve margins – to understand the effect of offshoring manufacturing on communities and the people who live in them. Consider one example – Galax, Virginia: [66]

> Among the displaced thirteen hundred furniture workers in Galax, those in their fifties and sixties had the toughest time recovering from the closings. Luper [a sawmiller] has friends his age who now mow grass, clean homes, wash cars, and make crafts and foodstuffs – anything to manage until their Social Security kicks in. A minister and food-bank operator told me she's counseled a handful of folks who are camping out in the woods.
>
> A Facebook yard-sale page . . . gets visited by nearly everyone in the town of seven thousand. In January 2013, it had more than eleven thousand members, counting residents of surrounding counties, and featured house-cleaning and clothes-washing services for as little as four dollars an hour. One continuing controversy involves members who try to resell drink mixes, power bars, and canned goods that have been donated to them by a local charity. "Is that right

[60] *Id.* at 5.
[61] *Id.* at 254-265.
[62] *Id.* at 296.
[63] *Id.* at 274.
[64] *Id.* at 5.
[65] *Id.* at 311.
[66] *See* Beth Macy, Dopesick: Dealers, Doctors, and the Drug Company that Addicted America 35 (2018). Galax is described as follows: "a factory town that it just witnessed the closing of two of its largest employers, Haynes-Brands clothing and Webb Furniture, and continued downsizing in the town's remaining plants."

> or wrong? It's not for me to say," moderator Jessy Shrewsbury told me. "Some people are just very desperate for money to pay their bills."[67]

In Galax "40 percent of Galax residents qualify for food stamps; two-thirds of the town schoolchildren are on free or reduced-rate lunches; and nearly a quarter of the population lives in poverty."[68]

Beth Macy, the author of Factory Man, in another book, Dopesick, discussed the opioid drug addiction which has been spreading through rural communities and arguably began in the Appalachian area near Galax. One contributing factor to the drug crisis was a lack of hope and the loss of self-respect that was triggered by the loss of jobs. She recounted the importance of even a poor paying job:

> Even though the pay wasn't great, those [production] jobs gave two things to our communities: one, families on the margin didn't always have to be on the brink of not having food on the table or money for utilities. And the second, more important thing was the behavior it modeled for families, where people got up in the morning and went to work.[69]

One resident of the area summed it up: "I guess we traded our jobs for somebody somewhere else in the world to have a better life, I don't know."[70]

The purpose of government is to act in the best interests of all its people, not to buy in to an unrealistic theory of trade that benefits some but results in the deprivation of others.

2.5. YUAN MANIPULATION

2.5.1. CHINESE INTERVENTION TO STEM THE RISE IN THE VALUE OF THE YUAN.

Since 1985, the United States has consistently and continually run a trade deficit with China. This means that the U.S. importers would need to purchase Chinese yuan in order to pay for the Chinese goods and that China would build up a huge store of US dollars. This, in turn, has resulted in a huge transfer of dollar reserves to China and should have, over time, caused a relative increase in the value of the yuan and a decrease in the value of the dollar.

[67] Macy, *supra* note 48, at 372-373.
[68] *Id.* at 373.
[69] Macy, *supra* note 66, at 36.
[70] Macy, *supra* note 48, at 374.

The flow of American dollars and Chinese yuan is illustrated by the chart below:[71]

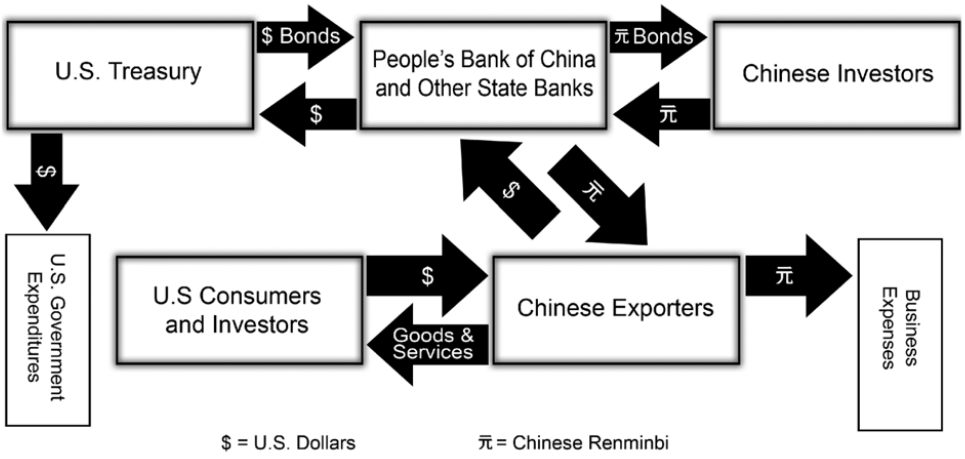

Chart 9

As of 2008, even though the yuan had appreciated over 18% since July 2005, it was still estimated to be undervalued against the dollar by about 30%. This is a huge export subsidy.[72]

One expert in international trade, Presad Eswer, summarized the situation as follows:

> China's exports began to pick up soon thereafter [becoming a member of the World Trade Organization], which meant more foreign currency coming into the country. As the economy started registering strong growth and also began opening up its capital account, foreign capital flowed in increasingly, putting further upward pressure on the RMB. China did not want its export machine to lose momentum, so it started intervening in foreign exchange markets to prevent the value of the RMB from rising. With China's manufacturing sector registering strong productivity growth, the RMB should have appreciated markedly. The PBC's [People's Bank of China] intervention made the RMB increasingly undervalued – in other words, kept it at a level that was lower than it would have been had it been subjected to unfettered market forces. The increase in manufacturing sector productivity, in tandem with low domestic wages and an undervalued exchange rate, make Chinese exports very competitive in world markets. Consequently, the trade surplus grew by leaps and bounds, forcing the PBC

[71] *See* U.S.-China Econ. and Sec. Review Comm'n, 2008 Report to Congress 27 (2008).
[72] *Id.*

> to intervene even more aggressively, buying up[73] dollars, euros, yen, and other currencies that were flooding into China as payments for its exports. This maneuver was intended to offset the rising demand for RMB in exchange for those currencies that would otherwise have driven up the price of the RMB (i.e., the exchange rate).

As can be seen from the chart below, the value of the yuan from 1985 until November 1993 decreased in a fairly regular pattern from about 3.2 yuan to the dollar at the end of 1985 to about 5.8 yuan to the dollar in November 1993. Then, in November 1993, it decreased dramatically from about 5.8 yuan to the dollar to about 8.7 yuan to the dollar. In May 1995, it rose to about 8.3 yuan to the dollar and remained constant at that level until July 2005. From 2005 to 2014, the yuan slowly and gradually appreciated to approximately 6 yuan to the dollar and then decreased to about 7 yuan to the dollar at year-end 2016.[74]

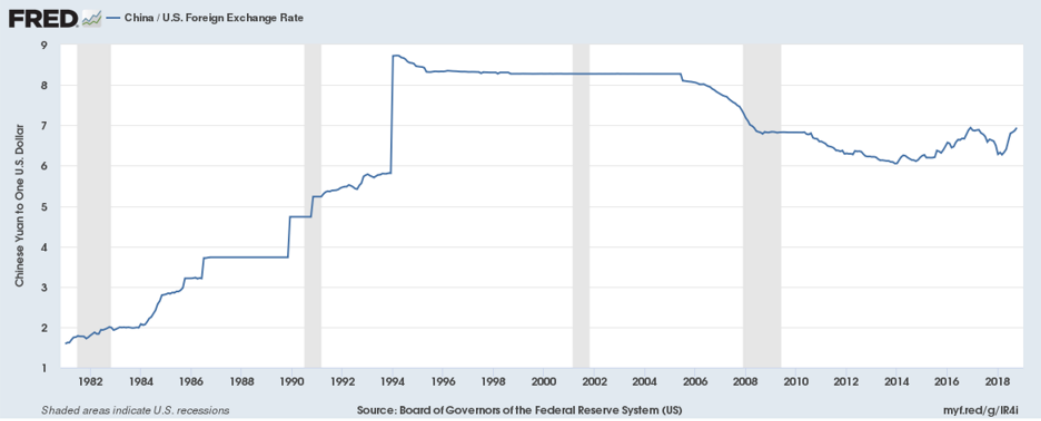

Chart 10: *(Source: see footnote 74)*

During this period of time U.S. trade deficit with China increased to over $33 billion in 1995, to over $200 billion in 2005, and to over $375 billion in 2017. As a result, it has been argued that the yuan has been overvalued by as much as 40 percent.[75]

A study by the Congressional Research Service summarized the issue of China's manipulation of the yuan as follows:

> China's policy of intervention to limit the appreciation of its currency, the renminbi (RMB) against the dollar and other currencies has become a major

[73] Eswar S. Presad, Gaining Currency: The Rise of the Renminbi 77 (2017) (Prof. Presad Eswer, is the Tolani Senior Prof. of Trade Policy at Cornell University and a fellow at the Brookings Institution he was formerly the head of the International Monetary Fund's China division).

[74] *Dollar Yuan Exchange Rate,* MacroTrends (https://www.macrotrends.net/2575/us-dollar-yuan-exchange-rate-historical-chart).

[75] Gordon Chang, *G-20 in Seoul: Global Currency War Is Inevitable*, The Daily Beast, (Nov. 10, 2010), https://www.thedailybeast.com/g-20-in-seoul-global-currency-war-is-inevitable.

> source of tension with many of its trading partners, especially the United States. Some analysts contend that China deliberately "manipulates" its currency in order to gain unfair trade advantages over his trading partners. They further argue that China's undervalued currency as been a major factor in the large annual U.S. trade deficits with China and has contributed to widespread job losses in the United States, especially in manufacturing. Pres. Obama stated in February 2010 that China's undervalued currency puts U.S. firms at a "huge competitive disadvantage," and he pledged to make addressing China's currency policy a top priority. At a news conference in November 2011, Pres. Obama stated that China needed to "go ahead and move towards a market-based system for their currency" and that the United States and other countries felt that "enough is enough."[76]

However, President Obama's bark was worse than his bite and little was done, probably, in part, due to the worldwide economic turmoil at that time and, in part, due to the leverage China enjoyed due to its huge buildup of dollar reserves as a result of the U.S. growing trade deficit with China. This, in turn, has led to huge investments in U.S. Treasury bonds, with the result that China now holds more than $1 trillion of U.S. debt. Consequently, there was a fear that China would begin selling its U.S. treasury investments. If China were to sell, rather than buy, US debt, this could raise interest rates and negatively impact the American economy.

2.5.2. RECOGNITION OF THE RELATION OF TRADE DEFICITS TO NATIONAL WEALTH.

Ricardo's theory of comparative advantage contemplated that relative currency values would move in the direction that would smooth out imbalances in trade over time. One author acknowledged that Ricardo's theory recognizes that the value of a country's imports could exceed the value of such country's exports, and thus result in a decrease in national wealth:

> To return to the Ricardian example of the exchange of wine and cloth between England and Portugal, what if England's wine imports yield Portugal £100 a year, yet the English cloth it requires cost £200? In this example, to maximize the gains from trade, Portugal must draw down its national reserves of wealth (e.g. gold) in order to obtain the additional £100 it needs to purchase English

[76] Wayne M. Morrison & Marc Labonte, China's Currency Policy: An Analysis Of The Economic Issues 1 (2013).

> cloth. It thus seems that the mercantilist objection that liberal trade could reduce accumulated national wealth has not really been met by the theory of comparative advantage.[77]

The author then credits Hume with identifying the possibility that a rebalancing of exchange rates could reduce this problem:

> The philosopher David Hume is thought to be the first to have developed a theory of the balance of payments that could meet this objection. In essence, the theory suggests that since the demand for a country's currency depends on demand for its exports, where the latter rises, so will the former. Where a country has a trade surplus, the extra demand for its exports would increase the value of its currency and therefore make its exports more expensive and its imports cheaper. This, in turn, will reduce the surplus, as demand for exports goes down in response to their relatively higher cost, whereas demand for imports goes up owing to their relatively lower cost. In theory, an equilibrium will eventually be reached where trade and payments are balanced at a given exchange rate.[78]

As discussed earlier in this article, I submit that Ricardo himself did recognize that the impact of unbalanced trade would result in a flow of wealth from the importing country to the exporting country.[79] Ricardo's analysis was predicated upon the existence of something akin to what we might consider the "gold standard."

One authority characterizes this as the "market equilibrium" view of exchange rates and asserts that a version of this was adopted in connection with the post-Second World War Bretton Woods agreement:

> This "market equilibrium" view of exchange rates and the balance of payments is fundamental to understanding the interface between the legal order of international trade and the international monetary system. The post-Second World War Bretton Woods arrangements contemplated a system of fixed exchange rates tied to the gold standard. Under this system, a country would in theory be required to hold sufficient reserves of gold to back the quantity of its currency in circulation. Where a temporary imbalance of payments occurred (i.e. where a country could not meet payments for imports with its receipts of foreign currency from export sales without selling gold for foreign currency), this would be financed by a

[77] Trebilcock Et. Al., *supra* note 10 at 227.
[78] *Id.*
[79] Ricardo, *supra* note 18-22.

> country borrowing from the International Monetary Fund. In the case of a structural or persistent imbalance, a country would devalue its currency under the supervision of the IMF, which might recommend domestic policy adjustments to ensure that further devaluations are not required in order to maintain the balance of payments. In the case of a country running a persistent trade surplus, foreign demand for its currency, i.e. by purchasers of its exports, would eventually exceed the amount of its currency that could be backed by gold reserves, thereby calling for a reevaluation of the exchange rate and/or domestic policy changes to dampen exports/or boost imports.[80]

The United States has certainly run a "persistent imbalance" in its trade with China and, were the above system in effect, the United States would have needed to devalue its currency vis-a-vis China, i.e., the value of the yuan would increase vis-a-vis the U.S. dollar.

However, the above system did not remain in place very long, in part due to the fact that, while the U.S. enjoyed a substantial trade surplus immediately following The Second World War, the U.S. surplus trade declined after the economies of Europe and Japan began to recover. However, the Johnson and Nixon administrations declined to revalue the dollar and, in 1971, the U.S. unilaterally refused to back the dollar with gold any longer and proposed a new system of floating exchange rates.[81]

2.5.3. THE CURRENT SYSTEM FOR VALUING CURRENCY.

Under the current system of free capital flows, the value of the currency is affected, not just by government intervention, but also by the activity of speculators who make their own assessment as to the appropriate respective values of the Chinese yuan and American dollar.[82] Balance of trade is not the sole factor upon which a currency speculator would focus. Relative interest rates and relative inflation as well as an overall view of the stability of the economy will also be taken into consideration. Consider a recent analysis expressing concern about whether the yuan will weaken to more than seven yuan to the dollar:

> While China hasn't raised interest rates, the Federal Reserve in Washington has. That makes it attractive for many people to sell their renminbi and buy dollars. Would you rather have a one-year renminbi certificate of deposit

[80] TREBILCOCK ET AL., *supra* note 10, at 227-228.
[81] *Id.* at 228.
[82] *Id.* at 230. See also Mico Loretan, *Indexes of the Foreign Exchange Value of the Dollar*, FED. RES. BULL. (2005).

> that pays 1.5 percent interest now, or a one-year dollar C. D. that pays out 2.6 percent or more? [83]

Today, there is no agreed international standard against which a currency can be viewed as either over or undervalued.[84] As one authority recounts: "Economists have attempted various estimates of a 'correct' exchange rate between the Renminbi and the U.S. Dollar, but these estimates vary considerably depending on the methodology used."[85]

One of the organizations that sought to assess whether a country is manipulating its exchange rate is the Economic Policy Institute. It has suggested a three-fold test for determining whether a country is manipulating the value of its currency for competitive advantage:

> First, does it have a high and rising bilateral trade surplus with the United States? Second, is its *global* current account surplus (the broadest measure of its trade and income flows) high and rising? Third, does it possess a high and rising accumulation of international reserves?[86]

It then analyzed nine situations in which currency manipulation has been found:[87]

		Trade surplus w/U.S. annual rate (US$ billions)	GDP	Trade surplus w/U.S. annual rate (% of GDP)	Global Current Account most recent year (US$ billions)	Global Current Account most recent year (% GDP)	Accumulation of reserves 12-month change (US$ Billions)	Accumulation of reserves Total reserves (Months of imports)
Taiwan	Oct-88	17.4	97.8	17.8%	18.1	18.5%	31	28.0
	Apr-89	13.9	122.9	11.3%	10.2	8.3%	-	-
	May-92	9.8	179.1	5.5%	12.0	6.7%	14	17.0
	Dec-92	10.5	179.1	5.9%	12.0	6.7%	13	18.0
South Korea	Oct-88	9.4	120.5	7.8%	**10.0**	8.3%	7	-
	Apr-89	9.0	157.1	5.7%	14.3	9.1%	9	**3.0**
	Oct-89	**8.1**	169.0	4.8%	14.2	8.4%	9	-
China	May-92	12.7	369.7	3.4%	12.2	**3.3%**	14	10.0
	Dec-92	16.7	409.1	4.1%	13.5	3.3%	**6**	8.0
Current position of China								
China		203.8	2,259.2	9.0%	160.8	7.1%	207	12.9

Bold indicates lowest level with finding of manipulation.

Historical data source: U.S. Treasury Report to the Congress on International Economic and Exchange Rate Policy.
Current data source: U.S. International Trade Commission and the International Financial Statistics Database of the International Monetary Fund.

Chart 11: Currency manipulation found nine times in the past, *(source: see footnote 27)*

[83] Keith Bradsher, *The Number 7 Could Make China's Currency a Trade-War Weapon*, N.Y. TIMES, Oct. 31, 2018, https://www.nytimes.com/2018/10/30/business/china-renminbi-currency-trade-war.html.
[84] *See* TREBILCOCK ET. AL., *supra* note 10, at 231.
[85] *Id.* at 234.
[86] Robert E. Scott & Josh Bivens, *China Manipulates Its Currency: A Response Is Needed*, ECON. POL. INSTIT. (Sept. 25, 2006), https://www.epi.org/publication/pm116/.
[87] *Id.*

In concluding that, in 2006, China was manipulating the value of the yuan to assist in maintaining its trade surplus with the United States, the Institute set forth the following supporting data:

> The bilateral U.S.-China surplus (as measured by the U.S. government) was $203 billion for 2005. This bilateral surplus has risen by $119 billion over the past five years and represents over 9% of China's total GDP. In seven of the nine cases where damaging currency manipulation was found, the U.S. bilateral trade deficit was lower than 9%, and in May 1992—the first time China was found guilty of currency manipulation—its surplus with the United States was only 3.4% of China's GDP.
>
> China's *global* current account surplus is now over 7% of its GDP, up 5 percentage points in five years. China's reported current account surplus exceeds levels reached in four of the nine previous cases. Furthermore, there is evidence that demonstrates that China's own trade data may substantially under-estimate its global trade and current account surpluses.3 Using data on Chinese imports and exports from its top 40 trading partners (covering 88-95% of China's total trade), the China Currency Coalition estimated that China's total trade surplus in 2003 was $203 billion, 341% more than China's officially reported trade surplus of only $46 billion.
>
> China's international reserves increased by $207 billion in 2005, ending the year at $821 billion. The best estimates are that 70% of these are dollar reserves and that this share has remained stable over time. These international reserves constitute 36% of China's total GDP and are sufficient to finance over a year of Chinese imports. China's purchase of reserves in the form of dollar-denominated assets has propped up the value of the dollar, keeping the Chinese currency from gaining value. In short, these reserve purchases act as a *de facto* subsidy for Chinese exports into the U.S. market.[88]

However, neither the Bush administration nor the succeeding Obama administration moved aggressively to challenge the Chinese manipulation. The situation is reminiscent of that in banking: if you borrow $1 million, the bank will foreclose, but, if you borrow $1 billion, the bank will not seek foreclosure but rather attempt to work something out.[89]

So long as the economies of the Asian nations were small vis à vis the United States, we could take a tough stand. However, as the Chinese economy grew, we became

[88] *Id.*

[89] *See* Brendan Murphy, *Trump Obtains $20 Million Bridge Loan, Pays Bonds*, UPI (June 26, 1990), https://www.upi.com/Archives/1990/06/26/Trump-obtains-20-million-bridge-loan-pays-bonds/5513646372800/.

too dependent upon China's exports, and too concerned about China's leverage resulting from its accumulation of U.S. dollars, to take a hard stand.

3. CHINA'S "FREE TRADE" VIOLATIONS OF WTO PRINCIPLES TO ACQUIRE TECHNOLOGY AND KNOW-HOW TO SUPPLANT THE AMERICAN MANUFACTURING BASE

As can be seen thus far, circumstances have greatly changed since Ricardo posited his theory of comparative advantage. Capital is no longer loyal to the country of origin, and something akin to the gold standard, which would adjust currencies to even out imbalance in trade flows, no longer exists. Ricardo also did not contemplate that the government of one trading partner will sanction or even participate in industrial espionage.

3.1. THE CONSEQUENCES OF A NAÏVE APPROACH TO GLOBAL TRADE

At the low-end of the technological scale, consider T-shirts and wood furniture industries. When I went to China in 1992, you could purchase five cheap T-shirts for a dollar and a better-quality T-shirt for about one dollar. Comparable T-shirts in this country would cost about three dollars. China clearly had a competitive advantage. On the other hand, through technology and skilled workmanship, the United States could produce quality wooden furniture that China could not begin to meet.[90] Thus, we had a competitive advantage there. But China could produce cheap wooden furniture, which did not require the same degree of skilled workmanship or technological input, more efficiently than we could. Therefore, under a comparative advantage approach, if we could produce cheap wooden furniture more efficiently than we could produce T-shirts, then China should make the T-shirts and the United States should make the cheap wooden furniture. But soon China not only made T-shirts, but also cheap wooden furniture because capital, including some from United States sources, flowed into China to fund the Chinese furniture industry.

In the process of making cheap wooden furniture, China's workplace skills increased and undoubtedly found American manufacturers willing to sell woodworking equipment. Representatives of the Chinese wood furniture industry visited American

[90] *See* U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, 2004 REPORT TO CONGRESS 179 (2004).

factories and gleaned our know-how, bought the necessary technological equipment, and began to undercut our quality wooden furniture industry. The American wholesalers and retailers, to obtain the greater margins possible through buying Chinese quality wooden furniture, further funded the development of a quality wooden furniture industry in China by now buying quality wooden furniture from the Chinese, and America ended up producing neither T-shirts, nor cheap wooden furniture, nor quality wooden furniture.

According to the advocates of free trade, America would simply adjust by then producing more high technology goods. Even if this were possible, there is no assurance that such high technology goods would be produced in the same communities or by the same workers that were laid low by the loss of the American high-quality wooden furniture market. The loss of jobs, and attendant devastation of communities, in part, accounts for the attractiveness of President Trump's "Make America Great Again" spiel.

However, China has never been content to be a low-tech producer. In 2004, the United States-China Commission stated that the Chinese government "has a coordinated, sustainable vision for science and technology development." In 2017, the United States-China Commission reported:

> The Chinese government has laid out industrial plans where the government – not market forces – plays a central role in developing Chinese firms into the global leaders in cutting-edge, dual-use technologies. These industrial plans establish the government strategy for sector development at the national and local government levels, and set targets for localization, market creation, and productivity. To meet these objectives and cultivate local and national market leaders (the so-called "national champions"), central and local governments implement comprehensive industrial policies such as strong state funding, a protected domestic market, selective recruitment of foreign investment, imports and talent, and, in some cases, industrial espionage.[91]

China's "Made in China 2025" and "Internet Plus" initiatives target 10 key sectors for additional government support: (1) new energy vehicles, (2) next-generation of information technology, (3) biotechnology, (4) new materials, (5) aerospace, (6) ocean engineering and high-tech ships, (7) railway, (8) robotics, (9) power equipment, and (10) agricultural machinery.[92]

[91] U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, 2017 REPORT TO CONGRESS 509 (2017).
[92] *Id.* at 513.

3.2. CHINA'S WTO OBLIGATIONS

Admitting China to the World Trade Organization was a great experiment, founded on unbridled optimism. The focus in the United States was on opening up markets of over 1 billion Chinese customers; little thought was given to the productive capability of China and its impact on United States manufacturing and employment. As a report commissioned by the United States-China Commission stated:

> Because China is a huge country, with a very rapidly expanding economic base and an economy which continues to reflect significant state involvement in decisions of resource allocation, there was no certainty at the time of accession that China's economic system would mesh well with the World Trade Organization rules and other trading partners' generally market-oriented economies.

Indeed, in the history of the GATT, and now World Trade Organization, never has a country of such trading importance been admitted with a system that was still so far from conformance with GATT/WTO norms.[93]

The rules of the World Trade Organization, but often in general terms, preclude domination of the economy by state owned enterprises, subsidies to local industry, forced technology transfers, and piracy of technology and intellectual property. By entering the WTO, and agreeing to the Protocol on the Accession of the People's Republic of China,[94] China agreed to abide by these rules. But it is one thing to agree to rules and another to observe and enforce them. From the outset, China has avoided compliance in order to facilitate the development of its export driven economy.

The expectation of the WTO is that its members will have a market-oriented economy, not a command-and-control economy. Article XVII of GATT provides:

> Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall in its purchases

[93] Terence P. Stewart, China's Compliance with WTO Obligations: A Review of China's First Two Years of Membership 1 (2004) https://www.uscc.gov/sites/default/files/Research/china%20compliance%20with%20wto%20obligations%20first%20two%20years.pdf (the report recounts how China has sought to undermine the utility of provisions added to its accession protocol to ensure timely compliance with its agreements and to permit other countries to limit imports from China, as well as how China lobbied the US to delay addressing import surges from China, thus adversely impacting the US textile industry. *See* executive summary at 4, 6-7. In a market economy, the delay of a couple of years in responding to unfair competition can devastate a company or an industry; contrariwise, and a command-and-control economy, the government can carry a company or industry as long as it believes it is in the best interest of the country).

[94] World Trade Organization, Protocol on the Accession of the People's Republic of China, WTO Doc. WT/L/432 (2001) [hereinafter *Accession Protocol*].

> or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this agreement for governmental measures affecting imports or exports by private traders.

With respect to subsidies, Article XVI of the GATT recognizes that governmental subsidies are inconsistent with the policy of GATT.[95] More particularly, the Agreement on Subsidies and Countervailing Measures treats "subsidies [that favor] the use of domestic over imported goods" as prohibited subsidies,[96] while such matters as covering operating losses, forgiveness of debt, impeding the imports of a product, displacing exports, significant price undercutting, or other actions that result in an increase in the world market share that constitutes a consistent trend are treated as matters of serious prejudice.[97] A member is under an obligation not to cause serious prejudice to the interests of another member.[98]

The Accession Protocol provides that state trading enterprises will comply with the WTO agreement and that China "shall refrain from taking any measure to influence her direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with WTO provisions."[99] The Accession Protocol also provides that China shall ensure that the "distribution of import licenses and other means of approval for importation . . . or investment shall not be conditioned" on: "whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance for the conduct of research and development in China."[100]

In many respects, WTO and its rules are ineffectual. If a country games the system and evades the rules, in many circumstances the violations will not be challenged, and, even if challenged and the result is successful, China will have won and other countries and their manufacturing enterprises will have lost because of the time delays involved and the advantages that China obtains in the interim. As reported by the U.S. – China Commission:

> But there is only one sure way to judge whether a dispute is satisfactorily concluded, and that is the effect on sales of products or services to which the complained-of restriction applied. In the case of auto parts, where the U.S.

[95] *Additional Provisions on Export Subsidies* (July 4, 1986), GATT BISD, at 26 (1986).
[96] Agreement on Subsidies and Countervailing Measures, pt.2, § 3.1 (b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 229.
[97] *Id.* at pt. 3, § 6.
[98] *Id.* at pt. 3, § 5.
[99] *Accession Protocol*, *supra* note 94, § 6.
[100] *Accession Protocol*, *supra* note 94, § 7.

> won its case, it would be interesting to ask whether China's restrictions may have served their purpose, with the favorable WTO result coming too late to reverse the damage to U.S. commercial interests. The same is true of local content or technology transfer requirements or applied to investments. The requirements may be lifted after they have had the desired effect. Even then, the case may have resolved only part of the problems faced. The United States has had some 'wins' in the area of IP [intellectual property] enforcement, but the Chinese market is still saturated with pirated software and DVDs.[101]

3.3. CHINA'S FAILURE TO COMPLY WITH ITS WTO OBLIGATIONS

As stated above, Ricardo's notion of comparative advantage did not contemplate an export-oriented government that would eliminate other countries competitive advantage by theft and by conditioning technological transfer as a requirement to entering its markets, nor one that would subsidize exports at the expense of its own citizens. Peter Navarro, President Trump's Director of Trade and Industrial Policy, summarized China's policies, somewhat pejoratively, as follows:

> 1. An elaborate web of illegal export subsidies.
>
> 2. A cleverly manipulated and grossly undervalued currency.
>
> 3. The blatant counterfeiting, piracy, and outright theft of America's intellectual property treasures.
>
> 4. An incredibly short-sided willingness by the Chinese Communist Party to trade massive environmental damage for a few more pennies of production cost advantage.
>
> 5. Ultra-lax worker health and safety standards so far below international norms that they make brown lung, butchered limbs, and a dizzying array of cancers not just occupational hazards but virtual certainties.
>
> 6. Unlawful tariffs, quotas, and other export restrictions on key raw materials from A to Z – antimony to zinc – as a strategic ploy to gain greater control over the world's metallurgy and heavy industry.
>
> 7. Predatory pricing and "dumping" practices designed to push foreign rivals out of key resource markets and to then gouge consumers with monopoly pricing.

[101] U.S.-China Economic and Security Review Commission, 111th Cong., Report to Congress 20 (2010).

> 8. China's vaunted "Great Walls of Protectionism" – to keep all foreign competitors from setting up shop on Chinese soil.[102]

While Mr. Navarro sometimes uses hyperbolic language, the various objections he raised to the unfair trading practices by China have been supported down through the years by the U.S.-China Commission.

China's use of cheap labor, toiling in deplorable conditions, and its currency manipulations have previously been discussed. The following focuses upon the various subsidies that China has provided to its export sector and its forced transfer of technology and know-how and piracy of intellectual property.

The U.S. – China Commission, in 2009, summarized this issue as follows:

> To accelerate the growth of the information technology sector, the Chinese government has used direct and indirect subsidies, including low- or no-cost loans, tax concessions, grants of land and infrastructure, and government support for graduate education and for research and development. At the same time, the Chinese government has fostered the development of Chinese manufacturers through requirements that foreign suppliers establish joint ventures with Chinese partners, build manufacturing plants in China, transfer technology, and offset their imports of component parts through domestic purchases.[103]

In its 2009 report, the Commission also stated:

> China has long provided subsidized energy and water to many manufacturers, despite the fact that China must import large quantities of oil and gas and already has very limited supplies of water for agricultural purposes. Also, many manufacturers have been offered free or discounted land, particularly in the vast, government-run industrial parks. Today, China's subsidies still include free land and discounted electricity, but support for business is also growing more subtle and harder to detect. This support includes tax incentives for investment, funding for research and development, refunds of value added taxes (VAT) on exports, and the construction of strategically planned industrial parks in favored locations.[104]

[102] Peter Navarro, Greg Autry, Death by China 50 (2011).
[103] U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, 2009 REPORT TO CONGRESS 70 (2009).
[104] *Id.* at 50.

Subsidization of Chinese industry continues today and has actually accelerated as a result of the industrial policies that the Chinese government has been implementing. In 2017, the U.S.-China Commission reported:

> The Chinese government has laid out industrial plans where the government – not market forces – plays a central role in developing Chinese firms into the global leaders and cutting-edge, dual-use technologies. These industrial plans establish the government strategy for sector development at the national and local government levels, and set targets for localization, market creation, and productivity. To meet these objectives and cultivate local and national market leaders (the so-called "national champions"), central and local governments implement comprehensive industrial policies such as strong state funding, a protected domestic market, selective recruitment of foreign investment, imports and talent, and, in some cases, industrial espionage.[105]

With respect to forced technology transfer and industrial espionage, the Office of the U.S. Trade Representative conducted a recent investigation into whether China's practice of forcing technology transfer by U.S. companies was still ongoing:

> The evidence collected in this investigation from hearing witnesses, written submissions, public reports, journal articles, and other reliable sources indicates there are two key aspects of China's technology transfer regime for inbound foreign investment.
>
> First, the Chinese government uses foreign ownership restrictions, such as formal and informal JV requirements, and other foreign investment restrictions to require or pressure technology transfer from U.S. companies to Chinese entities. These requirements prohibit foreign investors from operating in certain industries unless they partner with a Chinese company, and in some cases, unless the Chinese partner is the controlling shareholder. Second, the Chinese government uses its administrative licensing and approvals processes to force technology transfer in exchange for the numerous administrative approvals needed to establish and operate a business in China.
>
> These two aspects of China's technology transfer regime are furthered by the non-transparent and discretionary nature of China's foreign investment approvals system. Prior to 2001, China often explicitly mandated technology transfer, requiring the transfer of technology as a quid pro quo for market access. In 2001, China joined the WTO and committed not to condition the

[105] U.S.-China Econ. and Sec.Review Comm'n, *supra* note 91.

> approval of investment or importation on technology transfer. Since then, according to numerous sources, China's technology transfer policies and practices have become more implicit, often carried out through oral instructions and "behind closed doors".[106]

3.4. PIRACY AND INDUSTRIAL ESPIONAGE

In addition to requiring American and other companies to transfer technology and know-how, directly or indirectly, to Chinese companies, the Chinese government, its companies, and individuals sympathetic to China have engaged in industrial espionage and theft of intellectual property. Industrial espionage, as practiced by China, was beyond imagination at the time Ricardo developed his theory.

This has been a long-standing problem with China. The International Intellectual Property Alliance reported that, in 2002, intellectual property theft translated to a $1.8 billion loss to the pirated industries and the Motion Picture Association of America reported that 95% of video discs in China were pirated.[107] The U.S.-China Commission estimated that unauthorized copying of business software applications generated a loss of over $2.7 billion.[108]

In 2011, the Office of the National Counterintelligence Executive reported on the increased pace of theft of U.S. technologies and trade secrets:

> The pace of foreign economic collection and industrial espionage activities against major U.S. corporations and U.S. government agencies is accelerating. Foreign intelligence services, corporations, and private individuals increase their efforts in 2009-2011 to steal proprietary technologies, which cost millions of dollars to develop and represented tens or hundreds of millions of dollars in potential profits. The computer networks of a broad array of U.S. government agencies, private companies, universities, and other institutions – all holding large volumes of sensitive economic information – were targeted by cyber espionage; much of this activity appears to have originated in China.[109]

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[106] Off. of the U.S. Trade Representative, Findings of the Investigation into China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974, at 19 (2018).

[107] *See e.g.,* U.S.-China Econ. and Sec. Review Comm'n, 2004 Report to Congress 184 (2004).

[108] *Id.* at 184-185.

[109] Off. of the Nat'l. Counterintelligence Executive, Foreign Spies Stealing U.S. Economic Secrets in Cyberspace 9 (2011).

More recently, the Department of Justice indicted a Chinese company, Huawei Device Co. Ltd., and its U.S. subsidiary with the theft of trade secrets, wire fraud and obstruction of justice.[110] The facts underlying the indictment were summarized by the Department of Justice release:[111]

> According to the indictment, in 2012 Huawei began a concerted effort to steal information on a T-Mobile phone-testing robot dubbed "Tappy". In an effort to build their own robot to test phones before they were shipped to T-Mobile and other wireless carriers, Huawei engineers violated confidentiality and non-disclosure agreements with T-Mobile by secretly taking photos of "Tappy," taking measurements of parts of the robot, and in one instance, stealing a piece of the robot so that the Huawei engineers in China could try to replicate it. After T-Mobile discovered and interrupted these criminal activities, and then threatened to sue, Huawei produced a report falsely claiming that the theft was the work of rogue actors within the company and not a concerted effort by Huawei corporate entities in the United States and China. As emails obtained in the course of the investigation reveal, the conspiracy to steal secrets from T-Mobile was a company-wide effort involving many engineers and employees within the two charged companies.

The indictment also charged that the Chinese company offered bonuses to employees, based on the value of the information that they stole from other companies around the world. This wrongful conduct clearly is an ongoing problem. According to the U.S. Trade Representative:

> For over a decade, the Chinese government has conducted and supported cyber intrusions into U.S. commercial networks targeting confidential business information held by U.S. firms. Through these cyber intrusions, China's government has gained unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications. These acts, policies, or practices by the Chinese government are unreasonable or discriminatory and burden or restrict U.S. commerce. [112]

[110] *See* United States v. Huawei Device Co., No. CR19-010 (W.D. Wash. 2019).

[111] *See also* Press Release, Department of Justice, Chinese Telecommunications Device Manufacturer And Its U.S. Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction of Justice (Jan. 28, 2019), https://www.justice.gov/opa/pr/chinese-telecommunications-device-manufacturer-and-its-us-affiliate-indicted-theft-trade.

[112] *See Trade Representative Findings, supra* note 106, at 153.

The foregoing is a consistent pattern, but not a pattern that is consistent with the principles of free trade. Rather, it is consistent with industrial, and in some instances national security, war.

3.5. CHINESE FINANCING OF AMERICAN COMPANIES AS A TOOL TO ACQUIRE TECHNOLOGY

Over the last few years, China has embarked upon another strategy to obtain technology and know-how – through acquisition of American and other companies and through providing venture capital to start-up companies in promising industries. This has been possible through China's huge aggregation of foreign currency reserves and has enabled the Chinese government to control foreign investments through its control of such reserves. The Office of the United States Trade Representative reported:

> The Chinese government continues to direct and/or unfairly facilitate the systemic investment in, and/or acquisition of, US companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer and industries deemed important by Chinese government industrial plans.[113]

The Chinese government has instituted an outbound investment approval system which applies to all enterprises, not just SOEs. This gives the state a decisive role in determining which industry sectors should be targeted or closed for overseas investment. "As a result, any enterprise seeking to receive government support for such acquisitions is incentivized to invest in sectors favored by the government, including those classified as" encouraged "in outbound investment measures and those identified in major S&T plans such as the *Made in China 2025 Notice*".[114]

"Control over the use of foreign exchange is a crucial tool for the government to influence outbound investment. China operates a closed capital account that restricts currency convertibility, as well as monetary inflows and outflows."[115] The Section 301

[113] Off. of the U.S. Trade Representative, Update concerning China's Acts Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation 31 (2018).

[114] *Trade Representative Findings*, *supra* note 106, at 87 ("Encouraged-type overseas investment projects" include "(1) investments that enable the acquisition of resources and raw materials that are in short supply domestically and which are "in urgent demand for national economic and social development;" (2) investments that support the export of products, equipment, technology, and labor for which China has a comparative advantage; and, (3) investments that "are able to clearly enhance China's technology research and development capacity, including an ability to use international leading technology and advanced management experience and professional talent." Thus, the acquisition and subsequent use of technology is a central feature of "encouraged" outbound investments." *Id.* at 77).

[115] *Id.* at 75.

Report by the Office of the United States Trade Representative , which was updated above, noted that investments that are "encouraged" receive several forms of government support, including:

> [S]ubsidies for fees incurred, and bank loans at government-subsidized interest rates; policy bank loan support; priority administrative approval; priority support for the use of foreign exchange; export tax rebates on exports of equipment and other materials relating to the overseas investment project; priority access to services relating to overseas financing, investment consultation, risk evaluation, risk control, and investment insurance; and coordinated support from several government departments with respect to information exchange, diplomatic protections, the travel of personnel abroad, and registration of import and export rights.[116]

Annual Chinese foreign direct investment in the United States prior to 2011 was less than $5 billion. [117] By 2016, it had risen to over $45 billion. In addition, Chinese investors have increased their participation in venture capital deals. In 2011, such participation was less than $1 billion. It rose to over $6 billion in 2015 and about $9 billion in 2018.[118]

When the Senate considered a bill that would make it more difficult for foreign firms to make investments in U.S. technology companies on the basis that providing access to developing U.S. technology could produce a national security threat, venture capital advocates asserted that a minority interest in a high-tech firm cannot provide access to technology. [119] This illustrates that individual firms or individual industries cannot be expected to forgo their self-interests in light of what may or may not be a national security problem.

A commissioner at the U. S.-China Economic and Security Review Commission differed with the venture capital advocates, stating that "insights into the underlying technology can be a condition of participation in venture capital deals [and] participating Chinese firms might well ask to confirm patents, which provides access to underlying technology."[120] This summer, the Foreign Investment Risk Review Modernization Act of 2018 was enacted which would strengthen the Committee on Foreign Investment in the United States.[121]

[116] *Id.* at 78.
[117] *See China Hearings, supra* note 23.
[118] *See Trade Representative Findings*, *supra* note 106, at 41.
[119] *See also* Sarah McBride & David McLaughlin, *Venture Capitalists Fret over U.S. Bill Targeting Chinese Investors*, Bloomberg News (May 16, 2018), https://www.bloomberg.com/news/articles/2018-05-16/venture-capitalists-fret-over-u-s-bill-targeting-chinese-investors, Venture Capitalists Fret Over U.S. Bill Targeting Chinese Investors.
[120] *Id.*
[121] *See generally* Press Release, U.S. Department of the Treasury, Treasury Secretary Mnuchin Statement on Sign-

The Trump administration has announced that it will utilize the expanded review system to more aggressively police foreign investment so as to prevent China from gaining access to sensitive American technology. "The investment restrictions will allow the United States to block a far wider array of foreign transactions that are deemed a threat to national security, including minority stakes and joint ventures in technology, telecommunications and other cutting-edge companies."[122]

4. THE LACK OF LOYALTY BY AMERICAN BUSINESS TO AMERICAN TAXPAYERS AND WORKERS

4.1. THE ILLUSION THAT GLOBAL TRADE PREDICATED UPON LABOR ARBITRAGE WOULD BENEFIT AMERICAN WORKERS

Consider now the high technology goods to which our industrial base was supposed to turn, which required innovation and intellectual property, and which would provide the jobs for our supposedly retrained workers. The high-tech advantage, which American workers and manufacturers at one time enjoyed, unfortunately has been traded away to other countries. American businesses, which now consider themselves global enterprises, not American enterprises, have traded away such advantage in exchange for market access in other countries which, in the short run, increases the profitability of American businesses at the expense of American jobs, but which in the long run may ultimately result in loss of business by the companies that gave away their know-how and technology.

The most naïve people in the world are highly educated Republicans and conservative Democrats, such as former President Bill Clinton who believes that free trade is the norm in our global economy and that it is a win-win proposition for all concerned. According to the free-traders: "Expanding global trade would advance the well-being of all nations, it was said, because free markets rewarded price efficiency. Therefore, over time, the sales would gravitate to nations that each produced what they did best and at the lowest cost, whether it was textiles or automobiles."[123]

ing of FIRRMA to Strengthen CFIUS (Aug. 13, 2018), https://home.treasury.gov/news/press-releases/sm457.

[122] Alan Rappeport, *In a New Slap at China, U.S. Expands Power to Block Foreign Investments*, N.Y. Times, Oct. 10, 2018. https://www.nytimes.com/2018/10/10/business/us-china-investment-cfius.html.

[123] *See* Greider, *supra* note 42 at 126.

The same people believe that the notion that the United States should have an industrial policy is anathema to our capitalistic system.

With regard to whether unfettered "free" trade is a win-win proposition for all concerned, try telling the highly skilled craftsmen in the wood furniture industry, described earlier in this article. Or try telling that to a highly skilled machinist in the aerospace industry as described below.

Once we adopt the notion that the purpose of a corporation is to maximize shareholder value, because shareholder value is a function of earnings, which in turn are a function of sales, the primary focus of a multinational corporation is market access so as to generate sales, irrespective of where the product is actually produced. If a product needs to be produced in another country so as to generate sales, then so be it. This then creates a benefit for the shareholder (and for management whose compensation is a function of profitability), but certainly not for the workers, if the jobs they formerly performed are outsourced to another country. And, if the price of access to a market in another country is the transfer, not just of jobs but of technology whose development was funded by the American taxpayer, so be it.

This certainly works in the short run – at least from the standpoint of shareholders and management. But what of the long run? If we outsource the jobs to another country and train their workers, and then transfer our technology and manufacturing know-how, what is to stop governments, businesses, and investors in such other country from setting up a competing business and appropriating the market for themselves?

President Clinton advocated for most favored nation status for China because he was enthralled with the possibility of opening up a market of 1.2 billion potential customers. But, putting to one side barriers to entry imposed by the host government, you can only sell to people who can afford to buy. If the policy of the host government is to create an industrial base for export and not necessarily to raise the standard of living of its citizens, instead of opening up a huge market into which American companies can sell, we have created a massive production machine which can sell into our affluent economy.

Now, if other countries can extract concessions as the price of accessing their market, could not the United States also extract concessions as a condition of other countries accessing our market? To do so, would be to have a so-called industrial policy. But this would violate our notions of a free enterprise, capitalistic economy which, supposedly, works best for everyone.

4.2. CASE STUDY – THE AIRCRAFT INDUSTRY

The aircraft industry is a good case study in this regard since the technology and manufacturing know-how were clearly paid for by the American taxpayer in connection with funding the military budget from the start of World War II until today. It also exemplifies the reality that business does not unnecessarily go to the highly efficient, low-cost manufacturer.

Other countries desire to get into the high-tech business and to short-circuit the time and expense involved in developing the technology themselves. Consequently, they use the availability of their markets to extract technology and know-how from American companies that seek to enter their markets.

In the mid-1990s, Boeing was the world's preeminent manufacturer of large-body commercial aircraft:

> Boeing was already, without dispute, the best. It was the world's most efficient low-cost producer, even with the $20-an-hour wages for machinists. Boeing products and especially its design capabilities were without peer. If the economists' logic of comparative advantage ruled the world, then Boeing could be making all of the world's jet airliners.[124]

Boeing's massive assembly plant in Everett, Washington, had achieved the "act of bringing everything together perfectly."[125]

However, Boeing had overcapacity and sought to increase its export business. To get sales, it outsourced various sections of its aircraft:

> The 777s entire fuselage traveled in quarter sections from Japan, shipped by Mitsubishi from Nagoya to Puget Sound, where the pieces were barged from Tacoma to the Port of Everett, then hauled by railcars of the steep grade to the factory. Wingtip assembly came from Korea. Rudders from Australia. Dorsal fins from Brazil. Main landing gears from Canada and France. Flight computers from the United Kingdom. And so on.[126]

In connection with a package of $5 billion in future sales from China, the company announced that "complete tail sections for Boeing's most popular model, the mid-range 737, usually produced at Boeing's Wichita, Kansas, plant, would soon also be fashioned in China."[127]

[124] *Id.* at 127.
[125] *Id.* at 129.
[126] *Id.*
[127] *Id.* at 124.

The following chart, with respect to the Boeing 787, illustrates the scope of outsourcing engaged in by Boeing:[128]

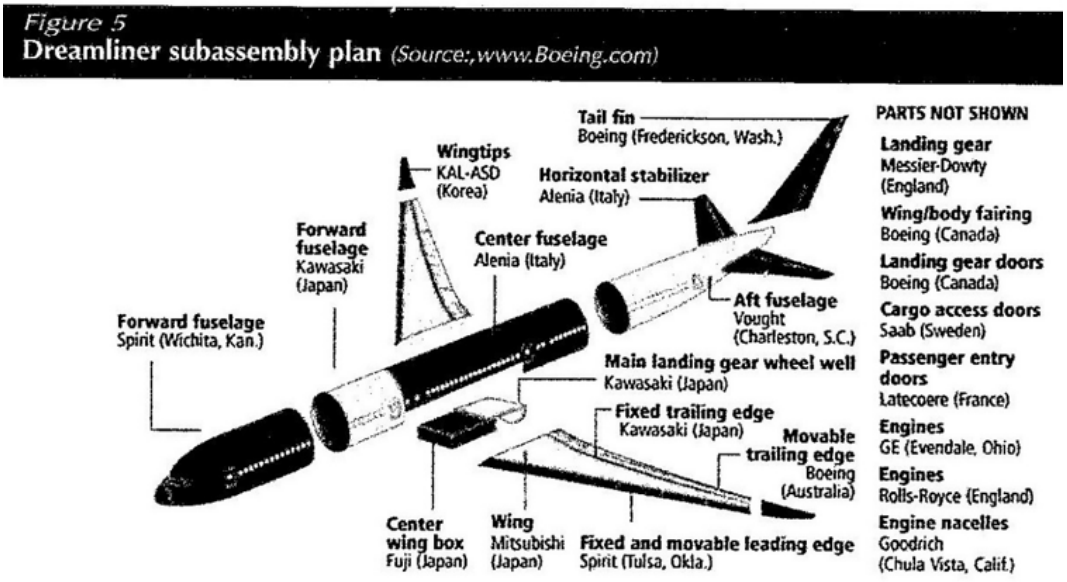

Chart 12

The reason for the foregoing outsourcing was not based on manufacturing efficiency, but rather upon a combination of labor arbitrage and the desire to increase sales. One Boeing middle manager stated: "[Y]ou've got to maintain the tit-for-tat if you expect to keep selling airplanes."[129] According to Grieder, "[a]ssembly parts were disbursed to the foreign producers because the market demanded that, not because these things could be made better or cheaper somewhere else."[130] A senior vice president of Boeing stated:

> I am scratching their itch [other countries desires for outsourced work]. I have to create some jobs in those countries to get those markets. But what we're trying to do in the net equation is to protect the jobs here. I think I can show that happened with China or with Japan. But, overall it's a tougher problem as I look down the future. Will I have a lot of U.S. suppliers or will I have more international suppliers? I don't know the answer, but it is clear that the U.S. suppliers don't bring me any market.[131]

[128] *Id.*
[129] *Id.* at 129.
[130] *Id.*
[131] Randy Barber Robert E. Scott, Jobs on the Wing: Trading Away the Future of the U.S. Aerospace Industry (Economic Policy Institute 1995).

The reason for the foregoing outsourcing was not based on manufacturing efficiency or comparative advantage, but rather upon a combination of labor arbitrage and the desire to increase sales.

The problems some of which came to light in connection with the electrical problems Boeing experienced with its 787 Dreamliner[132]with outsourcing as a business model were raised in an internal Boeing symposium in 2001.[133]

5. THE NATIONAL SECURITY ASPECT OF CEDING

5.1. MANUFACTURING AND SPACE-AGE ASPECTS

Early on, after the admission of China to the World Trade Organization, concern was raised over the export of dual-use technology [technology that has both an industrial and a military use] to China. In 2002, the US-China Commission conducted a hearing on exporting dual-use technology to China. Dr. Paul Godwin, a retired professor at the National War College, testified about China's military capability and its interest in acquiring dual-use technology. According to Dr. Godwin: "[T]he major change [in China's military thinking from the 1950s until 2002 was] Beijing's recognition of the close interdependence now between civil and military technologies; further, that the design and production of advanced weaponry and supporting systems is dependent on components and processes that are essentially dual-use."[134]

Dr. Godwin also testified that, "what China wants to do with its defense, R and D, and production, it wants to have as close as possible an autarkic [self-sufficient] military-industrial capability."[135] He continued by noting "the PLA's [People's Liberation Army] recognition that the traditional three-dimensional battlefield has been transformed into a battle space where cyberspace and space join the land, sea, and air realms of military operations."[136]

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[132] *See* Dominic Gates, *Boeing 787's Problems Blamed on Outsourcing, Lack of Oversight*, Seattle Times, Feb. 2, 2013. https://www.seattletimes.com/business/boeing-787rsquos-problems-blamed-on-outsourcing-lack-of-oversight.

[133] *See* L. J. Hart-Smith, *Out-Sourced Profits – The Cornerstone of Successful Subcontracting* (Boeing, Working Paper No. MDC 00K0096, 2001). http://seattletimes.nwsource.com/ABPub/2011/02/04/2014130646.pdf#_ga=2.112611264.532496093.1546385394-80545396.1546385394.

[134] U.S.-China Commission, Hearing on Export Controls in China 1079 (Jan. 17, 2002) , https://www.uscc.gov/sites/default/files/transcripts/1.17.02HT.pdf.

[135] *Id.*

[136] *Id.*

The recent Worldwide Threat Assessment of the U. S. intelligence community reported:

> Persistent trade imbalances, trade barriers, and a lack of market-friendly policies in some countries [read China] probably will continue to challenge U. S. economic security. Some countries almost certainly will continue to acquire U. S. intellectual property and proprietary information illicitly to advance their own economic and national security objectives.[137]

The report added that "China, for example, has acquired proprietary technology and early-stage ideas through cyber-enabled means. At the same time, some actors use largely legitimate, legal transfers and relationships to gain access to research fields, experts, and key enabling industrial processes that could, over time, erode America's long-term competitive advantages."[138] Thus, it is not just industrial espionage that poses a threat to our national security, but also transfers of technology and know-how, voluntary or involuntary, by American companies seeking to get market share.

With respect to the military threat, the Assessment further stated:

> Foreign countries – particularly China and Russia – will continue to expand their space-based reconnaissance, communications, and navigation systems in terms of the numbers of satellites, the breath of their capability, and the applications for use.
>
> Both Russia and China continue to pursue anti-satellite (ASAT) weapons as a means to reduce U. S. and allied military effectiveness. Russia and China aim to have nondestructive and destructive counter space weapons available for use during a potential future conflict.
>
> China's PLAs military units have begun initial operational training with counterspace capabilities that it has been developing, such as ground-launched ASAT missiles. Russia probably has a similar class of systems in development. Both countries are also advancing directed-energy weapons technologies for the purpose of fielding ASAT weapons that could blind or damage sensitive space-based optical sensors, such as those used for remote sensing or missile defense. [139]

As can be seen from the above, as a result of the capital and know-how that American businesses have provided to China, and China's industrial espionage, China, as predicted

[137] Statement for the Record, Worldwide Threat Assessment Of the U. S. Intelligence Community, February 13, 2018, at 12, *available at* https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA—Unclassified-SSCI.pdf.
[138] *Id.* at 12-13.
[139] *Id.* at 13.

by Dr. Godwin, in addition to developing its conventional weapons and military capability, has also developed space-age military alternatives:

> China is pursuing a range of advanced weapons with disruptive military potential. Six types that China's leaders have prioritized are maneuverable reentry vehicles, hypersonic weapons, directed energy weapons, electromagnetic railguns, counterspace weapons, and unmanned and artificial intelligence-equipped weapons.[140]

While the United States appears to have an edge at present in the development of these weapons, "the United States cannot assume it will have an enduring advantage in developing next frontier military technology."[141] According to experts in this area, "a breakthrough that outpaces current predictions could magnify the military challenge and "change [U.S.] strategic calculations in the Asia Pacific and beyond."[142]

China has long anticipated the possibility of a military conflict with United States over Taiwan.[143] As the U. S.-China Commission stated in 2017, "China tightened its effective control over the South China Sea by continuing to militarize the artificial islands it occupies there and pressuring other claimants such as Vietnam and the Philippines to accept its dominance".[144] China has rejected the decision by the Permanent Court of Arbitration in the Hague in favor of the Philippines and the "free seas" tradition. The president of Taiwan has recently warned that the military threat

[140] *See, e.g.,*U.S.-China Economic and Security Review Commission, 115th Cong., Report to Congress 553 (2017) (a comparison between U.S. activities and those of China is set forth at 574-576 of the report. A maneuverable reentry vehicle is a ballistic missile reentry vehicle that is capable of maneuvering after reentering Earth's atmosphere; a hypersonic weapon is one That Can exceed five times the speed of sound (3836 mph); directed energy weapons are those that use focused energy to destroy a target; electromagnetic railguns use electromagnetic force rather than an explosive propellant; counterspace weapons include striking a satellite directly, using lasers or microwave devices to degrade a satellite, using electromagnetic attacks to jam radio communications, or using cyber-attacks upon the transmitted data or the systems that use this data; and unmanned and artificial intelligence-equipped weapons are those in which a computer system performs the tasks normally requiring human intelligence, such as choosing between different courses of action and self-correction. *Id.* at 557-571).

[141] *Id.* at 582-583.

[142] *Id.* at 582.

[143] *See generally Godwin Testimony*, supra note 134, at 1079 (in discussing the motivation for China's acquisition of advanced technology, Dr. Godwin stated that China's advanced technology acquisitions are motivated by its "need to prepare for a potential military conflict with the United States over Taiwan. And finally, it is also likely that Beijing's long-term defense industrial objectives include preparing for an extended military confrontation with United States in the West Pacific").

[144] U.S.-China Econ. and Sec. Review Comm'n, 2017 Report to Congress 154 (2017). *See also* Andrew Browne, *China Throws out South China Sea Rulebook*, Wall St. J. Dec. 20, 2016. https://www.wsj.com/articles/china-throws-out-south-china-sea-rule-book-1482226667.

posed by China is growing daily and constitutes a danger to the rest of the world, particularly the Southeast Asian nations.[145]

The foregoing focus is upon high-tech activities. But there is a national security threat in the low-tech arena as well.

5.2. RAW MATERIAL ASPECTS

China's Belt and Road Initiative (BRI), publicly released in 2013 and formerly named "One Belt, One Road", on the surface would seem to be a force for good. The Initiative aims to expand economic and commercial ties to China by financing, constructing, and developing transportation infrastructure, natural gas pipelines, hydropower projects, technology and industrial parks throughout the Indo-Pacific, Africa, the Middle East, Europe, and the Americas. China views BRI as a way to enhance its trade connectivity, reduce surplus domestic industrial capacity, develop poorer interior provinces, promote energy security, and internationalize Chinese industrial and financial standards.[146]

But there is a darker side to this picture as well. There is some perception that the Belt and Road Initiative is a form of colonialism, whereby China will exploit Africa for its own benefit.[147] By providing development, such as in energy or infrastructure, financed by loans, ownership of such developments will pass to China if the African countries, overextended with debt, cannot service the loans.

The country of Sri Lanka can serve as an example. China provided the loans and a Chinese company, China Harbor Engineering Company, a state-owned enterprise, did the construction. Unfortunately, the project was not an economic success and Sri Lanka defaulted. Eventually, under pressure from the Chinese government, Sri Lanka handed over the port and 15,000 acres of land to China for ninety-nine years.[148] China now has a major port on the Indian Ocean and, if history repeats itself, the same will hold true in

[145] *See, e.g.*, Matt Rivers, Stephen Jiang and Ben Wescott, *Taiwan President Tsai Ing-wen Issues a Warning to the World*, CNN (Feb. 20, 2019), https://www.cnn.com/2019/02/19/asia/tsai-ing-wen-china-us-interview-intl/index.html.

[146] *See, e.g.*, U.S.-China Economic and Security Review Commission, 115th Cong., Report to Congress 261 (2018).

[147] *But see,* Panos Mourdoukoutas,*What is China Doing in Africa?*, Forbes (Aug. 4, 2018), https://www.forbes.com/sites/panosmourdoukoutas/2018/08/04/china-is-treating-africa-the-same-way-european-colonists-did/#1041c83e298b. *See also* Luke Daniel, *Debt Colonialism: Is China Trying to Buy Africa's Resources?*, The S. Afr. (Sept. 3, 2018), https://www.thesouthafrican.com/debt-colonialism-china-africa-resources/.

[148] *See* Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. Times (June 25, 2018), https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html.

Tanzania where China is funding another port development.[149] This could give China a second major report on the Indian Ocean.

But, arguably, the bigger concern from the Belt and Road Initiative is not what China gains but what the United States loses. A less publicized activity of China in Africa is its attempt to lock up the supply of critical minerals, such as cobalt and the rare earth metals. In 2010, in a study commissioned by the Peterson Institute of International Economics, a pro-trade group, concluded that China's attempt to "lock-up" minerals in Africa was not anti-competitive, except that "Chinese attempts to exercise control over "rare earth elements" mining may constitute a significant exception."[150] The report stated:

> The U. S. was self-sufficient in rare earth production until the mid-1980s, now more than 90% is imported from China.... Rare earth minerals are crucial for a growing array of civilian and military products. Historically the rare earth mining industry has been characterized by excess capacity, and oversupply. In August 2009 China's Ministry of Industry and Information Technology issued a draft policy to set an annual export quota of 35,000 tons, a potential ban on exports of at least five types of rare earth elements, and a series of steps to control mining and improve environmental practices. These actions may be directed at securing control over international markets; at the same time, they are being deployed as a tool to compel more foreign investment and more value-added ...in industries in inland China.[151]

U.S. Geological Survey data also confirms that, for the past decade, China has accounted for more than 90% of global production of rare earths and that China's restrictions on the supply of rare earth metals, beginning in 2010, has spurred efforts to explore for these metals outside of China.[152] While China dominates production, the same is not true of deposits and, outside North America and Australia, "southern and eastern Africa offer the greatest potential for rare earth production."[153] Based on China's pattern of seeking to

[149] *See* Nick Van Mead, *China in Africa: WIn-Win Development, Or a New Colonialism?*, The Guardian (July 31, 2018), https://www.theguardian.com/cities/2018/jul/31/china-in-africa-win-win-development-or-a-new-colonialism. *See also* Ibrahim Anoba, *China Is Taking Over Zambia's National Assets but the Nightmare Is Just Starting for Africa*, Afr. Liberty (Sept. 10, 2018), https://www.africanliberty.org/2018/09/10/china-is-taking-over-zambia-national-assets-but-the-nightmare-is-just-starting-for-africa/.

[150] Theodora Moran, *Is China Trying To "Lock up" Natural Resources around the World?,* Center for Econ. Policy Research (Feb. 27, 2010), https://voxeu.org/article/china-trying-lock-world-s-natural-resources.

[151] *Id.*

[152] Bradley S. Van Gosen, Philip L. Verplanck, Robert R. Seal II, Keith R. Long & Joseph Gambogi, *Rare Earth Elements*, *in* Critical Mineral Resources of the United States — Economic and Environmental Geology and Prospects for Future Supply, at O1 (Klaus J. Schulz et al. eds., 2017).

[153] Ian Coles, *Africa Holds Promise of Rare Earth Riches*, Fin. Times (Mar. 6, 2017), https://www.ft.com/content/88abbe52-0261-11e7-aa5b-6bb07f5c8e12.

lock up African mineral deposits, discussed below, it is likely that China will seek to do the same with respect to rare earth elements.

Closer to home, Molycorp's Mountain Pass Mine, the only rare earth producer in North America, was shut down in 2016 and filed for bankruptcy. In 2010, Molycorp went public at $14 per share and reached a high of almost $80 per share in 2011. However, when rare earth prices became depressed, arguably as a result of Chinese dumping of rare earths, the stock crashed and bankruptcy ensued. In 2017, it was sold to a American consortium with a Chinese minority partner for $20.5 million, $500,000 over a bid made by an American, Australian and Swiss consortium.[154]

A CEO of an advanced-materials manufacturer has met with President Trump's staff to persuade him that the U.S. should nationalize the country's only rare earth mine because of its military implications.[155]

The dependency of the U.S. on other countries for rare earths is illustrated below.

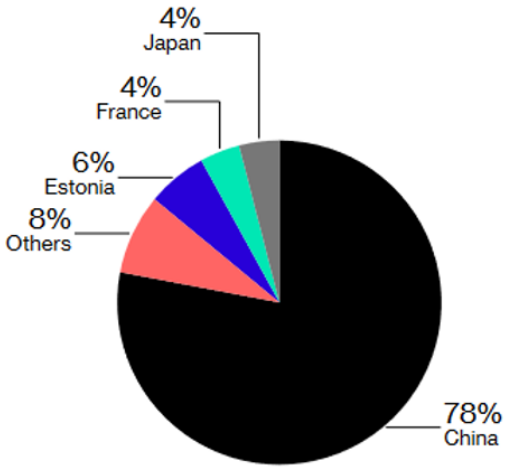

Chart 13: *(Source: see footnote 155)*

Availability of rare-earth minerals is critical for the development of electric cars, manned and unmanned aircraft, batteries that power guided missiles, and lightweight materials used to make jet engines and rocket noses. "Without a domestic supply, the

[154] *See* Andrew Topf, *Mountain Pass Sells for $20.5 Million*, MINING.COM (June 16, 2017), http://www.mining.com/mountain-pass-sells-20-5-million/. *See also* In the Matter of MP Mine Operations LLC; Order Approving Direct Transfer of Control of Licenses, 82 FR 58455 (Issued Nov. 27, 2017), https://www.federalregister.gov/documents/2017/12/12/2017-26748/in-the-matter-of-mp-mine-operations-llc-order-approving-direct-transfers-of-control-of-licenses.

[155] *See* Sally Bakewell & Steven Church, *This CEO Wants Trump to Nationalize the Only Rare-Earth Mine in America*, BLOOMBERG NEWS (Jul. 18, 2017),https://www.bloomberg.com/news/articles/2017-07-18/trump-urged-by-ceo-to-nationalize-the-only-u-s-rare-earths-mine

Americans must rely on Chinese sources of rare earths to build 'made in America' military and space equipment."[156] It makes little sense to rely upon a military competitor for access to materials essential for national security.

Rare earths are not the only strategic metal. Lithium, copper, chromium, cobalt, manganese, and platinum are also essential for industrial and military purposes. For example, manganese, aside from iron ore, is the most essential mineral in the production of steel. But most of our electrolytic manganese comes from China. This is clearly a supply chain vulnerability. But while the United States has not been aggressive in locking up sources of these metals, relying rather on market forces, China has been very aggressive in locking up needed resources.

China is the world's largest producer of minerals, but its "burn rate" has caused concern to Chinese authorities. Consequently China has adopted a so-called "Two Resources, Two Markets" policy to encourage SOEs and private enterprises to actively pursue mining deals throughout the world.[157] The "Two Resources, Two Markets" policy was adopted in 2006 and in the subsequent decade the number of mining/mineral processing assets in Africa in which China has an interest has increased from "a handful in 2006 to more than one hundred and twenty in 2015." The interests range from direct investment and ownership to production lockups.[158]

American companies have been somewhat reluctant to invest heavily in Africa because of the corruption and unrest in that part of the world. On the other hand, China has no scruples in dealing with dictatorships or corruption. Thus, its heavy investment in African mining interests.[159]

Consequently, we need an industrial policy that will assure a supply of essential materials necessary to feed our industrial and national defense systems.

[156] Rick Mills, *How China Is Locking up Critical Resources In the U.S.'s Own Backyard*, MINING.COM (Feb. 20, 2019), http://www.mining.com/web/china-locking-critical-resources-uss-backyard/.

[157] *See Insights into China's Recent Investments in Mineral Resources Globally*, SAI INDUSTRIAL (2016), https://www.saiindustrial.com/insights-into-chinas-recent-investments-in-mineral-resources-globally/.

[158] *See* Vladimir Basov, *The Chinese Scramble to Mine Africa*, MINING.COM (Dec. 15, 2015), http://www.mining.com/feature-chinas-scramble-for-africa/.

[159] *Id.* (South Africa produces 52% of the world's chromium, is the world's leader in manganese, and controls about 95% of the platinum group metals reserves. The Democratic Republic of the Congo produces 50% of global cobalt Zimbabwe is the fifth largest producer of lithium and in the top five for platinum group materials. Rwanda is a leader in the production of tantalum).

6. THE UNITED STATES MUST DEVELOP ITS OWN INDUSTRIAL POLICY BECAUSE A "FREE MARKET" APPROACH RESULTING IN A LOSS OF MANUFACTURED JOBS HAS EVISCERATED THE MIDDLE CLASS

6.1. WHAT IS AN INDUSTRIAL POLICY?

At one time, Republicans were the party of Wall Street and Democrats were the party of labor.[160] But that changed along the way.[161] In the 2016 election, a Democrat, Hillary Clinton, was seen as having close ties with Wall Street, whereas Donald Trump, a Republican, was seen as the advocate for working people.

However, Republicans have traditionally been seen as opposed to an "industrial policy": "Republicans oppose any policies that are seen as interventionist, and that give the federal government control of industry. They feel that these policies allow the government to pick the winners and losers of the marketplace, rather than letting economics and business practices speak for themselves."[162]

One of the reasons that Wall Street has been favored over manufacturing is that, on the one hand, the simplicity of the notion of supply and demand and that markets are the best determinants of policy is a superficially easy concept to accept,[163] and, on the other hand, Wall Street has been able to attract the STEM[164] oriented graduates with higher compensation than academia and manufacturing can offer.

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[160] Contrast the policy of presidents Hoover and Roosevelt. *See* Doris Kearns Goodwin, Leadership: In Turbulent Times 273-74, 294-96, 302-04 (2018).

[161] *See* Thomas Frank, What's the Matter with Kansas?: How Conservatives Won the Heart of America (Picador 2007) (2004).

[162] *Republican Views on the Economy,* RepublicanViews.Org (May 24, 2014), https://www.republicanviews.org/republican-views-on-the-economy/. *See also* David Coates, *Taking Republicans to Task: (5) An Industrial Policy*, David Coates Blog (Apr. 24, 2012), https://www.davidcoates.net/2012/04/24/taking-the-republicans-to-task-5-on-industrial-policy/. ("Democrats over-tax, over-spend and over-regulate. Republicans, by contrast, do none of those things. They get government out of the economy. They set the private sector free. They reward rather than penalize initiative, innovation and success. They do not pick winners and losers. And let market forces do that. They do not put their trust in bureaucrats. They put their trust instead in the ingenuity and genius of the American people.").

[163] *See* Jeff Faux, *Industrial Policy: The Road Not Taken*, The American Prospect (Dec. 20, 2009), https://prospect.org/article/industrial-policy-road-not-taken (the industrial-policy debate consummated the marriage of Wall Street in the mainstream economics profession that continues today. For believers in the neoclassical synthesis, financial markets are easy to romanticize; buyers and sellers reacting almost instantaneously to mildew price changes that are supposed to reflect all of the available information on businesses, about which neither buyer nor seller has to know anything at all. This simulated perfect market let itself to the mathematical models needed to gain tenure and when Nobel Prizes in economics. And global investors, like neoclassical economists, are free-traders, indifferent to where exactly investment goals, so long as it maximizes what economists call the efficiency – and financiers call profit).

[164] STEM is the acronym for science, technology, engineering and mathematics.

What Republicans fail to realize is that how government taxes and how government spends is itself an indirect form of an industrial policy. When hedge fund managers compensation is taxed at capital gains rates, rather than ordinary income tax rates under the carried interest theory, this is a form of industrial policy. And when the federal government's budget is dominated by military expenditures, this is a form of industrial policy. Defense expenditures have subsidized the aircraft and technology area. While this is essential for national defense, it is also an industrial policy. And when President Kennedy decided to send a man to the moon, these expenditures were a form of industrial policy and in fact spawned many industries.[165]

At the other end of the spectrum, consider how a command-and-control economy, such as that of China, creates an industrial policy. The chart below illustrates the process by which the Chinese government establishes its industrial policy: [166]

Chart 14

[165] *See NASA Technologies Benefit Our Lives*, NASA, https://spinoff.nasa.gov/Spinoff2008/tech_benefits.html.
[166] U.S.-China Economic and Security Review Commission, 115th Cong., Report to Congress 510 (2017).

Robert D. Atkinson, the president of the Information Technology and Innovation Foundation has warned that Chinese policymakers use industrial policies "to autarkically [autarkically is an economic system and an ideology based on implementing policies in a manner that supports national economic self-sufficiency and independence] supply Chinese markets for advanced technology products with their own production while still benefiting from unfettered access to global markets for their technology exports and foreign direct investment."[167] In other words, China has an industrial policy.

In 2017, The United States-China Commission set forth a two-page table illustrating the scope of China's industrial policy and setting forth nine items in China's "Industrial Policy Toolbox:"[168]

> 1. Localization targets, i.e., setting targets for domestic and international market share that should be held by local technology and production;
>
> 2. State funding for industry development – subsidies, tax breaks and other forms of financial support for national champions;
>
> 3. R & D funding for strategic sectors;
>
> 4. Government procurement favoring domestic suppliers;
>
> 5. Technology standards that favor domestic companies;
>
> 6. Governmental regulations that create high thresholds for market entry and that are often vague so as to permit discretionary interpretation and enforcement;
>
> 7. Governmental direction of foreign investment and technological imports to fund or discourage certain industries;
>
> 8. Recruitment of foreign talent, including both Chinese and foreign individuals with desired expertise;
>
> 9. Industrial espionage to gain access to cutting-edge technologies, intellectual property and strategic sectors.

Recognition of the foregoing is not to suggest that the United States follow a similar track. However, the United States does need an industrial policy, not only to ensure the health of U.S. manufacturing to create both direct jobs and spinoff employment, but also to ensure, from a national security perspective, that we are not dependent upon other nations in having access to materials and production for national defense.

[167] *Id.* at 511, n. 12.
[168] *Id.* at 511-513.

6.2. WHY WE NEED AN INDUSTRIAL POLICY

To suggest that United States manufacturers and labor can compete with subsidized Chinese manufacturing and harsh labor policies or that the United States economy can maintain a decent standard of living for American workers without a manufacturing base is not just foolish but irrational. It is all the more foolish and irrational to jeopardize national security by undercutting our industrial base through outsourcing manufacturing to China. One of the reasons that the entry of the United States into World War II was decisive was not just the skill and bravery of American fighting men and women, but also the might of the U.S. industrial base which quickly moved from a domestic focus to the production of military needs.

Solyndra is often used as an example of why an industrial policy is a failed enterprise. A Department of Energy loan guarantee provided critical funding for Solyndra's manufacturing growth which, unfortunately, ended in bankruptcy. But the situation is more complex than is often recounted. The price of silicon in the 2000s had risen dramatically from $30 a kilogram in 2001 to $450 a kilogram in early 2008.[169] Solyndra's innovative plan was to produce a solar panel that did not need expensive silicon.[170] At the time, it seemed like a good idea.

The rise in the price of silicon was sparked both by higher demand and a production base they could not keep up. However, in late 2008, the price of silicon started falling rapidly, "owing partly to better manufacturing technology, economy of scale and the entry of fully integrated Chinese manufacturers."[171] With the fall in the price of silicon, the business plan of Solyndra was undercut.

This does not mean that the development of a solar panel that did not need silicon was not a prudent concept. However, it was a concept that was destined to fail in a market-oriented economy. Contrariwise, in a command-and-control economy like China, a company like Solyndra might be kept alive as a precautionary matter until such time as its product becomes economically feasible.

The staying power provided by China's subsidization of the solar panel industry illustrates both the good and bad effects of governmental intervention. As a result of China's decision to dominate the solar panel industry, prices dropped 80% from 2008 until 2013. Making solar panels is difficult. To make them efficiently, the business

[169] *See* Jonas Hamberg, *Falling Silicone Prices Shakes Up Solar Manufacturing Industry*, Down To Earth (July 4, 2015), https://www.downtoearth.org.in/news/falling-silicon-prices-shakes-up-solar-manufacturing-industry-34045.

[170] *See, e.g.*, *What Went Wrong at Solyndra*, Fortune (Sept. 1, 2011), http://fortune.com/2011/08/31/what-went-wrong-at-solyndra/.

[171] *Hamberg, supra* note 169.

requires large, semiautomated factories. Donald Chung, of the Department of Energy, stated: "It is not easy to add small bits of capacity to meet growing demands; you have to add it in big chunks. [This creates] a "yo-yo effect" that tends to create more and more capacity. That made solar still more attractive to China."[172]

But this also created a worldwide glut with the resultant drop in prices. While the shareholders of Chinese companies may have wanted profits, the Chinese government wanted jobs and wanted them long-term. Thus, from the Chinese perspective, the drop in price from dumping excess capacity on the market "[led] to eighty-six bankruptcies and closures (largely at U.S. and EU competitors) from 2009 to 2015".[173] This ensured long-term Chinese dominance of industry in which the United States invented the technology and still holds many of the patents. As another energy expert stated: "If there was ever a situation where the Chinese have put their whole governmental system behind manufacturing, it's got to be solar modules. I think they think they can wipe out all the competition in the world. It makes all kinds of sense if you have the staying power."[174]

A recent Department of Energy study concluded that, if the United States innovates, cuts costs and nurtures newer technologies, it could emerge as the world's second largest solar panel manufacturer by 2020.[175] But that will require innovation and nurturing of new technologies – in other words an industrial policy. It also requires an awareness that not all new technologies play out, and that the failure of one should not be used as a political tool to thwart continued investment in new technology and support for critical industries.

6.3. FINALLY, MARCO RUBIO AND AN AMERICAN RESPONSE TO MADE IN CHINA 2025

In a surprising twist, Marco Rubio, as chairman of the Senate Small Business and Entrepreneurship Committee, published a recent report that "turn[ed] heads in the conservative policy world" because, although it did not use the phrase industrial policy,

[172] John Fialka, *Why China Is Dominating the Solar Industry*, Sci. Am. (Dec. 19, 2016), https://www.scientificamerican.com/article/why-china-is-dominating-the-solar-industry/.

[173] *See, e.g.*, U.S.-China Econ. and Sec. Review Comm'n, *supra* note 167. U.S.-China Economic and Security Review Commission, 115th Cong., Report to Congress 511 (2017).

[174] *Fialka*, supra note 172.

[175] *See* Donald Chung Kelsey Horowitz & Parthiv Kurup, *On the Path to SunShot: Emerging Opportunities and Challenges In U.S. Solar Manufacturing*, Department Of Energy, (May 2016) *available at* Department of Energy, opportunities and challenges in solar energy.

it asserted the need for a national innovation strategy.[176] The Made in China Report recognized that markets cannot function without rules and that, therefore, the government should ensure that the rules that are in place provide for "strong families and decent wages for average people." [177]

The Report asserted that the logic of the market and the drive to maximize shareholder value (at least in the short run) can lead to results that are inconsistent with a policy to provide for "strong families and decent wages for average people":

> For example, increasing profit margins by developing new products to outcompete others takes risk, but saving on labor costs by off-shoring employment is more often safe. Highly-leveraged investments in technological discovery offer unknown outcomes, but distributions to shareholders are quantifiable. The existence of non-productive alternatives to capital investment, as a result, makes the product of the firm's American workers less valuable while at the same time increasing profits, making possible a world of higher asset prices, lower investment in the economy, and lower worker pay. [178]

The decision at the turn-of-the-century to expand trade with China was predicated upon the expectation that this would open up additional markets in China for American companies. The Made in China 2025 Report recognized that this has not happened. Instead, the advanced manufacturing products where America supposedly had not just a comparative advantage but a competitive advantage are increasingly being captured by Chinese enterprises.[179] Our focus has been oriented in the wrong direction:

> In a globalized economy, high wages for American workers are not the natural outcome of expanding trade, especially when some trading partners do not abide by the rules that they've agreed to. Free markets can be an unparalleled force for the creation of prosperity and wealth, but they produce in response to the terms they've been given. Lately, success by these terms has been defined by the growth of financial services instead of applied research or advanced manufacturing. The conclusion we should

[176] *See* Samuel Hammond, *Marco Rubio Wants a National Innovation Strategy*, NAT'L REV. (Feb. 15, 2019), https://www.nationalreview.com/2019/02/marco-rubio-industrial-policy-report-counter-china-innovation-strategy/.

[177] *Id.*

[178] *See* U.S. Senate Committee on Small Business and Entrepreneurship, Made in China 2025 and The Future of American Industry 72 (Comm. Print. Feb. 12, 2009) (hereinafter "Made in China 2025 Report"), https://www.rubio.senate.gov/public/_cache/files/d1c6db46-1a68-481a-b96e-356c8100f1b7/3EDECA923DB439A8E884C6229A4C6003.02.12.19-final-sbc-project-mic2025-report.pdf.

[179] *Id.* at 4.

> draw from this evidence is that we have too often failed to make the well-being of working Americans the terms for market success.

In arguing in favor of a focus upon manufacturing, as opposed to financial services, the Report stated:

> To that end, recent history delivers a few general lessons to help provide these implications. Manufacturing provides better and more stable employment for American workers than financial services. Physical capital development makes for more prosperous towns and communities than does digital capital. Knowing how to make a specialized product is a less replicable skill than marketing the product for sale. Research and development expenditures deliver greater benefits to the public than private cost alone justifies. Offshoring jobs to save on labor costs doesn't often create equivalent jobs for the workers displaced by it. Worker skills are not easily transferable across industries. Geographic proximity to productive assets like factories increases the prosperity of supplying and [sic] local small businesses. In sum, production matters.[180]

The "industrial policy" suggested by the report was summarized as follows:

> U.S. policy should respond to the practical and political economy challenges of the "Made in China 2025" plan. This includes enacting strategic U.S.-China capital flow restrictions and corresponding defensive measures for domestic industries targeted by the plan. It also means prioritizing new economic development, including encouraging physical investment and discouraging un-productive arbitrage through the tax code, and utilizing development assistance like the Small Business Investment Company and Small Business Investment Research programs. Finally, it means considering labor market stabilization policies to support Americans' attachment to the labor force and accumulation of valuable skills.[181]

This is a basis upon which to begin a discussion as to what a meaningful industrial policy for the United States would look like when it is focused upon benefiting the ordinary worker rather than the one percenters.

[180] *Id.* at 13.
[181] *Id.* at 6.

CONCLUSION

When Paul Samuelson argued that the principle of comparative advantage was the most beautiful idea in economics, he was dealing with the 20th century situation in which the trade between developed and undeveloped nations was often that in which the underdeveloped nations provided natural resources and the developed nations provided finished products. The trade between developed countries was essentially between countries with similar standards of living. It was also a time when the United States was dominant in trade. When a principle is working for you, there is less incentive to examine its underlying basis. That may account for why the notion of comparative advantage has been accepted without critical examination.

But once Ricardo's theorem is examined in its entirety, two under-identified factors stand out: that Ricardo assumed that capital would be loyal to the country of origin and that adjustments in the value of currencies would eventually even out imbalances in trade. Even here, he recognized that, when one country consistently runs a trade deficit, there is a transfer of wealth from that country. Ricardo's example of cloth and wine also did not involve dual-use technologies that have not just industrial uses but military uses as well.

Once capital is free to move around the world in search of higher returns, and where the conventional wisdom is that the purpose of a corporation is to maximize shareholder value, not worker well-being, international trade turns into labor arbitrage and jobs are shipped from the importing nation to the exporting nation. As a consequence, United States has lost much of its manufacturing base. From 2000 to 2009, the United States lost over 5 million manufacturing jobs, almost one-third of the total.

Supposedly this job loss occurred as a result of automation. But we suffered these job losses at a time of increasing gross national product. If manufacturing had grown along with gross national product, then the effect of automation might well have been merely to level the manufacturing job base rather than reduce it. When entire industries, such as the wood furniture industry examined in this article, move offshore to a nation with low labor standards, it is labor arbitrage and not automation that is the culprit. And when Boeing contracts out portions of its planes to countries and companies that arguably have no more technical superiority than Boeing, in order to obtain sales from such countries, this transfer of jobs is not caused by automation, but rather by the desire to enhance sales, corporate profitability, and shareholder wealth.

Neither American workers nor American businesses physically located in the United States can compete in a system in which a country, such as China, subsidizes its

industry and short-circuits the cost of technological development by coercing, directly or indirectly, the transfer of technology developed in the United States and often funded by the U.S. taxpayer. The situation is all the more egregious when a country, such as China, engages in theft of intellectual property and industrial espionage.

Unfortunately, many so-called American companies today view themselves as global enterprises, with loyalty to neither the United States nor our workforce. If the goal is to maximize shareholder value, where the product is produced is irrelevant so long as it is produced at the lowest possible cost so as to maximize profits. From the standpoint of national loyalty, it is easy to rationalize financing industrial development in other countries and transferring technology to obtain sales, on the basis that this is the nature of global trade and global enterprise.

When an American company opens a plant in China, not only do American workers lose, but the spinoffs from manufacturing, including satellite suppliers and research and development, are also lost.

China's industrial policy, discussed at length, is to be the world leader in high-tech manufacturing and to establish a military capability, including the frontiers of space, second to none. In such a situation, the United States can not blindly turn aside to the realities of the situation and rely abstractly on the notion that the market solves all problems. As Sen. Rubio recognized in his report, Made in China 2025 and the Future of American Industry, in order for markets to work effectively, there must be rules.

It is important that the United States economy operates upon rules that provide for the benefit of all Americans, including workers, and not just investors.

If we are to stem the outflow of jobs from the manufacturing sector and their replacement, if in fact they are replaced, by lower paying service jobs, we need an industrial policy that values manufacturing and American workers, and not just financial engineering.

Equally important, from a national security perspective, we cannot rely upon either products that originate in, or supply chains that run through, a potential adversary.

Global trade needs to work to the advantage of the United States and our workers, not to our disadvantage. Sen. Rubio has opened a discussion of the need to have some sort of industrial policy that will focus United States on the maintenance and development of critical industries and the provision of a job base that will support the middle class. Just relying upon the mantra that free trade benefits all, and supporting such mantra on the

basis that it is "proved" by Ricardo's theory of comparative advantage, is to put our head in the sand and ignore the evidence set forth in this article.

APPENDIX – TRADE DEFICITS WITH SEVEN COUNTRIES

China			
Year	Exports	Imports	Balance
1985	3,855.70	3,861.70	-6
1990	4,806.40	15,237.40	-10,431.00
1995	11,753.7	45,543.2	-33,789.5
1996	11,992.6	51,512.8	-39,520.2
1997	12,862.2	62,557.7	-49,695.5
1998	14,241.2	71,168.6	-56,927.4
1999	13,111.1	81,788.2	-68,677.1
2000	16,185.2	100,018.2	-83,833.0
2001	19,182.3	102,278.4	-83,096.1
2002	22,127.7	125,192.6	-103,064.9
2003	28,367.9	152,436.1	-124,068.2
2004	34,427.8	196,682.0	-162,254.3
2005	41,192.0	243,470.1	-202,278.1
2006	53,673.0	287,774.4	-234,101.3
2007	62,936.9	321,442.9	-258,506.0
2008	69,732.8	337,772.6	-268,039.8
2009	69,496.7	296,373.9	-226,877.2
2010	91,911.1	364,952.6	-273,041.6
2011	104,121.5	399,371.2	-295,249.7
2012	110,516.6	425,619.1	-315,102.5
2013	121,746.2	440,430.0	-318,683.8
2014	123,657.2	468,474.9	-344,817.7
2015	115,873.4	483,201.7	-367,328.3
2016	115,545.5	462,542.0	-346,996.5
2017	129,893.6	505,470.0	-375,576.4

Table 1: US Census Bureau (https://www.census.gov/foreign-trade/balance/c5700.html)

Japan			
Year	Exports	Imports	Balance
1985	22,630.90	68,782.90	-46,152.00
1990	48,579.50	89,684.00	-41,104.50
1995	64,342.7	123,479.3	-59,136.6
1996	67,606.6	115,187.1	-47,580.5
1997	65,548.6	121,663.3	-56,114.7
1998	57,831.0	121,845.1	-64,014.1
1999	57,466.0	130,863.8	-73,397.8
2000	64,924.4	146,479.4	-81,555.0
2001	57,451.5	126,473.1	-69,021.6
2002	51,449.2	51,449.2	-69,979.4
2003	52,004.3	118,036.6	-66,032.4
2004	53,568.7	129,805.2	-76,236.5
2005	54,680.6	138,003.7	-83,323.1
2006	58,459.0	148,180.8	-89,721.8
2007	61,159.6	145,463.3	-84,303.8
2008	65,141.8	139,262.2	-74,120.4
2009	51,134.2	95,803.7	-44,669.5
2010	60,471.9	120,552.1	-60,080.3
2011	65,799.7	128,927.9	-63,128.2
2012	69,975.8	146,431.7	-76,455.9
2013	65,237.4	138,575.3	-73,337.9
2014	66,891.8	134,504.5	-67,612.7
2015	62,387.8	131,445.5	-69,057.7
2016	63,226.1	132,030.3	-68,804.3
2017	67,605.1	136,480.8	-68,875.7

Table 2: US Census Bureau (https://www.census.gov/foreign-trade/balance/c5880.html)

India			
Year	Exports	Imports	Balance
1985	1,641.90	2,294.70	-652.8
1990	2,486.20	3,196.80	-710.6
1995	3,295.80	5,726.30	-2,430.50
1996	3,328.20	6,169.50	-2,841.30
1997	3,607.50	7,322.50	-3,715.00
1998	3,564.50	8,237.20	-4,672.70
1999	3,687.80	9,070.80	-5,383.00
2000	3,667.30	10,686.60	-7,019.30
2001	3,757.00	9,737.30	-5,980.30
2002	4,101.00	11,818.40	-7,717.40
2003	4,979.70	13,055.30	-8,075.60
2004	6,109.40	15,572.00	-9,462.70
2005	7,918.60	18,804.20	-10,885.60
2006	9,673.60	21,830.80	-12,157.30
2007	14,968.80	24,073.30	-9,104.40
2008	17,682.10	25,704.40	-8,022.30
2009	16,441.40	21,166.00	-4,724.60
2010	19,248.90	29,532.90	-10,284.10
2011	21,542.20	36,154.50	-14,612.30
2012	22,105.70	40,512.60	-18,406.90
2013	21,810.40	41,810.00	-19,999.50
2014	21,499.10	45,358.00	-23,858.90
2015	21,452.90	44,782.70	-23,329.70
2016	21,635.70	46,027.80	-24,392.10
2017	25,688.90	48,602.90	-22,914.10

Table 3: US Census Bureau (https://www.census.gov/foreign-trade/balance/c5330.html)

Germany			
Year	Exports	Imports	Balance
1985	9,050.20	20,239.20	-11,189.00
1990	18,759.90	28,162.00	-9,402.10
1995	22,394.30	36,843.90	-14,449.60
1996	23,494.90	38,944.90	-15,450.00
1997	24,458.30	43,121.40	-18,663.10
1998	26,657.20	49,841.90	-23,184.70
1999	26,800.30	55,228.30	-28,428.00
2000	29,448.40	58,512.90	-29,064.50
2001	29,995.40	59,076.60	-29,081.20
2002	26,629.60	62,505.70	-35,876.10
2003	28,831.90	68,112.70	-39,280.80
2004	31,415.90	77,265.60	-45,849.70
2005	34,183.70	84,750.90	-50,567.20
2006	41,159.10	89,082.00	-47,922.90
2007	49,419.70	94,164.10	-44,744.40
2008	54,505.30	97,496.60	-42,991.30
2009	43,306.30	71,498.20	-28,191.90
2010	48,155.30	82,450.40	-34,295.10
2011	49,294.20	98,684.30	-49,390.10
2012	48,803.00	109,225.80	-60,422.80
2013	47,363.50	114,341.90	-66,978.40
2014	49,418.80	124,182.00	-74,763.10
2015	49,978.80	124,887.80	-74,909.00
2016	49,432.10	114,107.10	-64,675.00
2017	53,896.80	117,575.20	-63,678.50

Table 4: US Census Bureau (https://www.census.gov/foreign-trade/balance/c4280 .html)

United Kingdom			
Year	Exports	Imports	Balance
1985	11,272.80	14,937.20	-3,664.40
1990	23,490.50	20,188.30	3,302.20
1995	28,856.50	26,929.70	1,926.80
1996	30,962.30	28,978.70	1,983.60
1997	36,425.30	32,659.20	3,766.10
1998	39,058.10	34,838.30	4,219.80
1999	38,407.20	39,237.30	-830.1
2000	41,570.60	43,345.10	-1,774.50
2001	40,714.20	41,368.70	-654.5
2002	33,204.70	40,744.90	-7,540.20
2003	33,827.90	42,795.00	-8,967.00
2004	35,901.70	46,273.80	-10,372.20
2005	38,568.10	51,032.60	-12,464.50
2006	45,410.10	53,513.00	-8,102.90
2007	49,981.50	56,857.50	-6,876.10
2008	53,599.10	58,587.40	-4,988.30
2009	45,703.60	47,479.90	-1,776.30
2010	48,410.30	49,805.40	-1,395.10
2011	56,033.10	51,262.50	4,770.60
2012	54,860.50	55,005.80	-145.3
2013	47,361.20	52,741.20	-5,380.00
2014	53,913.20	54,689.50	-776.3
2015	56,094.70	58,057.10	-1,962.40
2016	55,169.30	54,270.90	898.5
2017	56,257.90	53,060.30	3,197.60

Table 5: US Census Bureau (http://www.census.gov/foreign-trade/balance/c4120.html)

Canada			
Year	Exports	Imports	Balance
1985	47,251.00	69,006.40	-21,755.40
1990	83,673.80	91,380.10	-7,706.30
1995	127,226.00	144,369.90	-17,143.90
1996	134,210.20	155,892.60	-21,682.40
1997	151,766.70	167,234.10	-15,467.40
1998	156,603.50	173,256.00	-16,652.50
1999	166,600.00	198,711.10	-32,111.10
2000	178,940.90	230,838.30	-51,897.40
2001	163,424.10	216,267.90	-52,843.80
2002	160,922.70	209,087.70	-48,165.00
2003	169,923.70	221,594.70	-51,671.00
2004	189,879.90	256,359.80	-66,480.00
2005	211,898.70	290,384.30	-78,485.60
2006	230,656.00	302,437.90	-71,781.80
2007	248,888.10	317,056.80	-68,168.60
2008	261,149.80	339,491.40	-78,341.60
2009	204,658.00	226,248.40	-21,590.50
2010	249,256.50	277,636.70	-28,380.30
2011	281,291.50	315,324.80	-34,033.20
2012	292,650.50	324,263.00	-31,612.50
2013	300,754.90	332,503.60	-31,748.80
2014	312,817.00	349,286.10	-36,469.20
2015	280,855.20	296,305.10	-15,449.90
2016	266,734.50	277,782.30	-11,047.80
2017	282,265.10	299,319.40	-17,054.30

Table 6: US Census Bureau (https://www.census.gov/foreign-trade/balance/c1220.html)

Mexico			
Year	Exports	Imports	Balance
1985	13,634.70	19,131.70	-5,497.00
1990	28,279.00	30,156.80	-1,877.80
1995	46,292.10	62,100.40	-15,808.30
1996	56,791.60	74,297.20	-17,505.60
1997	71,388.50	85,937.60	-14,549.10
1998	78,772.60	94,629.00	-15,856.40
1999	86,908.90	109,720.50	-22,811.60
2000	111,349.00	135,926.30	-24,577.30
2001	101,296.50	131,337.90	-30,041.40
2002	97,470.10	134,616.00	-37,145.90
2003	97,411.80	138,060.00	-40,648.20
2004	110,731.30	155,901.50	-45,170.20
2005	120,247.60	170,108.60	-49,861.00
2006	133,721.70	198,253.20	-64,531.40
2007	135,918.10	210,714.00	-74,795.80
2008	151,220.10	215,941.60	-64,721.60
2009	128,892.10	176,654.40	-47,762.20
2010	163,664.60	229,985.60	-66,321.00
2011	198,288.70	262,873.60	-64,584.90
2012	215,875.10	277,593.60	-61,718.50
2013	225,954.40	280,556.00	-54,601.70
2014	241,007.20	295,730.00	-54,722.80
2015	236,460.10	296,433.30	-59,973.20
2016	230,051.20	293,923.90	-63,872.80
2017	243,314.40	314,267.30	-70,952.90

Table 7: US Census Bureau (https://www.census.gov/foreign-trade/balance/c2010.html)

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Of Peacocks, Tulips, And Shotguns: Intentions and Side Effects in John Finnis' Natural Law Theory

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ABSTRACT

This article constitutes a detailed response to John Finnis' present-day critique and deconstruction of two famous tort cases decided in England in the first half of the nineteenth century: Ilott v. Wilkes (King's Bench 1820) and its progeny Bird v. Holbrook (Court of Common Pleas 1828). Both cases involved trespassers who were seriously injured upon entering landowners' property without permission. Their injuries were caused by means of 'man-traps,' i.e., shotguns set outdoors by a landowner and primed to fire upon contact with a tripwire.

Finnis concedes that in laying man-traps, landowners may not have had a desire to harm (in fact they may have had a desire not to harm) but merely to deter. Nevertheless, according to Finnis, any landowner setting such devices, even if he posts clear warnings, ineluctably involves that owner in "conditionally, but really" intending to kill or seriously injure. The present article challenges this view. It argues, by applying Finnis' own natural law theory of human action, intention, and choice, that his conclusion is undermined.

While this topic may appear arcane to some, it focuses attention on important general questions in legal theory and philosophy about the meaning of intentions, choices, and side effects.

KEYWORDS

Basic Goods; Natural Law; Intention; Side Effects; Finnis

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INTRODUCTION

John Finnis, a renowned Oxford legal scholar and professor of law, in his well-known treatise *Natural Law and Natural Rights*,[1] and his noteworthy essay *Intention in Tort Law,*[2] articulates a theory of practical reasoning and ethical choice that frequently relies in its analyses upon a controversial philosophical position often referred to as the 'principle of double effect' [hereinafter PDE]. PDE draws upon a distinction asserted to exist, by Finnis and others,[3] between a person's intention in acting and consequences that may be foreseeably caused by that action, often with certainty, but which, according to PDE are not necessarily included in the actor's intention.[4] Finnis employs PDE as a foundation for his analyses and resolution of critical ethical issues.[5] In this article, I will not enter into technical discussion of PDE and all its details, which I have treated elsewhere,[6] but rather, as Finnis often does, apply its principles generally in the course of analysis.

The specific impetus for this present study, however, while dependent at various points upon Finnis' adoption of PDE, arises as a critique of the position taken by Finnis in his contemporary deconstruction of two seminal tort cases decided in England in the first half of the nineteenth century: *Ilott v. Wilkes (*King's Bench 1820)[7] and its progeny *Bird v. Holbrook* (Court of Common Pleas 1828).[8] Both cases involved trespassers, who were seriously injured upon entering a landowner's property without permission. Their injuries were caused by means of a 'man-trap,' i.e., a shotgun primed to fire when any would-be trespasser made contact with a tripwire.

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[1] John Finnis, Natural Law and Natural Rights (1980) [hereinafter NLNR (1980)].

[2] 2 John Finnis, *Intention in Tort Law*, *in* Intention and Identity: Collected Essays 198 (2011) [hereinafter Finnis, *Intention in Tort Law*] reprint of the same in Birks Peter et al., Philosophical Foundation of Tort Law 229, 229-48 (David G. Owen ed., 1995).

[3] Finnis has developed this theory in collaboration with a number of other philosophers, including Joseph Boyle and Germain Grisez: *see, e.g.,* John finnis, Joseph Boyle and Germain Grisez, Nuclear Deterrence, Morality and Realism (1987) [hereinafter Nuclear Deterrence]; *see also* John Finnis, Germain Grisez and Joseph Boyle, *Practical Principles, Moral Truth, and Ultimate Ends,* 32 Am. J. Juris. (1987) [hereinafter *PPMT*], their most significant general summary of their views; *see also,* John Finnis, Germain Grisez and Joseph Boyle, *"Direct" and "Indirect": A Reply to Critics of our Action Theory,* 65 Thomist 1 (2001), *reprinted in* 2 John Finnis, Intention and Identity, Collected Essays 235-68 (2011) [hereinafter CE Vol. II].

[4] *See infra* notes 146-154 and accompanying text.

[5] *Id.*

[6] For an especially thorough and lucid explication and defense of the principle, *see* Thomas Anthony Cavanaugh, Double-Effect Reasoning: Doing Good and Avoiding Evil (2006). In previous articles, I have offered descriptions and defenses of the generally unrecognized operation of double effect in various substantive areas of the law. *See* Edward C. Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law,* 57 Fla. L. Rev. 469 (2005); *see also* Edward C. Lyons, *Balancing Acts: Intending Good and Foreseeing Harm - the Principle of Double Effect in the Law of Negligence,* 3 Geo. J. L. & Pub. Pol'y 453 (2005); *see also* Edward C. Lyons, *Slaughter of the Innocents: Justification, Excuse, and the Principle of Double Effect,* Berkeley J. Crim. L., Fall 2013, at 151. In the present article, however, I explore Finnis' deeper foundations of this principle in his underlying theory of natural law, practical reason, and human choice.

[7] (1820) 106 E.R. 674 (K.B.) (U.K.), [hereinafter *Ilott*].

[8] (1828) 130 E.R. 911 (C.P.) (U.K.), [hereinafter *Bird*].

Finnis concedes that in laying man-traps, landowners may not have had a desire to harm (in fact they may have had a desire not to harm) but merely to deter; yet, according to Finnis, any harm or death caused by such traps must be considered "intended." To wit, Finnis contends, in a way that would very likely have surprised those erstwhile landowners, that setting a spring gun as a deterrent, even if they post clear warnings, ineluctably involves them in "conditionally, but really" intending to kill or seriously injure.[9] The present article challenges this conclusion, proposing that Finnis' own theory of human action and his account of moral responsibility undermines his conclusion here.

Sections 1 and 2 of this article offer a systematic overview of essential strands of Finnis' thought comprising his natural law theory. His theory begins with an exposition of what he terms "basic goods," the first principles of all properly human action. While Finnis' theory is of interest in its own right, especially his treatment of various objections to natural law theory as a philosophical project, its primary importance for the present study lies in laying the foundation of his more detailed account, developed in the sections following, of free choice; the first principle of morality; the origins of moral obligation; and related intermediate principles he asserts are entailed by that first principle of morality.

Section 3 reviews Finnis' reflections on various instances, hypothetical and real, where human persons are killed, not accidentally and not by straightforward purposeful murder, but where questions might be raised about whether such killings were intended or not. These scenarios are important for developing a clearer understanding of Finnis' theory of 'man-killing' and articulating distinctions he draws out between intentions and side effects, and the moral significance he attributes to these distinctions.

Section 4 considers in some detail Finnis' deconstruction of the opinions in those two infamous "man-trap" cases. Although, discussions in this part center around the historical use of that common defensive practice (and its very public controversy), this section seeks to demonstrate that Finnis' definitive rejection of the logic of the judges' opinions in those cases—in which they unanimously expressed the view that the setting of man-traps with warnings did not ipso facto entail an intention to maim or kill—is mistaken. Moreover, it is at odds with his own explanation of human action and moral choice. While killing and maiming under such conditions may be wrong and immoral, that does not require that it be deemed intentional.

[9] Finnis, *Intention in Tort Law, supra* note 2, at 230-231.

1. FINNIS' ACTION THEORY: PRACTICAL REASON AND BASIC GOODS

Finnis' account of practical reasoning, understood as the foundation for understanding moral judgment and choice, is sometimes referred to as "the new natural law theory"[hereinafter NNL].[10] As will be reflected in this article, it is comprehensive and multifaceted. Almost every foundational aspect of it has proven controversial and has been debated by scholars.[11] The following section seeks to sketch out the essential principles of his theory of practical reason, intention, and choice necessary for the purposes of this article.

Finnis begins his analysis of human conduct by inquiring into and examining the principles of specifically human actions, or as Finnis restates it, those "initiated by free choice."[12] By referring to his search for the "principles" of human action, Finnis employs the term in a technical sense as *principium* or origin. In other words, he seeks to uncover the very foundations of human choice, which in his view, cannot be reduced to any conditions precedent: "principles are uncovered by examining that of which they are the principles. The principles we are concerned with here are motives of human action. As principles, they will be basic motives, irreducible to any prior motives of the same sort."[13]

The first principle of free action asserted by Finnis is that it is an act guided by reason aiming at some object, i.e., an end. "The first type of principle of human action . . . is that *for the sake of which* such an action is done" (emphasis added).[14] This "for the sake of which" (whether a specific object produced by an action or action sought for its own

[10] The New Natural Law (NNL) theory is the name given to a particular revival and development of Thomistic natural law theory, first proposed in the 1960s by Germain Grisez in an interpretative article on St Thomas Aquinas, in which Grisez challenged the then-dominant interpretation of Aquinas on natural law. In subsequent decades Grisez, John Finnis, Joseph Boyle and other richly developed the theory and applied it to other issues (free choice, moral absolutes, abortion, euthanasia, marriage and others.

Patrick Lee, *The New Natural Law Theory,* in THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS 73 (Tom Angier ed., 2019).

[11] "Finnis is known as an exponent of the 'new natural law' school, which presented a fresh understanding of St Thomas Aquinas, politics and moral questions. On all these points, more traditionally-minded Thomists have strongly criticised Finnis and his associates."*See* Dan Hitchens, *The incoherent campaign against John Finnis*, CATH. HERALD (Jan. 17, 2019), https://catholicherald.co.uk/magazine/john-finniss-critics-are-loud-but-incoherent. *See also,* Steven A. Long, *Fundamental Errors of the New Natural Law Theory* 13 NAT'L CATH. BIOETHICS Q. 105, 105-32 (2013).

[12] *PPMT, supra* note 3, at 100. ("Perhaps the most important presupposition from philosophical anthropology is that human persons can make free choices. Whether they assented to this proposition or not, most who have contributed to ethical theory, whether in ancient or more recent times, have denied, overlooked, or, at best, not fully appreciated the role of free choice in morality.").

[13] *Id.* at 102.

[14] *Id*

sake) refers then to the rational ground for choice of an action marked out as a means to one's purpose. Elaborating all this, Finnis explains:

> That for the sake of which one acts is one's PURPOSE in acting; one hopes that this purpose will be realized through and/or in one's action. A purpose in this sense is a state of affairs–something concrete, which can exist or not exist in reality. For example, if one enters a contest, one's purpose is to win a prize; if one does not feel well and goes to the doctor, one's purpose is to get better.
>
> People do not always have a purpose distinct from their action; sometimes doing the action is itself their purpose in acting. That is very often the case when one plays a game or reads a novel.[15]

In further expanding on this conception of 'purpose', Finnis proposes that an object, action, or possible state of affairs can be envisioned by a rational agent as a purpose only if it can be understood rationally to participate in or instantiate some general good grasped and desired by the acting person.[16] As an example, Finnis notes that a person's reason for playing a game or reading a book has as its purpose some good, but the pursuit of that good is not exhausted by those particular actions. "Thus, playing and knowing always have their basic appeal, insofar as they are good, but like other goods they can be realized only in limited ways through particular actions".[17]

Drawing out his account of the general types of goods that underlie all human choices, Finnis develops his theory of basic goods. This theory, which he avowedly bases closely on the writings of Thomas Aquinas,[18] proposes that there are some rationally grasped goods to which all human persons are inclined by virtue of the very experience of the inclinations of shared human nature.[19] Since, as noted, Finnis' position has roots

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[15] *Id.* at 102-103.

[16] We distinguish between purposes and that about a purpose which makes one rationally interested in acting for it. We call the latter a GOOD. For example, among goods are winning and being healthy, considered insofar as they can be realized-protected, promoted, and so on-not only by one action but by many possible actions. In entering a contest or going to the doctor, one's purpose of winning or regaining health only PARTICIPATES in the goods of winning and health, in which one is interested more generally. To explicate this participation relationship between a purpose and a good, we say: Achieving the purpose will INSTANTIATE the good which is the reason one is interested in acting for that purpose.

Id. at 103.

[17] *Id.*

[18] Finnis at times relies quite closely on the texts of Thomas Aquinas. For example, with respect to his book NATURAL LAW AND NATURAL RIGHTS, *NLNR see supra* note 1, he states: "To understand this book aright, one should note that whenever Thomas Aquinas is quoted or cited, the author is to be taken (except in a few cases where he expresses a reservation) to mean to adopt Aquinas' view." *PPMT, supra* note 3, at 150.

[19] This conception of "shared" nature will be taken up in Section II.A.2.a below, *see* footnotes 85-90 and accompanying text.

deep in the views of Aquinas, it will be useful to review Aquinas' summary of the foundations of natural law[20] as found in his *Summa Theologiae.*[21]

1.1. THOMAS AQUINAS AND THE PRINCIPLES OF NATURAL LAW

Aquinas begins his discussion of natural law by commenting on the most general characteristic of practical reason i.e., reason directed by persons' thinking about what they are going to do.[22] He observes hat practical thinking about action is rooted in orientation of actions towards ends (i.e., goals) under the aspect of good: "[G]ood is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good."[23]

Immediately following this point, Aquinas emphasizes its significance by asserting this insight into the experience of practical reasoning as being directed to 'good' is self-evidently embodied as the very first principle of all exercise of practical reason. "Consequently the first principle of practical reason is one founded on the notion of good, viz. that 'good is that which all things seek after.' Hence, this is the first precept . . . good is to be done and pursued, and evil is to be avoided."[24]

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[20] Thomas Aquinas, Summa Theologiae II-II q. 94, art. 2 corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73) deals with "The Natural Law." "*De lege naturali*" This is Aquinas most elaborate treatment of natural law though references to "the natural law" (*'lex naturae')* occur throughout his writings.

[21] For ease of access, this article will—unless otherwise noted—cite the popular English translation of the *Summa Theologica* or "Theological Summary" (in more contemporary academic writings it is usually referred to as the *Summa Theologiae* or Summary of Theology") of the Benziger edition, published originally in 1911 revised in 1920. Latin parallel citations are taken from the online edition ound at http://www.logicmuseum.com/authors/aquinas/Summa-index.htm.

[22] One philosopher has described the difference between theoretical and practical reason in the following way:

> How are we to understand this opposition between the theoretical and the practical? One possibility is to understand theoretical reflection as reasoning about questions of explanation and prediction. . . . Theoretical reflection is concerned with matters of fact and their explanation. . . . Theoretical reasoning, . . . finds paradigmatic expression in the natural and social sciences. Practical reason, by contrast . . . typically asks, of a set of alternatives for action none of which has yet been performed, what one ought to do, or what it would be best to do. . . In practical reasoning agents attempt to assess and weigh their reasons for action, the considerations that speak for and against alternative courses of action that are open to them. Moreover they do this from a distinctively first-personal point of view.

Wallace, R. Jay, Practical Reason, in The Stanford Encyclopaedia of Philosophy (Edward N. Zalta ed., Spring 2018), https://plato.stanford.edu/entries/practical-reason/#PraTheRea.

[23] "[B]onum est primum quod cadit in apprehensione practicae rationis, quae ordinatur ad opus, omne enim agens agit propter finem, qui habet rationem boni." Thomas Aquinas, Summa Theologiae *I-II*, q. 94, art. 2 (Fathers of the English Dominican Province trans., Benziger 1911)(1265-73). Finnis expresses a similar point, "To understand something possible or actual as good is to understand it has having or giving point, as a 'that for the sake of which . . . ,' as end."1 John Finnis, Reason in Action: Collected Essays, 161 (2011) [hereinafter CE Vol. I].

[24] [*Et ideo primum principium in ratione practica est quod fundatur supra rationem boni, quae est, bonum est quod omnia appetunt. Hoc est ergo primum praeceptum . . . , quod bonum est faciendum et prosequendum, et malum vitandum.*] Thomas Aquinas, Summa Theologiae *II-II*, q.94., art. 2 corp (1265-73).(Author's translations).

Finally, Aquinas draws his conclusion proposing that the natural law is constituted by the operation of this first principle of practical reasoning in light of human persons' naturally grasping objects of the natural inclinations as goods:

> Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, (*prosequenda*) and their contraries as evil, and objects to avoid (*vitanda*). Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law.[25]

Moreover, Aquinas immediately follows this with a concrete discussion of some of these naturally grasped goods:

> Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, "which nature has taught to all animals" [*Pandect. Just. I, tit. i], such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.[26]

Thus, —while full explication of this passage exceeds the scope of this article—for Aquinas and Finnis the natural law arises from our basic human inclinations to preserve being [life]; to form families and live in human communities, and the inclination to acquire knowledge, including knowledge of the ultimate causes [God]. Finnis provides the following exegesis

[25] [*Quia vero bonum habet rationem finis, malum autem rationem contrarii, inde est quod omnia illa ad quae homo habet naturalem inclinationem, ratio naturaliter apprehendit ut bona, et per consequens ut opere prosequenda, et contraria eorum ut mala et vitanda. Secundum igitur ordinem inclinationum naturalium, est ordo praeceptorum legis naturae.*] *Id.*

[26] *Id.*

of Aquinas' passage, with particular emphasis on the action-guiding role these principles play in practical reasoning:

> Thomas Aquinas, in his formal discussion of the basic forms of good and self-evident primary principles of practical reasoning . . . . arranges the precepts in a threefold order: (i) human life is a good to be sustained, and what threatens it is to be prevented; (ii) the coupling of man and woman, and the education their young, etc., is to be favored, and what opposes it is to be avoided; (iii) knowledge (especially the truth about God), sociable life and practical reasonableness are good, and ignorance, offence to others, and practical unreasonableness are to be avoided.[27]

1.2. FINNIS' BASIC GOODS

The preceding section has elucidated in a concise, general way the salient features of Aquinas' view upon which Finnis grounds his own position; viz., that the principles of natural law are founded upon the experience of natural inclinations toward their objects, insofar as these are grasped by practical reason as perfective (as an "end")[28] and rationally grasped as goods to-be-pursued.[29] Commenting on Aquinas' view laid out in

[27] NLNR (1980), *supra* note 1, at 94.

[28] "The essence of goodness consists in this, that it is in some way desirable. Hence the Philosopher says (Ethic. i): 'Goodness is what all desire.' Now it is clear that a thing is desirable only in so far as it is perfect; for all desire their own perfection." [*Ratio enim boni in hoc consistit, quod aliquid sit appetibile, unde philosophus, in I Ethic., dicit quod bonum est quod omnia appetunt. Manifestum est autem quod unumquodque est appetibile secundum quod est perfectum, nam omnia appetunt suam perfectionem.*] Thomas Aquinas, Summa Theologiae I, q. 5, art. 1. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

[29] > [T]he principle of voluntary movements must be something naturally willed. Now this is good in general, to which the will tends naturally, as does each power to its object, and again . . . speaking generally, it is all those things which belong to the willer according to his nature. For it is not only things pertaining to the will that the will desires, but also that which pertains to each power, and to the entire man. Wherefore man wills naturally not only the object of the will, but also other things that are appropriate to the other powers; such as the knowledge of truth, which befits the intellect; and to be and to live and other like things which regard the natural well-being; all of which are included in the object of the will, as so many particular goods.
>
> [*Similiter etiam principium motuum voluntariorum oportet esse aliquid naturaliter volitum. Hoc autem est bonum in communi, in quod voluntas naturaliter tendit, sicut etiam quaelibet potentia in suum obiectum, et . . universaliter omnia illa quae conveniunt volenti secundum suam naturam. Non enim per voluntatem appetimus solum ea quae pertinent ad potentiam voluntatis; sed etiam ea quae pertinent ad singulas potentias, et ad totum hominem. Unde naturaliter homo vult non solum obiectum voluntatis, sed etiam alia quae conveniunt aliis potentiis, ut cognitionem veri, quae convenit intellectui; et esse et vivere et alia huiusmodi, quae respiciunt consistentiam naturalem; quae omnia comprehenduntur sub obiecto voluntatis, sicut quadam particularia bona.*] Thomas Aquinas, Summa Theologiae I-II, q. 10, art. 1. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73). Aquinas, in his Commentary on Aristotle's *De Anima,* writes:
>
> > For that of which there is a desire, to wit, the object of desire, is the first principle of practical reason. For that which is desired first, is the end from which the

the critical passage cited above, Finnis writes: "The goods identified in these principles are naturally wanted; they are the appropriate objects of the inclinations which pertain to each of the human capacities and a human being's natural integrity."[30] Elsewhere, Finnis states:

> Human persons have natural dispositions toward what will fulfill their potentialities. Some of these dispositions are natural appetites—that is, dispositions of a person's various parts and powers toward their own actualizations. . . . These natural dispositions, insofar as they are experienced, provide data for the insights in which one knows the first, self-evident principles of practical knowledge corresponding to the substantive goods.[31]

Thus Finnis' model of practical reason, following Aquinas' lead, is rooted in " first principles", i.e., starting points internal to practical reasoning itself. These are engendered not discursively but simply by a rational appreciation of the variety of human goods grasped as to-be-pursued by practical reason itself. Thus, they are natural, and intelligent appreciations of the directiveness of human inclinations to particular goods.[32] It is essential to recall, however, that Finnis, throughout his analysis, maintains that these 'basic goods' rasped by practical reason as *prima* principia, are not derived or inferred from empirical facts. Rather they are self-evidently known insofar as each

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> consideration of practical reason commences. Whenever we want to deliberate about things to be done, we first propose an end, and then proceed by mode of inquiry to the things which are means to that end; thus always proceeding from the later to the prior, until finally arriving at that which is to be done immediately. And thus [Aristotle] adds, the last thing attained by practical reason is the beginning of action. (Author's trans.)

[*Sed illud cuius est appetitus, scilicet appetibile, est principium intellectus practici. Nam illud, quod est primo appetibile, est finis a quo incipit consideratio intellectus practici. Cum enim volumus aliquid deliberare de agendis, primo supponimus finem, deinde procedimus per ordinem ad inquirendum illa, quae sunt propter finem; sic procedentes semper a posteriori ad prius, usque ad illud, quod nobis imminet primo agendum. Et hoc est quod subdit quod ultimum de actione intellectus practici, est principium actionis.*] Thomas Aquinas, De anima lib. 3 l, 15 , § 821 (Editio Leonina 1953) (n.d.).

[30] John Finnis, Practical Reasoning, Human Goods and the End of Man (Jan. 29, 1985), https://www.academia.edu/9325262.

[31] *PPMT*, *supra* note 3, at 108.

[32] As Patrick Lee, another collaborator in the NNL project, *see* Lee, *supra* at note 10, has summarized this crucial point:

> What Aquinas called the precepts of the natural law, or the specific principles of practical reason, issue from practical insights into experience of conditions or activities. For from the experience of these conditions or activities one comes to understand that, for example, health, knowledge, or harmonious relationships with other people, are of themselves fulfilling and thus worthy of being pursued. An object's being genuinely fulfilling is the intelligibility under which one sees it as worthy of pursuit. According to Aquinas, and Finnis developing Aquinas, these insights are made *into one's natural inclinations*. The natural inclinations *are data for . . . practical insight* (emphasis added).

Patrick Lee, *Comment on John Finnis's Foundations of Practical Reason Revisited*, 50 Am. J. Juris 133, 134 (2005).

person's practical reason grasps them directly in and through human experience of these goods as to be pursued. As Finnis aptly captures Aquinas' point, ". . . [P]ractical reasoning begins not by understanding this nature from the outside, . . . but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations."[33]

It follows from this, that each individual practical principle relating to a good of the natural inclinations should not be considered a limitation on the operation of practical reason. Rather, each good serves as a root for the very possibility of practical reasoning itself. Each can be instantiated (rather than 'applied') in indefinitely many, more specific, practical principles and premises. Thus, rather than restrict, these are the very principles which open horizons for all deliberated human activity.[34]

In *Natural Law and Natural Rights*, Finnis proposes his own list of basic goods and provides substantial commentary. While it is not possible here to do justice to Finnis' elaboration of the meaning of each basic good, the following table lists with some of his main reflections summarized on each.[35]

Basic Goods	Normative Description
A. Life	Life is to be preserved, the drive for self-preservation. The term life here signifies every aspect of the vitality . . . which put a human being in good shape for self-determination. [L]ife here includes bodily (including cerebral) health and freedom from the pain that betokens organic malfunctioning or injury.
B. Knowledge	Knowledge is to be pursued for its own sake and mistakes and mis-information are to be avoided. Universally the practical principle that truth is a good worth attaining . . . is applied by human beings to whatever form of knowledge-gathering they choose to interest themselves in or commit themselves to.

[33] NLNR (1980), *supra* note 1, at 34.
[34] *Id.* at 63.
[35] This table is developed from the descriptions these basic goods proposed by Finnis in NLNR (1980), *supra* note 1, at 86-90, and by Finnis with Grisez and Boyle in *PPMT*, *supra* note 3, at 106-107. In describing each basic good, the scope of this article permits room for only a terse summary based on remarks found in these these explications.

Basic Goods	Normative Description
C. Play	Creatively transform the world by work or play. Engaging in performances which have no point beyond the performance itself, enjoyed for its own sake. Play can enter into any human activity.
D. Aesthetic experience	Aesthetic experience, unlike play, need not involve an action of one's own. Sometimes what is sought after and valued for its own sake may simply be the beautiful form 'outside' of oneself and the 'inner' experience of appreciation of its beauty. But often enough the valued experience is found in the creation and/or active appreciation of some work of significant and satisfying form.
E. Socialability (friendship)	Seek peace and harmony in human relationships. This good is found in participating in communities on a large scale as well as the flowering of intimate relationships of full friendship. It is not the instrumental seeking of one's own good, but involves acting for the sake of one's friend's purposes, one's friend's well-being.
F. Practical reasonableness	Seek to bring an intelligent and reasonable order into one's own actions, habits, and practical attitudes. This value is complex, involving freedom, reason, integrity and authenticity.
G. Religion	Strive to think reasonably and (where possible) correctly about questions concerning the origins of cosmic order, human freedom, and reason. Even if the answers are agnostic or negative.

Table 1: Basic goods

As Finnis reiterates in closing his main chapter on basic goods,[36] their function—rationally grasped as "to-be-pursued"— constitute the very foundation through which the myriad possibilities for human choice become possible:

> So it is that the practical principles which enjoin one to participate in those basic forms of good, through the practically intelligent decisions and free

[36] NLNR (1980), *supra* note 1, at 81-99.

> actions that constitute one the person one is and is to be, have been called in the Western philosophical tradition the principles of natural law because they lay down for us the outlines of everything one could reasonably want to do, to have, and to be.[37]

1.3. PRIOR ERRORS ABOUT NATURAL LAW METHOD: THE PURPORTED DERIVATION OF NATURAL LAW FROM HUMAN NATURE AND THE 'NATURALISTIC FALLACY'

The preceding sections of this article have offered a synopsis of Finnis' account of practical reason, culminating, as seen above, in his articulation of seven basic goods. Yet to investigate, however, is the pivotal issue of how Finnis understands the role and interplay between these goods in relation to the possibility of human choice, and especially moral choice.[38] Before moving onto that topic, however, it is opportune to consider the manner in which Finnis argues his theory resolves two related problems that have arisen in prior efforts to develop a coherent natural law theory. Each of these two problems relates to similar but differing questions regarding the possibility of 'deriving' by a type of syllogistic reasoning the principles of natural law from purely 'metaphysical' description of human nature.

1.3.1. METAPHYSICAL OR ONTOLOGICAL KNOWLEDGE OF HUMAN NATURE AS THE SOURCE OF KNOWLEDGE OF THE NATURAL LAW.

The first fundamental error Finnis believes his theory responds to, and resolves, is the erroneous attempt by some natural law philosophers to derive the principles of natural law from a prior metaphysical description of human nature and its faculties. Finnis proffers the following passage of a would-be natural law philosopher as a paradigm example of this ostensibly flawed approach:

> [T]he theory of natural law which is the basis of St. Thomas' ethics turns on the idea that human nature is constituted by a unique set of properties which can be understood and summed up in a definition. . . .
> . . . In outlining man's powers and functions, as he saw them, Aquinas was outlining the *nature of man,* his essential features which make a man what he

[37] *Id.* at 97.
[38] *See infra* notes 76-100 and accompanying text.

> is, namely a rational, animal. And in thus sketching the nature of man he is sketching what is to be the necessary foundation for his moral philosophy.[39]

According to this mode of analysis, the task of natural law philosophy would simply be to identify the powers and faculties of human nature and then suggest the orientation of those faculties to particular sorts of objects.[40] This would eo ipso establish an "ought".[41] For Finnis, however, this approach turns the proper order of inquiry on its head. Again following Aristotle and Aquinas, Finnis proposes that natures themselves can only be known through *prior understanding* of the actions and operations that flow from those natures, understood as the principle of rest and motion in things.[42]

> Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason . . . , are . . . indemonstrable. They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about 'the function of a human being,

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[39] Daniel J. O'Connor, Aquinas and Natural Law 15-6 (1967); cited in NLNR (1980), *supra* note 1, at 34.

[40] *See*

> [I]f we were to conceive of the nature of man on such a model [geometrically], One might say that it was contrary to the nature of a human being that he should not be characterized by upright posture, . . . or that certain human organs should be put to a use other than their natural use. And proceeding along these lines, one might be tempted to argue that, it being contrary to the nature for a human being, say, to walk on all fours, it is therefore wrong for a human being to do so.

Henry Veatch, *Natural law and the "Is"-"Ought" Question: Queries to Finnis and Grisez, in* 1 Natural Law 302 (John Finnis ed., 1991).

[41] As one philosopher acknowledges:

> We . . . concede to Finnis and Grisez . . . that . . .many so-called natural law moralists, particularly in recent years, have, either consciously or unconsciously, fallen into the very bad habit of uncritically construing human nature simply on . . . [a] false geometrical model; and to the extent to which these natural law thinkers did lapse into bad habits of construing human nature in this unfortunate way, then their inferences from "is" to "ought," or from the natural to the normative, would need to be pronounced to be fallacious.

Id. at 304.

[42] As Aquinas writes:

> I answer that, a power as such is directed to an act. Wherefore we seek to know the nature of a power from the act to which it is directed, and consequently the nature of a power is diversified, as the nature of the act is diversified. Now the nature of an act is diversified according to the various natures of the objects.

[*Respondeo dicendum quod potentia, secundum illud quod est potentia, ordinatur ad actum. Unde oportet rationem potentiae accipi ex actu ad quem ordinatur, et per consequens oportet quod ratio potentiae diversificetur, ut diversificatur ratio actus. Ratio autem actus diversificatur secundum diversam rationem obiecti.*] Thomas Aquinas, Summa Theologiae I, q.77,art,3, corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73). Finnis following Aquinas on this point states: "[H]uman nature is known through its capacities, and they are known through their acts, and these are known through their object, and those objects are, for the most part, precisely the basic good identified in the *prima principia* of practical understanding." CE Vol. I, *supra* note 23 at 166.

> nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).[43]

For Finnis then, asserting that the moral or practical principles of natural law can merely be "read off" of human nature or its faculties is a petitio principii and ultimately nonsensical[44]. Abstract knowledge of human nature—rather than being prior to knowledge of the prima principia of natural law—is itself dependent upon that prior practical knowledge of the prima principia.

> One understands human nature by understanding human capacities, those capacities by understanding human acts, and those acts by understanding their objects. But the objects of humanly chosen acts are precisely the basic purposes . . . , that is, goods . . . with which Aquinas is concerned . . . . So the epistemic source of the first practical principles is not . . . a prior, theoretical knowledge of human nature . . . . Rather, the epistemic relationship is the reverse; any deep understanding of human nature, that is, of the capacities which will be fulfilled by action which participates in and realizes those goods, those perfections, is an understanding which has amongst its sources our primary, undemonstrated, but genuine practical knowledge of those goods and purposes.[45]

Thus, for Finnis, no complete understanding of human nature can be reached until *after* one has grasped the fundamental goods of practical reason that are the dynamic goods or ends of the human inclinations. This is because, for Finnis, knowledge of the first principles of practical reason is not innate but quasi-spontaneously known through bare reflection upon one's experience of those very inclinations and the goods toward which

[43] NLNR (1980), *supra* note 1, at 33-34. Finnis elaborates on this at times in other writings: "[T]he insights whose content is the self-evident principles of practical knowledge are not intuitions—'insights' without data. Rather they are insights whose data are, in the first place natural and sensory appetites and emotional responses." CE Vol. I, *supra* note 23, at 205; Elsewhere, Finnis writes:

> The first principles of practical reason are 'indemonstrable' and 'self-evident.' This does not mean that they are data-less intuitions, or 'felt certainties', or that one cannot be mistaken about them, or that they cannot be defended by rational considerations. On the contrary Aquinas firmly holds that they are understood by what he calls 'induction' of principles. by which he means insight into the date of experience (data preserved, after the direct experience, in the memory). "To reach a knowledge of them [first principles, whether of speculative or practical reason] we need sensory experience and memory."

NLNR (1980), *supra* note 1, at 87-88 (citations omitted).

[44] NLNR (1980), *supra* note 1, at 43 ("A late [i.e., historically] . . . conception of natural law is the argument . . . that natural functions are never to be frustrated or that human faculties are never to be diverted ("perverted') from their natural ends. But, as a general premise, in any form strong enough to yield the moral conclusions it has been used to defend, this argument is ridiculous").

[45] CE Vol. I, *supra* note 23, at 179.

they direct. Prior to the development of knowledge of these basic goods, which cannot be inferred or derived from metaphysical reflection, no accurate metaphysical knowledge of human nature can be synthesized.[46]

1.3.2. NATURAL LAW AND THE 'IS/OUGHT' PROBLEM

The second error asserted by Finnis to be found in some natural law theories—closely tied to but distinct from that just discussed above—is the accusation that natural law theories fall subject to the "is/ought problem."[47] In short, even if abstract metaphysical conceptions of human nature could provide a basis for inferring principles of natural law, they would still have the problem of impermissibly attempting to extract an 'ought' from an 'is.' This problem, sometimes referred to as the 'naturalistic fallacy,' has a long and complex history.[48] The crux of it is a logical category error that occurs when one erroneously draws a conclusion including an 'ought' not found in any of the premises.[49] Finnis describes the error as follows:

[46] NLNR (1980), *supra* note 1, at 52 ("[W]hat needs to be shown is that the [teleological] conception of human good entertained by these theorists is *dependent* . . . . There is much to be said for the view that the order of dependence was precisely the opposite—that the teleological conception of nature was made plausible, indeed conceivable, by analogy with the *intro*spectively luminous, self-evident structure of human well-being, practical reasoning, and human purposive action").

[47] *See* Anthony J. Lisska, *Bentham and Recent Work in Natural Law: Toward Reconstructing an Unstilted Theory*, 51 Current Legal Probs. 299, 302 (1998).

[48] Hume, is perhaps one of the first philosophers to explicitly raise the issue: Much debate has risen in relation to the meaning of Hume's *locus classicus* found in Book III of his *Treatise of Human Nature* 1739-40:

> In every system of morality, which I have hitherto met with, . . . the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'ed to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with *an ought*, or *an ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely difference from it . . . . [A]nd I am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.

David Hume, A Treatise of Human Nature 521 (Mossner ed., Penguin 1969) (1739). For a short history of the influence of Hume's problem, *see* Lisska, *supra* note 47, pp. 302-303.

[49] As an example of a this logical error consider the following hypothetical syllogism *assuming* the truth of the following two premises: Factual Major Premise: The Second Amendment guarantees all U.S. Citizens the right to own a weapon. Factual Minor Premise: Daniel is a U.S. Citizen. Conclusion: Daniel ought to (or should) own a weapon. Even if both the major and minor premises are true facts, the conclusion that Daniel, or any, American "*ought to" or "should" own a weapon* does not follow and is a category error. The proper conclusion would be simply: "The Second Amendment guarantees Daniel the right to own a weapon." The erroneous conclusion seeks to import a term into the conclusion not entailed by the premises.

> [M]oral ought cannot be derived from the is of theoretical truth—for example, of metaphysical and/or philosophical anthropology . . . [F]rom a set of theoretical premises, one cannot logically derive any practical truth, since sound reasoning does not introduce what is not in the premises. And the relationship of principles to conclusions is a logical one among propositions.[50]

Finnis' retort to such a charge if brought against his natural law theory is categorically to deny what he terms the "common erroneous view". . . natural-law theory . . . *entails* . . . propositions about man's duties and obligations . . . inferred from propositions about his nature" (emphasis added).[51] Relying again on Aquinas' account of natural inclinations and the character of the prima principia as described in the preceding section, Finnis explains again that the prima principia of natural law are not inferences drawn from abstract metaphysical theories about human nature or a list of human faculties and powers.[52]

Rather, the principles of the natural law are quasi-spontaneous manifestations of the first principle of practical reason operating on, one might say synthesizing, the natural inclinations. Thus, practical reason intelligently begets a principle, i.e., a norm, which incorporates the directiveness which practical reason "sees" is proper to each inclination as to a basic good.[53] As explained above, Aquinas understands the "first principle of practical reason," operating in all its phases as directing that good is "to be done" and evil "to be avoided." Thus, each individual precept of the natural law generated by practical reason includes its own general directiveness of '*faciendum et prosequendum'*. As Finnis observes, following Aquinas, the "ought" of the natural precepts is found in the fact that they direct human action with respect to what "is to be done and pursued."

Hence, Finnis argues that his account of the principles of natural law does not fall subject to the 'is-ought' critique. For the principles of natural law are not derivations from metaphysical or descriptive accounts (i.e., factual, static aspects) of human nature. Rather, the prima principia in themselves provide 'oughts', independent of metaphysical propositions, inferences, etc. because each practical principle:

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[50] *PPMT*, *supra* note 3, at 102.

[51] NLNR (1980), *supra* note 1, at 33.

[52] *See supra* note 42.

[53] [P]ractical reasoning . . . begins . . . by experiencing one's nature . . . , from the inside, in the form of one's inclinations. . . . [B]y a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).
NLNR (1980), *supra* note 1, at 34.

> [I]s an ought that directs me to the good I am to (should, even if in fact I don't) choose and try to achieve.—an 'am to' which is not predictive but normative, not future indicative but gerundive, action-guiding by making sense of action by making it intelligible as the means to an intelligible purpose. And the purpose or objective is intelligible precisely as beneficial, as the attaining, instantiating, actualizing of an intelligible good. . . . [o]ughts that are truly directive or normative . . . . [54]

It is critical, however, at this juncture, to note that Finnis denies that the ought generated through each of the prima principia, directly constitutes a moral 'ought': "This ought is intelligible in a sense which is not moral."[55] As will be explored below,[56] Finnis suggestively adds without further elaboration, that "the 'ought' of the first principles is incipiently or '*virtually*' but not yet actually, moral in its directiveness or normativity" (emphasis added).[57]

Having laid out the general foundations of Finnis' theory of basic goods and the principles of practical reason, it remains to investigate how these various first principles become *actually* effective in constituting the human person as moral; how the various principles synthesize into a coherent system of personal responsibility for acts of moral good or evil.

2. HUMAN CHOICE WITHIN THE MATRIX OF BASIC GOODS

It is not evident, from the preceding considerations, how a person is to guide the exercise of practical reason in light of the multiplicity of basic goods and the manifold purposes that can be discovered in each of them.[58] Further, it is unclear, insofar as Finnis maintains that each basic good is experienced as some sort of an "ought" to which a person is inclined by a principle of practical reason,[59] how is one properly to choose between these basic goods? The answer to this question lies in Finnis' account of choice, and in particular moral choice. In other words, having traced his account of the basic goods, the inquiry

[54] CE Vol. I, *supra* note 42, at 3-4."This *ought* is intelligible in a sense which is not *moral . . .*".
[55] John Finnis, Aquinas: Moral, Political and Legal Theory 86 (1998) [hereinafter Aquinas].
[56] *See infra* note 79 and accompanying and following text.
[57] Aquinas, *supra* note 55, at 87.
[58] *See infra* note 76 and accompanying text.
[59] *See supra* note 54 and accompanying text.

comes back to the point of departure for Finnis' entire theory: the question of free choice and its possibility.[60]

2.1. CONDITIONS REQUIRED FOR THE POSSIBILITY OF FREE CHOICE

The first point Finnis makes with respect to the possibility of choice is to step back from discussion of the individual basic goods and propose that all of them, in themselves, are equally basic. They are irreducible to one-another. "[E]ach is self-evidently a form of good. . . . [N]one can be analytically reduced to being merely an aspect of any of the others, or . . . to being merely instrumental in the pursuit of any of the others."[61] At times Finnis expresses this line of thought simply by referring to basic goods as being "incommensurable" with one another.[62] Each offers its own distinct promise of fulfillment for human persons not offered by pursuit of any other basic good.[63] The upshot here is that no intrinsic hierarchy exists among basic goods; each good is capable, when focused on alone, and depending on circumstances facing the person, of seeming more important than all the others.[64] While one might ask whether they are or not all reducible to one quality, viz. 'desirability' or 'goodness'? Finnis responds that while it is true that they are all "desired for some reason,"[65] the basis for each good's desirability distinguishes it from others. "They differ in desirability because there is no single reason underlying every purpose for the sake of which one acts. The basic goods of diverse categories are called "good" only by analogy."[66]

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[60] *See supra* note 12 and accompanying text.

[61] NLNR (1980), *supra* note 1, at 92.

[62] Since [the basic goods] are primary principles, the goods of the diverse categories are incommensurable with one another. . . . For if they were commensurable . . . they would have to be . . . reducible to something prior by which they could be measured. . . . If they were reducible to something prior, they would not be primary principles.

PPMT, supra note 3, at 110.

[63] Aquinas, *supra* note 55, at 91."[T]he goods to which practical reason's first principles direct us are not abstract, 'ideal' or 'quasi –Platonic forms'. They are perfections, aspects of the *fulfillment,* flourishing, completion, full-being, of the flesh-and-blood human beings . . . in whom they can be instantiated." Aquinas, *supra* note 55, at 91. Elsewhere he writes, "Any creature which acts is . . . not fully given at the outset; it has possibilities which can be realized only through its acting. The basic goods are basic reasons for acting because they are aspects of the fulfillment of persons, whose action is rationally motivated by these reasons." *PPMT, supra* note 3, at 114.

[64] E.g., "If one is drowning, or, again, if one is thinking about one's child who died soon after birth, one is inclined to shift one's focus to the value of life simply as such . . . . [L]ife will not be regarded as a mere pre-condition of anything else; rather, play and knowledge. and religion will seem secondary, even rather optional extras". John Finnis, Natural Law and Natural Rights 92-93 (2011) [hereinafter NLNR (2011)].

[65] *PPMT, supra* note 3, at 114.

[66] *Id.*

It is precisely this incommensurability between basic goods––the unique desirability of each– which creates the possibility of free choice. If basic goods were commensurable, i.e., reducible to some univocal standard or measure (*x-ness)* by which instantiations of other basic goods could be evaluated and compared within and across categories, no person could choose freely. If *x-ness* were the only criterion that counted in guiding deliberation for choice,[67] on what basis could a person choose one option containing less of '*x*' when a second option contained all the '*x*' of the first option and more *x*?

> [W]hen technical reasonings identify one option as uniquely correct, that is, as dominant, they do so by demonstrating that it offers all that the other options offer and some more, it is unqualifiedly better. The other options then lack rational appeal. Such deliberation ends not in choice . . . but rather in insight, 'decision' (not choice, but rationally compelled judgment), and action.[68]

'Free choice', however, as understood by Finnis to be required for moral responsibility, which he calls free choice in the "strong" sense, demands incommensurable alternatives. For in such cases, selection between one or other of the options can only be settled by that very 'free choice' itself:

> [W]e refer to free choices in the strong sense– where one really does have reasons for alternative choices but these reasons are not determinative (i.e, are necessary but not sufficient conditions for making one or the other choice), so that no factor but the choosing itself settles which alternative is chosen. [69]

Thus, eliminating not only physical material determinism of thoughts and judgments as an adequate basis for *real* choice, Finnis also rejects any conception of psychological or intellectual determinism as a sufficient basis for explaining choice that is truly free. Ultimately there can be no sufficient reason for a choice, if it is free, other than the choice itself. No judgments of the mind, whatever their origin, prior to one's actual choice itself can definitively settle a choice that is authentically free. Rather the final selection—resolving deliberation between two irreducible options—is found only in the

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[67] [F]or consequentialist [i.e., commensurable] assessments . . . . the alternatives must be compared in terms of some conception of good common to them, in virtue of which, . . . one alternative can be judged better (or less bad) than the other(s). And if *that* can be done the greater good will contain all the goodness in the lesser, and some more . . . .

NUCLEAR DETERRENCE, *supra* note 3, at 256.

[68] CE Vol. I, *supra* note 23, at 225.

[69] *See, e.g.,* NUCLEAR DETERRENCE, *supra* note 3, at 256; "Choice . . . is a matter of preferring *one* amongst alternative proposals *both* or *all* of which win one's assent as promising benefit and so remain interesting." AQUINAS, *supra* note 55, at 66.

choice itself, a final, coextensive act of both will and judgment of reason. As Finnis explains this concept in greater detail:

> We have to choose when, however long we deliberate, we do not conclude that one proposal is 'dominant, i.e, offers all the benefits of alternatives plus more benefits. In the absence of such a conclusion, our deliberating (reasoning) is brought to an end only by will, *by the act of choosing*. . . . In choosing, one not only intends the intelligible benefits . . . one is adopting . . . . One also . . . is bringing one's rational deliberations to a close in a final judgement, a judgement of preference which can be called *iudicium electionis* the judgement 'of', i.,e, in, the very choosing (emphasis added).[70]

Finally, it is appropriate to note in this context, and by way of introduction to the next section, that Finnis' strong notion of choice as a free, original, and creative act of a human agent itself constitutes the ground of personal identity and character. Free choices—not *determined* but made possible by incommensurable alternatives grasped in deliberation by practical reason—lay the foundation for self-constituting personal responsibility. "[T]his creativity is also self-creative, self-determining, more or less self-constitutive. One more or less transforms oneself by making the choice, and by carrying it out . . . . One's choice in fact lasts in, and as part of, one's character."[71] In short, by making real choices, especially choices of moral significance about what to do as discussed in the section below, a person makes himself or herself the moral type of person they are.

2.2. MORAL CHOICE

As Finnis points out: "We have in the abstract no reason to leave any of the basic goods out of account. But we do have good reason to choose commitments, projects, and actions, knowing that choice effectively rules out many alternative reasonable or possible commitment(s), project(s), and actions(s)."[72] He further submits that the ability to choose between commitment to one basic good rather than another "is the primary respect in which we can call ourselves both free and responsible."[73]

Thus, as explained above,[74] each basic good is incommensurable with other basic goods—and, even particular instantiations of the same basic good can be

[70] Aquinas, *supra* note 55, at 67. For Further elucidation of this critical insight *see also* Finnis collaborator Joseph Boyle, *Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good*, 47 Am. J. Juris 123, 139-40 (2002).
[71] CE Vol. I, *supra* note 42, at 239.
[72] NLNR (2011), *supra* note 64, at 100.
[73] *Id.*
[74] *See supra* Part II.A.1., note 59 and accompanying text.

incommensurable with one another.[75] Selection between alternatives can only be resolved by choice that is free in the strong sense. But still unanswered is the question of what is to guide free-choice between these incommensurables? As Finnis poses the question anticipating its moral significance: "By disclosing a horizon of attractive possibilities for us, our grasp of the basic values thus creates, not answers the problem of intelligent decision: What *is to be* done? What *may be* left undone: What *is not to be* done?" (emphasis added).[76]

2.2.1. THE FIRST PRINCIPLE OF MORALS: THE INTEGRAL DIRECTIVENESS OF PRACTICAL REASON

Having examined Finnis' conceptions of incommensurability, choice, and responsibility, it is now possible to turn to his particular understanding of moral choice. As alluded to above,[77] but not developed, Finnis proposes that 'moral obligation' has its foundations in, but cannot be identified with, the "ought" proposed by each individual principle of practical reason, as constituted by practical reason's grasp of the basic goods. Developing this thought in more detail, and concluding with a comment noted earlier,[78] Finnis states:

> The moral sense of 'ought' is reached . . . when the absolutely first practical principle is followed through, in its relationship to all the other first principles, with a reasonableness which is unrestricted and undeflected by any subrational factor such as distracting emotion. In that sense, the 'ought' of the first principles is incipiently or 'virtually' but not yet actually, moral in its directiveness or normativity.[79]

The remaining portion of this section on moral choice will attempt to clarify Finnis' thought in this challenging paragraph.

This quoted passage proposes that moral 'ought' is achieved only when the first principle of practical reasoning—(*bonum faciendum et prosequendum et malum*

[75] There is another ground for the incommensurability of options, namely the fact that instances of the same good may instantiate it is ways that are not commensurable. The reasons for action which a human good motivationally underlies give reason for actions and goal so diverse that the generic similarity of the benefits is not sufficient for comparison . . . . [A] family's deliberation about the venue for a family vacation, taken for the good of family community and healthy relaxation, discovers no common measure for the instantiation of these goods in one location rather than another.
Boyle, *supra* note 70, at 139-140.

[76] NLNR (2011), *supra* note 64, at 100.

[77] *See supra* notes 55-58 and accompanying text.

[78] *See supra* note 57 and accompanying text.

[79] *Id.*

vitandum)[80]—is consistently applied ("followed through") against the background of *all* the practical principles; Further, no "subrational" factor may be permitted to "deflect" or impair this intelligent, active process. Postponing, for the moment, what 'subrational factors' refers to, in *Natural Law and Natural Rights* Finnis refers to this process of "following through" as a distinct basic good, i.e., the 'good of practical reason': ". . . [A]mongst the basic forms of good . . . is the good of practical reasonableness, which is participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one selection of project(s), and what one does in carrying them out."[81] Here Finnis' description suggests that the moral sense of 'ought' refers to some type of "harmonization" in deliberation between the first principle of practical reasoning (with, through, and in?) all the other human goods grasped by practical reason.

Asserting that his statement of the good of practical reasonableness in *Natural Law and Natural Rights*—partially identified by the quote above,[82]—was not adequately descriptive, Finnis has provided a number of alternative formulations.[83] For ease of analysis, and without belaboring the differences,[84] the following discussion will consider one of his most recent formulations.

Before turning to that, however, it is necessary to add one further development to the theory of basic goods that is essential for understanding Finnis' conception of the moral application of practical reason.[85] Finnis, in a number of his writings notes that the grasp of the basic goods and the practical principles directing us to them are not egoistic in their understanding or in application; one does not grasp them as referring solely to one's own individual good or benefit:

> [A] feature of all the basic human goods and all the first practical principles [is] that they are good also for others like us and that the principles direct each of us to have an interest in the attaining and instantiating of the relevant good not only in our own life but in the lives of *anyone.*[86]

[80] "Good is to be done and pursued and evil avoided." *See supra* note 24 and accompanying text.
[81] NLNR (2011), *supra* note 64, at 100.
[82] CE Vol. I, *supra* note 23, at 4.
[83] *See id.* for references. "The version of the first principle most commonly invoked by Finnis is that stated in terms of integral human fulfillment." Joseph Boyle, *On the Most Fundamental Principle of Morality* in Reason, Morality, and Law: The Philosophy of John Finnis, 69 (John Keown Robert P. George eds., 2013). In this article, I will follow Joseph Boyle in preferring Finnis' alternative description of it as consistent with 'integral directiveness of practical reason,' rather than 'integral human fulfillment'. *See id.* at 69-72.
[84] For a discussion of the various statements of Finnis and his collaborators about the 'first principle of morality' see Christopher Tollefsen, *Natural Law, Basic Goods and Practical Reason*, *in* The Cambridge Companion to Natural Law Jurisprudence 133, 148-53 (George Duke & Robert P. George eds., 2017).
[85] Delayed introduction of this topic was chosen to emphasize its pivotal place in Finnis' moral theory.
[86] CE Vol. I, *supra* note 23, at 4.

Adding this essential aspect of practical reason's grasp of a *shared* participation in basic goods by all human persons, it is possible to consider one of Finnis' latest discussions of the first moral principle of practical reason.[87]

As noted, Finnis observes that the inclusive understanding of the goods of practical reason encompasses "all persons like us" and involves a thoroughgoing application of practical reasoning, which itself constitutes a distinct basic good: "Here practical reasonableness comes into view as a further basic intelligible good to which a distinct practical first principle directs us."[88]

He then notes the complex interpersonal and intelligible contexts in which moral deliberations, the practical principles, and choices become relevant:

> The limitations and vulnerabilities of one's life and capacities . . . demand that one adjudicate the normative claims of each and all of the first practical principles in their bearing on the ways one's own choices and actions might affect the future existence and flourishing of oneself and others. That such an adjudication be reasonable is obviously good not only as a means to realizing any of the other intrinsic goods but also in itself.[89]

Choices and actions that have moral import are those by which we effect in our own and others' lives, growth or diminishment in flourishing in *all* human goods. Elaborating this point Finnis states:

> This architectonic good—of pursuing the other goods in one's own and others' lives *well*, fully reasonably, without deflection or distortion by sub-rational motivations—is the matrix of all normativity that is not merely practical but specifically *moral* (ethical). Its formal demand is that one be reasonable.[90]

Prior to exploring in more detail this conception of the first principle of moral reasoning, some attention must be given to the requirement, reflected in the passages above, that a properly moral functioning of practical reason must be "unrestricted and undeflected by any subrational factor such as distracting emotion."[91] Apparently, subrational factors negatively affect practical deliberation by finding a deficient justification in practical reasoning itself, one that in some manner, draws upon basic goods themselves. Finnis provides a helpful example of a desire for revenge caused by hatred or anger, an action opposed to the basic good of sociability.[92] If the desire for revenge arises, it is possible to

[87] The following discussion is drawn from his *Introduction* to CE Vol. I, *supra* note 23.
[88] *Id.* at 4.
[89] *Id.*
[90] *Id.*
[91] Aquinas, *supra* note 55, at 87.
[92] *See supra* note 35 and accompanying table in text.

find reasons for revenge: "one can find reasons which enable one to anticipate certain benefits from taking revenge—for example, that it will discourage future provocations and so make for more peaceful relations ("He'll never do that again!" or "that failure to take revenge would be unjust.")[93]

Of course, it becomes obvious to most persons in the course of a life, that choices aimed at satisfying subrational desires motivated by mere appetitive drives, detrimental habits, illness of mind or body, etc., can be supported by *selective* rationality. The impact of these influences can interfere with the natural course that one's own or another person's deliberations and choices would take if unaffected by such deflecting, "distorting" or "restraining" factors.[94] Feelings can impair the rational directiveness of reason "by proposing goals whose pursuit can be made into a purpose of rationally guided action, but only by a free choice that fetters reason and limits its directiveness."[95] And it is precisely in these circumstances, where the experience of moral obligation surfaces. One who does not choose to allow the full directiveness of reason to apply in practical deliberations, is aware of the breach of the moral principle by flouting the 'ought' inspired by t he full directiveness of practical reason.

Speaking directly to this grasp of moral obligation, Finnis writes:

> When practical knowledge is confronted with the tendency of feeling to restrict it by urging a possibility whose choice would fetter it, the is-to-be of practical knowledge becomes ought-to-be. The *directiveness* of practical knowledge *becomes normativity* because what is to be might not actually come to be and yet still rationally is to be.[96]

The force of this "ought" generated by the integral directiveness of reason provides a person with a reason to "override" both the intensity of any emotional factors drawing practical reason aside, as well as to overcome the selective reasoning which has been brought forth in support of the fettering option.[97]

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[93] *PPMT, supra* note 3, at 123.

[94] For our makeup as choosers and doers is complex. Feeling and emotion . . . may compete with and undermine intelligence and reasonableness. Always I am liable to be deflected from pursuit of the understood good into pursuit of the good which promises me some satisfactions, here and now, for me.

JOHN FINNIS, FUNDAMENTALS OF ETHICS 73. For a through consideration of the complex variations of how reason and be deflected or fettered by feelings or emotions, *See* Joseph Boyle, *On the Most Fundamental Principle of Morality, in* REASON, MORALITY AND LAW: THE PHILOSOPHY OF JOHN FINNIS 56, 65-69 (John Keown & Robert P. George eds., Oxford University Press, 2013). ; *See also PPMT, supra* note 3, at 123-125.

[95] *PPMT, supra* note 3, at 125.

[96] BOYLE, *supra* note 94, at 63.

[97] Elaborating the force of this obligation, Boyle writes,

> [T]he judgment to which a selective use of practical reason leads remains directive, and indeed it is possible that a person will choose the option thus recommended. These goods *ought not,* however, to be pursued in choices responding to this result of

In sum, Finnis argues that the first principle of *moral* reasoning then is not a restrictive precept limiting choices in accordance with one "good-making" criterion. As seen above, basic goods individually open up a full horizon of innumerable options for choice, all desirable in one way or other in view of the basic goods. By definitively establishing that each of the practical principles founded on the basic goods "state what ought to be (is-to-be) rather that what is or will be, and though they cannot be reduced to "speculative", i.e., non-practical principles, they are true (not false) and direct us to the basic goods a *as true* goods."[98] Hence, the moral principle—the "architectonic" directive of practical reason—guides a person to choose goods grasped in light of any of these true goods, but only so long as one fully considers those alternatives alive in one's deliberations in light of *all* the rational goods. Finnis, thus, proposes that moral reasoning is simply the full operation of practical reason "unfettered" by any obstacle interfering with it.[99]

As one Finnis collaborator summarizes the benefit of reasoning and choosing in a manner consistent with the *integral* directiveness of the basic goods:

> Carrying that process through to its end allows a fully rational assessment of the options for choosing. All the impacts on goods of all aspects of the options will be considered, not just noted theoretically. Their rational appeal is given voice and attention as human power allows. A free choice responsive to such an outcome of deliberation will be as reasonable as a choice can be, since it will be responsive to all that is reasonable and to nothing besides that . . . .[100]

From one perspective, then the application of the integral directiveness of practical reason is simply an expression of a basic maxim often employed by Aquinas:

> selective deliberation. The rational force of that obligation is rooted in the integral directiveness of practical reason; that force gives one reason to override not only the de facto urgency of the desire, but also the prescriptivity of the good that remains in the option one sets aside because of the selectivity of the deliberation supporting it.

[98] Aquinas, *supra* note 55, at 87. On this point, some natural law philosophers receptive to Finnis et al's efforts have stated with respect to the first principle of morality as self-evident, similar to the other first principles,

> [T]he cognitive awareness of the first principle [of morality] seems to be *just* am agent's rational grasp of the goodness of all the goods. An agent in whom reason grasps the first principle is thus one with a sufficient awareness of practical reasons; the appeal of those reasons just is, in some sense, the content of the first principle of morality, known by the agent without deliberation, and thus without choice.

See Tollefsen, *supra* note 84, at 152-153.

[99] "[T]he first moral principle makes it clear that to be morally good is precisely to be completely reasonable. *Right reason* is nothing but *unfettered reason* working throughout deliberation and receiving full attention." *PPMT, supra* note 3, at 121.

[100] Boyle, *supra* note 94, at 63. CE Vol. I, *supra* note 42.

> "[G]ood results from the entire cause [ex integra causa], evil from each particular defect. [ex quocumque defectu]"[101] Moral truth, i.e., moral rectitude, is found when all the principles of practical reason are brought to bear in one's deliberations and choice. Moral evil is found when one or more of these basic principles are excluded from consideration about what is to be done.

As Finnis states with reference to Aquinas' maxim:

> A choice is right if and only if it satisfies all the requirements of practical reasonableness, that is, *all* relevant moral requirements. . . The scholastics had an untranslatable maxim to make this simple point: *bonum ex integra causa, malum ex quocumque defectu,* an act will be morally good (right) if what goes into it is entirely good, but will be morally bad (wrong) if it is defective in *any* morally relevant respect . . . .[102]

While the preceding analyses may seem abstract and detached from typical moral reasoning about choices and conduct, Finnis' theory offers further, more concrete elaborations of how to achieve integral directiveness, i.e., proper moral reasoning. The following section considers some of these instrumental principles aiding in the application of Finnis' first principle of moral reasoning.

2.2.2. MORAL GOOD AND THE INTERMEDIATE PRINCIPLES

One useful approach to gaining clearer insight, 'putting flesh on the bones,' so to speak, of the operation of this first principle of morality—the "integral directiveness of practical reason" —is to consider its 'intermediate specifications' as proposed by Finnis. According to Finnis, these intermediate moral principles, "identify, and direct one away from, ways of cutting back on being fully reasonable."[103] Elsewhere, he writes, "[e]ach of these requirements concerns what one *must* do, or think, or be if one is to participate in the basic value of practical reasonableness."[104] While Finnis has posited a number of these

[101] "[B]onum causatur ex integra causa, malum autem ex singularibus *defectibus.*". Thomas Aquinas, Summa Theologiae I-II, q.19, a.6, ad 1 (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).
[102] 3 John Finnis, *War and Peace in the Natural Law Tradition*, *in* Human Rights and Common Good: Collected Essays 183, 87 (2011).
[103] John Finnis, Moral Absolutes: Tradition, Revision, and Truth 44 (CUA 1991).

principles whose full analysis is beyond the scope of this article,[105] the following section will take up only three of them:[106]

2.2.2.1. NO ARBITRARY PREFERENCES AMONGST VALUES

"[T]here must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values."[107] As Finnis explains, any reasonable choice of life is going to concentrate on and instantiate certain basic goods more than others, often at the expense of other forms of good, either for certain periods of time or perhaps permanently. Forfeiting certain basic goods, however, will be reasonable only if it is based on an accurate estimation of one's capacities, circumstances in life, and one's individual tastes. It will be unreasonable if that choice of life is based on an exaggerated preference for one basic good because of its mere instrumental value.

Thus, it would be unreasonable if one were to become a physician not out of a commitment to the basic good of life as such, but in truth because one sought the instrumental goods of money and reputation. A person can also act unreasonably in overzealous pursuit of one good to the entire neglect the other basic goods:

> If a statesman or father or any self-directing individual treats truth or friendship or play or any of the other basic forms of good as of no account, and never asks himself whether his life-plan(s) makes reasonable allowance for participation in those intrinsic human values . . . then he can be properly accused both of irrationality and of stunting or mutilating himself and those in his care.[108]

Any full human life should be devoted in some part (i.e. as much as possible) to each of the basic human goods.

[105] In Finnis, supra note 94, at 75, Finnis explicitly proposes nine of these intermediate principles; In *PPMT*, *supra* note 3, at 128.it is stated the following way. "These intermediate moral principles . . . do not refer to any specific kinds of acts, they are more specific than the first principle of morality, because they specify . . . how any action must be willed if it is to comply with the first principle of morality."

[106] As with the basic goods, there is no hierarchy among these principles and "each is fundamental, underived, irreducible and hence is capable when focused upon of seeming the most important." NLNR (2011), *supra* note 64, at 102.

[107] *Id.* at 105-110. In Finnis, supra note 94, at 75, he describes this principle as "(2) do not leave out of account , or arbitrarily discount or exaggerate, any of the basic goods."

[108] NLNR (2011), *supra* note 64, at 107.

2.2.2.2. NO ARBITRARY PREFERENCES AMONGST PERSONS

Sometimes referred to simply as "avoiding unfairness," this intermediate principle of practical reason proposes that one should give proper respect in deliberating and making choices to others' right to share in basic goods, i.e., to flourish as human persons.[109] Finnis asserts that no *reason* justifies an actor evaluating one's own well-being differently from any other person's.[110] While Finnis acknowledges that this principle does not prevent *reasonable* preference for one's own good or the good of those who are "near and dear,"[111] it does, however, prohibit preferences ". . . motivated only by desires, aversions, or hostilities which do not correspond to intelligible aspects of the real reasons for action, the basic human goods . . . ".

This requirement, therefore, directs persons against unreasonable self-preference in the pursuit of basic goods, i.e., against selectively choosing goods for one's own sake or perhaps for related persons based on exaggerated emotions of care and affection or, the opposite, to spite one's opponents. This principle would disallow unreasonably *interfering* with others pursuit of such goods, and certainly any self-preference in choice that unreasonably *prevents* others' pursuit of those goods. Finnis specifically mentions a few types of reasoning that should be rejected: "selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help . . . and all the other manifold forms of egoistic and group bias."[112] One could, then, presumably include in this list nepotism and cronyism. Jealousy and envy could be added as well, i.e., begrudging one's "neighbor" their success in realizing instantiations of various basic goods (e.g., loving spouse, rich communal family life, fulfilling occupation, solid friendships, etc.) Finnis goes on to note that this intermediate principle is captured by the "Golden Rule" recognized in both the Christian gospel and sacred texts of the Jews: 'Do to (of for) others what you would have them do to (or for) you.'[113]

2.2.2.3. RESPECT FOR EVERY BASIC VALUE IN EVERY ACT.

Finnis, as has been reflected in this study of his thought, believes that to live a human life is to pursue human flourishing through choices that instantiate basic goods.[114] At the

[109] *Id.* at 106-109; In Finnis, *supra* note 103, at 75, Finnis describes this principle as: "(3) do not leave out of account, or arbitrarily discount or exaggerate, the goodness of other people's participation in human goods."
[110] NLNR (2011), *supra* note 64, at 107.
[111] I assume here Finnis has in mind various obligations a person might have to oneself or one's family hat limit due to physical circumstances and other factors, how much a person can share goods with third parties.
[112] *Id.*
[113] *Id.*
[114] NLNR (2011), *supra* note 64, at 109-125.

same time, however, this foreseeably and unavoidably results in other instantiations of basic goods being left unchosen and undeveloped, even if one appreciates their value. "If one is to act intelligently at all one must choose to realize and participate in some basic value or values rather than others and this inevitable concentration of effort will indirectly impoverish, inhibit, or interfere with the realization of those other values.[115] This result is simply a condition of human existence and is often entirely reasonable.[116]

Finnis finds nothing objectionable in this type of "indirect" damage to basic goods. He does, however, contrast this permissible form of indirect "damage" to basic goods with another objectionable type of damage to basic goods, direct and immediate. This permissible/ impermissible contrast between 'indirect damage' and 'direct, immediate damage' is laid down in the following crucial paragraph (broken down here for ease of analysis):

> *[T]o indirectly damage any basic good* (by choosing an act that directly and immediately promotes either that basic good in some other aspect or participation, or some other basic good or goods). . . . is obviously quite different, rationally and thus morally, from . . . *directly and immediately damaging a basic good* in some aspect or participation by choosing an act which in and of itself simply (or, we should now add, primarily) damages onsistent with the moral principle "integral directiveness of practical reason" because such damage is inherent in virtually every choice, which necessarily leaves other options for instantiations of good unfulfilled.
>
> Direct and immediate damage to basic goods, however, is not consistent with that good in some aspect or participation but which indirectly, via the mediation of expected consequences, is to promote either that good in some other aspect or participation, or some other basic good(s.) (emphasis added).[117]

The first type of damage, i.e., indirect, occurs when an actor "promotes or pursues" one instantiation of a basic good, and insofar as they are busy promoting that instantiation, they cannot simultaneously pursue and promote instantiations in other basic goods. This for Finnis can be consistent with the fullness of integral practical reason, even though the point of the damaging action, or any immoral choice, will always be to bring about a

[115] *Id.* at 120; "We have, in the abstract, no reason to leave any of the basic goods out of account. But we do have good reason to choose commitments, projects, and actions, knowing that choice effectively rules out many alternative reason-ableor possible commitment(s), project(s), and action(s)." *Id.* at 100.

[116] "But there are many such basic forms of human good; . . . [a]nd each of them can be participated in, and promoted, in an inexhaustible variety of ways and with an inexhaustible variety of combinations of emphasis, concentration, and specialization. . . . . But our life is short." *Id.*

[117] *Id.*at 120.

good in some aspect or some other basic good. Finnis observes that even *immoral* choices will be directed at some basic good, insofar as all choices in some way correspond to the first practical principle 'do good and avoid evil.' "For anyone who rises above the level of impulse and acts deliberately must be seeking to promote some form of good . . .".[118]

The basis for the immorality of directly damaging a basic good, is that it strikes at the very heart of human rationality itself, as it is existentially known and experienced in, and lived through, the first and intermediate practical principles. It is important to remember that here one is not referring to mere technical mathematical or scientific principles gained through speculative inquiry. Rather these practical principles form a vital constituitive part of one's very psyche as a conscious acting person. Thus, when a person chooses to damage or destroy an instantiation of one of the basic goods, one experiences its clash with and contradiction to the moral 'ought' inscribed in the integral directiveness of practical reason itself. For actors who are sensitive to the demands of the integral directiveness of practical reason, the experience of such choices, can only be understood as a deformation of the human personality. In *Natural Law and Natural Rights* Finnis makes a similar but distinct point:

> [N]o sufficient reason can be found for treating any act as immune for the only direction which we have, viz., the direction afforded by the basic practical principles. These each direct that a form of good is to be pursued and done; and each of them bears not only on all our large-scale choices . . . but also on each and every choice of an act which is a complete act . . . . The incommensurable value of an aspect of personal full-being (and its corresponding primary principle) can never be rightly subordinated to any project or commitment. But such an act of subordination inescapably occurs at least whenever a distinct choice-of-act has in *itself* no meaning save that of damaging that basic value (thus violating that primary principle).[119]

Thus, Finnis establishes the ground for defending the intermediate principle currently under consideration: "Respect for Every Basic Value in Every Act."[120] Or as he rephrases it: "[O]ne should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of good."[121]

Finnis provides the following example of direct damage to a basic good: "This is especially obvious when a blackmailer's price for sparing his hostages is 'killing 'that

[118] *Id.* at 119.
[119] *Id.* at 121.
[120] *Id.* at 118.
[121] *Id.*

man,'"[122] i.e., the blackmailer agrees to release hostages only if one hostage kills another innocent hostage. Finnis observes that in this situation, "the person who complies with the demand, in order to save the lives of the many, cannot deny that he is choosing an act which of itself does nothing but kill."[123] The act of the hostage-murderer in these circumstances is wrong because it involves the actor in violating this intermediate principle. "Do not choose directly against a basic value."[124]

All the intermediate principles articulate various ways of acting immorally by failing to include in one's deliberations adequate attention to one or other of the basic goods of integral practical reason. However, the last intermediate principle considered above—'do not choose directly against a basic value'—is arguably the most egregious departure from integral practical reason. This is so because violation of *this* intermediate principle, involves not just neglect or diminished attention to one or more basic goods, but refers to situations where instantiations of basic goods are purposely damaged or destroyed.

Given Finnis' suggestion that 'killing a man' can—as he contends with respect to the hostage case just described—be a paradigm case of impermissible damage to a basic good, it is appropriate to consider how Finnis distinguishes between 'killing a man' in a manner that constitutes a direct attack on the basic good of life, and when it does not. As Finnis regularly highlights, his theory of basic goods cannot absolutely prohibit causing all damage to basic goods. "Every choice and action has some more or less immediate or remote negative impact—in some way tends to destroy, damage, or impede —some instantiations(s) of basic human goods. . .".[125] The unpredictable nature and complexity of human motivations, actions and circumstances of the physical world often conspire to bring forth negative consequences from even one's most well intentioned actions. So, Finnis observes, "one can never avoid *harming* some instances of human goods."[126] Accordingly, Finnis posits that it would be irrational to propose as an intermediate practical principle: "Do not cause harm even as a side effect."[127]

[122] *Id.* at 123.
[123] *Id. For* further discussion of an act which is nothing other than, in and of itself, an act of damaging a basic good which is one basis for distinguishing murder from permissible killing, *See Id.* at 122-124.
[124] *Id.* at 123.
[125] Finnis, *supra* note 103, at 71.
[126] *Id.* "Since it is inevitable that here will be some such harm, it cannot be excluded by reason's norms of action. For moral norms exclude irrationality, . . . but they do not exclude accepting the inevitable limits we face as rational agents."
[127] *Id.* at 71.

3. INTENTION AND CHOICE

It is now possible, at this point in the analysis, to inquire more deeply into Finnis' account of choice discussed above.[128] Considerations in that earlier section clarified that choice is always a selection between incommensurable alternatives of basic goods made intelligible through deliberation, which selection is settled only by the very choice itself[129] Finnis' more developed account of choice, however, explicitly includes a description of the essential role played by *intention*:

> Moral analysis, rightly employed, uses a . . . precise and stable conception of intention. This conception is tightly linked to the moral significance of choice. To choose is essentially to *adopt a plan or proposal* that one has devised and put to oneself in one's practical reasoning and deliberation on the merits of alternative options, that is, plans or proposals. Whatever, then, is included within one's chosen plan or proposal, whether as its end or as a means to that end, is *intended,* that is, is included within one's intention(s).[130]

To have an 'intention' has to two-fold character. First it requires a person to set one's volitional "sight," so to speak, o a volitionally desired object as to-be-pursued (grasped by practical reason as 'an end' orose' or 'good' because it instantiates a basic good);[131] and, second, an intention requires a person also to select the preferred means that he believes will lead to achieving that end, which means is grasped as good for that very reason. This proposal, a 'means-end' complex, provides practical reason with its intelligible form constituting, with the accompanying volitional act, one's choice, i.e., the bringing about of 'what is-to-be'.

Based on the description above about what makes voluntarily damaging a basic good morally wrong, it naturally follows for Finnis that that one should never *intend and*

[128] *See supra* § II.A., note 60 and accompanying text.
[129] *See supra* note 69 and accompanying text.
[130] CE Vol. II, *supra* note 3, at 143. Elsewhere he develops the same idea in more precise, technical language:

> The conception of intention used in moral and legal reasoning, properly understood, is tightly linked to [a] sense . . . of 'desire' precisely because it is linked to the moral significance of *choice*. To choose, in the relevantly rich sense of 'choice,' is essentially to *adopt a plan or proposal* which one has put to oneself in one's practical reasoning and deliberation on the merits of alternative options, that is, of alternative plans or proposals which one see some reason to adopt, this is, understands as desirable. Whatever, then, is included within one chosen plan or proposal, whether as its end or as a means to that end, is *intended,* that is included within one's intention(s). What one does is done 'with intent to X' (or: 'with intent that X') if X is a state of affairs which is *part of one's plan* either as its end (or a part of its end, or one of its ends) or as a means.

Id. at 176.
[131] *See supra* notes 13-16 and accompanying text.

choose the causing of harm to an instantiation of a basic good; or as he phrases it 'do not choose directly against a basic value.' In the context of 'man-killing' he describes the proscription as: "do not intend harm to a human being, either as an end or a means."[132] Returning to that hostage scenario, the intention, proposal, or plan of the killer (the co-hostage murderer) is clear. First, the 'end' is the intelligible, desirable good of obtaining release for himself and other hostages; second, the 'means' is his 'killing a man' (the hostage-taker has made it clear that the hostage must be made dead not just injured). Here, the basic good of life participated by and instantiated in the victim's existence is utterly, completely and intentionally annihilated by the killer. This is a clear example of a violation of the intermediate principle at issue; and, through the self-determination of character formed by one's choices, the co-hostage makes himself into a man-killer.[133]

3.1. INTENTION, CHOICE AND SIDE EFFECTS

But what about situations when a person has a plan or proposal that does not include 'killing a man,' the conduct is intentionally chosen entirely for other reasons. At the same time, however, the conduct *does* have 'killing a man' as a foreseeable result, perhaps even with substantial certainty? Finnis is emphatic that such consequences, playing no role in one's plan or proposal, are not intended:

> [S]tates of affairs which are connected, perhaps even very closely and directly, with the carrying out and the outcome of one's action, but which are neither needed nor wanted as part of one's way of bringing about what one proposes to do and bring about, are unintended effects, *side effects*. Though they are caused by one's choice and action, they are not chosen, that is, are not intended, even if they are foreseen (even foreseen as certain). Rather they are permitted, that is . . . *accepted.*[134]

In support of this claim, he provides two stark hypotheticals illustrating his position: "The first is the blowing up of an aircraft in flight in order to collect the cargo or hull insurance, thereby killing the pilot; this it is said is a clear case of . . . intending to kill." Finnis' response is sobering:

[132] Finnis, *supra* note 103, at 71.
[133] For further elaboration of this point, *see* Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law, supra* note 6, at 469, 496, 498.
[134] Finnis, *supra* note 103, at 70-71.

> It is in no sense a case of intending to kill, intention to ill, or intent to kill . . . . [T]he bomb's effects on the pilot, . . . are not intended. For they are no part of the accused's end or means as these figure in the proposal he adopted by choosing to blow up the plane. They are side effects in the morally relevant sense.[135]

He adds a second aircraft example:

> Terrorists hijack a plane. One of them is carrying a timing device primed to detonate a bomb in a city; the instrument can be destroyed only by free-fall from a great height. The terrorist's call for a parachute to be prepared, so that the woman among them can exit during the flight. The steward selects two parachutes and cuts off the ripcord of one of them, planning (a) to give over the dud parachute if the exiting terrorist is carrying the timing device, but (b) *to give over the good parachute* is she is not; the stewards concern is that the timing device be destroyed. . . . [T]he terrorist who asks for the parachute is carrying the device, so she is given the dud chute and falls to her death.[136]

Finnis concludes "[M]y story's steward . . . manifestly did not intend to kill the terrorist, though he foresaw and accepted that his own choice would certainly bring about her death. Her free-fall and death are side effects of the steward's plan to destroy the timing device."[137]

In both these examples, the death cause played no role in the specific proposal of the plotters or the stewards as an end or means. As one scholar comments in this context "[T]he harm . . . is not part of the proposal I adopt by choice; although the physical action of harming . . . is included in my physical act . . . , bringing about this harm is not a reason for action (either intrinsic or instrumental)."[138] Unlike the death in the hostage example, which itself is chosen as the precise means to promised release, *deaths* of the pilot and the hijacker-terrorist play no role in the plans or proposals of those causing these killings. The deaths are unintended, foreseeable consequences of doing what they are intentionally doing.

Here, two points require further clarification:

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[135] CE Vol. II, *supra* note 3, at 184. Finnis appends to this conclusion a semantic note: "One must immediately add, however, that by a nuance of our language, it *is* a case in which the accused cannot be said to have killed *unintentionally*—for 'unintentionally' connotes accident or mistake or lack of foresight." Adopting this awkward liquistic usage— without changing any of the foregoing analysis— it could consistently be said, that the though the killing was not intended, it was not *unintentional* because it was not an accident, or mistake, or due to a lack of foresight—". *Id.*

[136] *Id.*

[137] *Id.*

[138] Patrick Lee, *Distinguishing Between What is Intended and Foreseen Side Effects* 62 Am. J. Juris. 231, 234 (2017).

3.2. INTENTION AND 'SUBSTANTIAL CERTAINTY'

First, for those trained in common law, it may prove difficult to discard the view that intent is established if the actor causes an unlawful effect with "substantial certainty." The Restatement (Second) of Torts, for example, provides, "*The word "intent"* is used throughout the Restatement of [Torts] to denote that the actor desires to cause the consequences of his act, *or that he believes that the consequences are substantially certain to result from it*" (emphasis added).[139]

In Commentary to this section, the Restatement drafters clearly concede that defining "substantial certainty" as intent is pure legal fiction:

> All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, the *law treats him as if he had in fact desired* to produce the result (emphasis added).[140]

But treating 'substantial certainty' *as if* it were intent, the drafters in principle acknowledge a clear distinction between the volitional desire (*intent*) to achieve some end and the knowledge that such a result will occur. Whatever practical rationales may exist for defining intent so expansively (e.g., evidentiary considerations),[141] this fiction does not comport with the properly philosophical understanding of 'intent' as described by Finnis above.[142]

3.3. SIDE EFFECTS AND CULPABILITY

Second, by concluding the two aircraft hypotheticals with the assertion that the deaths caused are not intended, Finnis does not mean to suggest that the actors are not culpable and have no moral or legal responsibility for causing those side effects. On the contrary, he states: "Certainly one has moral responsibility for what one thus knowingly and "deliberately" causes or brings about. But that responsibility is not the same as one's

[139] Restatement (Second) of Torts, § 8A (Am. Law Inst., 1965).
[140] *Id.*, § 8A cmt. b.
[141] Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law*, *supra* note 6, at 518-525.
[142] Restatement (Third) of Torts, Phys. & Emot. Harm § 1 (Am. Law Inst., 2010) follows the same pattern, although it replaces the 'desire to cause the consequences' to 'acts with the purpose of producing that consequence:' A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.

responsibility for what one chooses (intends) as part (whether as end or means) of one's proposal.[143] In short, Finnis recognizes that asserting that a result was not intended, may, as J.L. Austin warned about excuses, only get one "out of the fire into the frying pan."[144]

In such cases, however, the wrongfulness, if it is wrongful, of causing the side effect, does not have superadded to it the same moral blameworthiness as it would had the harm been caused intentionally. Though the actor may be culpable because he or she caused an unintended side effect, she was not the type of person that brought that effect about because she *wanted and chose it,* i.e., intended it.

Before considering in more detail the morality of unintended but foreseeable deaths caused in the aircraft hypotheticals, it will be useful to consider two real-life situations in which Finnis believes that causing foreseen killings as side effects of action carries no moral culpability.

3.3.1. MORALLY ACCEPTABLE SIDE EFFECTS

3.3.1.1. SELF-DEFENSE

Finnis' account of self-defense, generally coincides with the general pattern of the defense proposed by Thomas Aquinas (1225-1274) and thus is informed by what has come to be known as the 'Principle of Double Effect.'[145] (PDE) As seen in the following excerpt from Aquinas' *locus classicus* for PDE, the justification for the morality of causing death in the case of defending oneself is rooted in the very distinction between intent and side effects adopted by Finnis.[146] Prior to consideration of Aquinas' text, however, it is necessary to note that he maintained that it was always impermissible for a private individual *to intend* the death of another person, unless sanctioned by the state. "[I]it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority."[147]

In his *Summa Theologiae,* Aquinas proposes that one act can have two effects: one effect is intended and the other not intended. As long as there is a reasonable proportion between the good objective (i.e., the focus of the actor's intent and choice) and the

[143] Killing of Finnis, *supra* note 103, at 71.
[144] J.L. Austin, *A Plea for Excuses*, 57 Proceedings of the Aristotelian Society 13 (1957).
[145] *See* Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law,, supra* note 6, at 482-484; For a comprehensive review of the PDE covering its understanding, application, and history see Cavanaugh, *supra* note 6.
[146] *See supra* § III.A.1., note 135 and accompanying text.
[147] "Illicitum est quod homo intendat occidere hominem ut seipsum defendat, nisi ei qui habet publicam auctoritatem." Thomas Aquinas, Summa Theologiae II-II, q. 64, art. 7. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

unintended side effect, (usually some form of foreseeable harm), the requirements of morality are satisfied and causing the unintended side effect(s) is justified:

> It is to be stated that nothing prevents there from being two effects of one act, of which only one is in intention [*in intentione*] and the other outside intention [*praeter intentionem*]. Moral acts, however, receive their character from what is intended and not from what is outside of intention. . . . From the act of defending oneself, therefore, two effects may follow: one being preservation of one's life and the other the killing of an attacker. Now an act of this type, insofar as the preservation of one's own life is intended, is not illicit since it is natural for every being to keep itself alive to the extent possible . . . . It is not necessary . . . that a man refrain from carrying out a measured act of defense to avoid the killing of another. A person has a greater obligation to provide for his own life than for that of another.[148]

Thus, for Aquinas, causing the "death of the attacker" plays no part in the agent's intention when properly acting in self-defense.[149] The victim does not *ipso facto* "intend" to kill just because he can keep himself alive only by engaging in conduct to stop the attacker that is so forceful that it also has the foreseen effect of causing the attacker's death. In such instance, the actor's conduct is permissible and justified precisely because the death resulting from repelling the attack is unintended, and the intention to protect one's life is a significant enough good to justify conduct that causes the foreseeable death of the attacker as an unintended side effect.

As Finnis summarizes all this:

> Aquinas denies that one who is defending himself may rightly intend the death of his assailant, even as a means of self-defense, though one may, if necessary, adopt a means of self-defense, which one knows will cause death as an unintended side effect. Quite a few in the tradition have disagreed, but many have agreed, as I do.[150]

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[148] *Id.* [*Dicendum quod nihil prohibet unius actus esse duos effectus, quorum alter solum sit in intentione, alius vero sit praeter intentionem. Morales autem actus recipiuntspeciem secundum id quod intenditur, non autem ab eo quod est praeterintentionem . . . . Ex actu igitur alicuius seipsum defendentis duplex effectus sequipotest: unus quidem conservatio propriae vitae; alius autem occisio invadentis.Actus igitur huiusmodi ex hoc quod intenditur conservatio propriae vitae, nonhabet rationem illiciti: cum hoc sit cuilibet naturale quod se conservet in essequantum potest. . . . Nec est necessarium . . . ut homo actum moderatae tutelae praetermittat ad evitandum occisionem alterius, quia plus tenetur homo vitae sua eprovidere quam vitae aliena.*]

[149] Of course it is often possible, or even probable, that some persons do in self-defense intend the death of an assailant. This, as indicated above, *see supra* note 148, Aquinas excludes as always illicit. For Finnis of course, intending the death of any person would always be proscribed by the intermediate principle, "Do not choose directly against a basic value." *See supra* note 125 and accompanying text.

[150] Finnis, *supra* note 103, at 78.

3.3.1.2. KILLING OF NON-COMBATANTS IN ARMED CONFLICT

Given the pervasive inflow of televised battlefield reportage, it is a commonly known fact that military adversaries often place assets of military value near, or embedded in, non-combatant populations. In situations of military conflict, opposing forces may attempt to destroy such facilities, often through aerial bombing. This has led to some countries efforts to limit, as far as possible, such 'collateral damage.' This concept has been defined as, "Unintentional or incidental injury or damage to persons or objects that would not be lawful military targets . . . Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack."[151] One author describes the thinking about "not unlawful" collateral damage as follows:

> In this scenario of foreseen, but unintentional killing, the military has set a certain level of acceptable risk for collateral damage death or injury. Attempts to reduce the number of civilians harmed will be made. But the operation may be allowed to proceed on the judgment that the civilian losses are justified in light of the value of the military objective . . . and that there was no other way to be effective . . . .[152]

In general, this example of restrained tactical bombing follows the general pattern of lawful self-defense described in the preceding section. Military air command determines that destruction of some military installation is reasonably necessary in light of its goal of victory against its opponents. The intention is not to damage the lives of surrounding civilians, but only to destroy the enemy's' war-making power. Assuming there is a truthful balancing of harm between the good intended (the value of the destruction of enemy facilities) and the unintended harm (damage and injury to civilians), generally the damage to civilians (even death), if necessary to the achieving a serious legitimate military goal, has been regarded as morally 'justified.'

Thus, both in self-defense and this type of restricted tactical bombing scenario there need be no intent to bring about the death of the assailant, in the first, ans the civilians, in the second. What is intended is whatever force is necessary to stop the attack or destroy the military facility. Although the death of the assailant, on the one hand, and the death of innocent civilians, on the other, may be risked or foreseen, and perchance foreseen with substantial certainty, those deaths need play no part in the practical reasoning of the actor, but may reasonably be regarded, though tragic, as unintended foreseeableside effects of the action they did intend. It follows, of course,

[151] Neta C. Crawford, Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post 9/11 Wars 16-17 (2013) (*citing* U.S. Air Force, Targeting: Air Force Doctrine Document 2-1.9, at 113 (2006).

[152] *Id.* at 19-20.

that military operations such as *strategic* bombing—where massive deaths of civilians and demoralization of the enemy, are chosen precisely as the intended means to victory—would not be justified under either Aquinas' or Finnis' application of PDE.[153]

3.3.2. MORALLY UNACCEPTABLE SIDE EFFECTS?

Returning to the two aircraft examples of unintended causing of death described by Finnis above,[154] It is appropriate to consider whether similar exculpatory conclusions can be reached regarding the deaths caused in these other scenarios.

With respect to the first hypothetical—in which the pilot was killed as a side effect of a bomber blowing up an aircraft in order to collect insurance on it—Finnis states very clearly, "[T]he pilot killed by the cargo bombers . . . is treated with gross injustice."[155] Relating this wrong back to the intermediate principles of practical reason, he explains that the bomber violates the second intermediate principle proscribing "arbitrary preferences amongst persons."[156] Finnis observes, "[T]he bomber violates the Golden Rule since he would not wish his own life to be thus willfully destroyed by others acting not pursuant to any moral responsibility (for example , of defense of self or others) but to desire for gain."[157] By rejecting practical reason's grasp of another's basic good of life as similar to one's own—and shared equally by oneself and the other—the cargo bomber acts unfairly in willingly[158], if not intentionally, causing the foreseen destruction of the other's (the pilot's) basic good of life.

In further elaborating the injustice done to the cargo pilot, Finnis adds "his life is simply treated as if it were of less value than the insurance money gained by the

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[153] Consider Finnis' comments on the bombing of Hiroshima:

> [T]he reason for selecting Hiroshima for atomic attack was not that its modest military installation challenged the US or its forces . . . . It was rather that Hiroshima met the requirement that some Japanese city be destroyed, without warning, by an attack designed to maximize the shock of destruction of people and structures, and so overcome Japanese willingness to continue the war . . . . The morally significant intent of those who planned and ordered the operation against Hiroshima was not merely to destroy the military target but rather to destroy the city and many of its inhabitants.

NUCLEAR DETERRENCE, *supra* note 3, at 93.

[154] *See supra* § III.3.A.1, notes 136-139 and accompanying text.

[155] CE Vol. II, *supra* note 3, at 184.

[156] *See supra* notes 110-114 and accompanying text.

[157] CE Vol. II, *supra* note 3, at 184. Here Finnis tacitly concedes that at times an actor can and must recognize the rights of others to interfere with one's own pursuit of basic goods.

[158] Finnis uses 'willfully' here in the same sense as "not unintentionally" which he uses to mean unintended, but not the result of accident, mistake, or lack of foresight. "By another nuance of our language, is it also a case, I think, of 'willfully' killing—for 'willfully', to my ear, means not unintentionally. *Id. See supra* note 135.

bomber."[159] Here, his language suggests that he sees the cargo bomber's conduct as also violating the intermediate principle proscribing "arbitrary preferences amongst values."[160] As noted in prior discussion of this principle, Finnis writes, "[T]here must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values."[161] The cargo bomber's preference, however, for a mere instrumental good, i.e., money, (perhaps desired as a means to enhance his own basic good of life) entirely disregards the value of the pilot's basic good of life. As noted in discussion of this principle above, it is unreasonable to pursue one basic good to the total exclusion of other basic goods. Knowingly, even if not intentionally, causing destruction of an instantiation of the basic good of life as a side effect, without proper justification is not justified. To cause as a side effect, the complete destruction of another's participation in the basic good of life, for the sake of an intentional choice of a limited instrumental good, e.g., money, could never be rationally justified by the directiveness of practical reason toward all the basic goods.

Turning to the second aircraft hypothetical—where the steward gives a disabled parachute to the bomb-laden hijacker-terrorist foreseeing that she would fall to certain death—Finnis states without elaboration, "the steward's treatment of the hijacker-terrorist "does the terrorist no injustice; one going about to kill others is not treated unfairly by lethal counter measures."[162] Here Finnis is clearly referring to the exculpatory analyses illustrated in the self-defense and tactical-bombing situations presented above.[163] Under that analysis, following Aquinas, a person unjustly subject to a threat of death or serious harm by another may act to protect themselves by using force, even deadly force to stop the threat. Without entailing any intention on the part of the actor to kill, the actor's efforts and the force required to 'terminate the threat,' may permissibly cause, understood as a side effect, the death of the person(s) creating the threat.

Finnis' conclusion then proposes that the steward, who disabled the parachute thus causing the female terrorist's foreseen death is guiltless of any moral fault. The steward's actions are entirely justified by the threat posed by the hijacker, and the intended protection of threatened persons. The cargo bomber, of course, has no such defense.

[159] CE Vol. II, *supra* note 3, at 186.
[160] *See* supra notes 107-115 and accompanying text.
[161] *See supra* note 110 and accompanying text.
[162] CE Vol. II, *supra* note 3, at 186.
[163] *See supra* § III.A.3.a, notes 149-153 and accompanying text.

3.3.2.1. LEGAL PENALTY FOR CAUSING FINNIS' MORALLY UNACCEPTABLE, UNINTENDED SIDE EFFECTS

So what is the appropriate treatment for the bomber in this situation? Finnis does not hesitate to assign him the highest form of criminal liability, i.e., murder. He, however, notes a problem given the limited and restricted categories available to his prosecutors in homicide cases:

> In a legal system which divides all criminal homicide into two sharply distinguished categories—murder and manslaughter— ranked in gravity, it is easy to sympathize with the pressure to assign the cargo bomber to the more serious category, notwithstanding that the categorization centres on the distinction between the intended and the non-intended but reckless or culpably negligent causing of death, that that the cargo bomber's killing is not a case of intending to cause death.[164]

Finnis here clearly expresses dissatisfaction with his envisioned options for legal prosecution of the cargo-bomber. Although the pilot's death for Finnis, is—strictly understood—an unintended, albeit foreseen, side effect, no justification exists for the cargo-bomber's willingly[165] causing that death. As seen in both the self-defense and tactical-bombing situations, proportionate goods were intended that balanced and justified the unintended causing of deaths in those scenarios. The cargo-bomber's killing of the pilot, however, is not similarly justified. Accordingly, Finnis does not hesitate to assert that the cargo-bomber is deserving of conviction for homicide at the highest level of culpability and punishment, i.e., murder.

Finnis' prosecutor, however, has only one type of homicide that can be prosecuted for murder: intentional homicide. Therefore,—because the pilot's death was, *ex hypothesi*, not intended— the carbo-bomber cannot be charged with murder. The only options, then, that remain for Finnis' prosecutor are, manslaughter for recklessness, or the third level of homicide for criminal negligence. None of these, however, satisfy Finnis given the "pressure" to mete out a proper punishment due the egregious nature of the cargo-bomber's conduct.

In response to this dissatisfaction, Finnis proposes as an alternative: "[T]he clear headed way of acceding to this pressure is, I suggest to broaden the definition of murder to include not only (a) killing with intent to kill but also (b) doing without lawful justification or excuse an act which one is sure will kill."[166] Of course, the option of a

[164] CE Vol. II, *supra* note 3, at 185.
[165] For Finnis' use of 'willingly' as including 'not intended' see *supra* note 158.
[166] CE Vol. II, *supra* note 3, at 185.

murder prosecution under section (b) of Finnis' proposed statute would apply to the cargo-bomber. In view of his unlawful act of blowing up the aircraft for money, knowing the pilot would indubitably perish. The cargo-bomber would have no justification or excuse defense. The aircraft-steward on the other hand, if charged with murder, would presumably be entitled to the 'defense of others' justification defense.

Finnis' plight, however, would be fully resolved by the Model Penal Code sections dealing with murder, and its corresponding grades and definitions.[167] MPC § 210 begins with a general definition of homicide: "Criminal Homicide. (1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." Subsection (2) adds "Criminal homicide is murder, manslaughter, or negligent homicide." This, of course, is generally consistent with Finnis' account of homicide stated above, where the options are murder, manslaughter, or negligent homicide. The advantage of the MPC provisions, however, is found in its specification of multiple culpability states of mind (mens rea) sufficient for indictment and conviction for murder. § 210.2. Murder provides:

> (1) Criminal homicide constitutes murder when:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.
>
> The crucial issues, of course, relate to how the MPC defines its terms. The relevant definition of "knowingly" applicable to the MPC provides:
>
> §2.02.(b) Knowingly
>
> A person acts knowingly with respect to a material element of an offense when: (ii) if the element involves a result of his conduct, *he is aware that it is practically certain that his conduct will cause such a result* (emphasis added).[168]

In short, the MPC murder provision solves all of Finnis' concerns. It would appear, for example that a prosecutor could proceed, confident of conviction, directly against the Cargo-bomber for murder under § 210.2.(1)(a) 'knowingly' prong.

The preceding section has illustrated that Finnis' account of intention and side effects does not do away with culpability for side effects, in fact he clearly indicates that punishment, even punishment for murders brought about as foreseen side effects, can be appropriate. "[O]ne who inflicts death, even as a side effect, in order to effect such an instrumentalization of another has in the fullest sense, 'no excuse' for thus knowingly

[167] *See* Model Penal Code, §2.02 and §210.2 (Am. Law Inst, 1985).
[168] *Id.*, §2.02.

causing death. We should not complain if both law and common moral thought treat this as murder."[169]

At the same time, however, Finnis cautions that—while it may be appropriate to treat unintended, but unfairly accepted foreseen deaths *as murder*— this should not be an occasion to warp the authentic and philosophically correct concept of 'intent.' The cargo bomber's knowledge that the pilot's death would follow with practical certainty, though a valid basis for a murder charge in that case, does not make, and should not be understood to imply, that such knowledge is in reality a form of intent. As Finnis writes, referring to situations where "knowingly" will support a murder conviction: "[N]or should we distort our understanding of intention so as to bring this within the category of murder supposed, too casually, to be limited to *intent* to kill (or seriously harm)."[170] Thus, while accepting in principle any definition of murder, like the MPC's, as able to be committed either "purposely or knowingly," Finnis seeks to emphasize that they are not one and the same and should not be conflated.

4. OVERVIEW

The foregoing sections of this article have elaborated central facets of Finnis' natural law theory. To recap, Finnis proposes that human life is, among others, a basic good of practical reason, and thus can never be intentionally damaged or destroyed. To do so would generate cognitive schizophrenia, pitting a person against his own natural inclinations and first principles of action, which in their integral directiveness establish the experience of 'moral ought.' His theory of intention and choice highlights the importance of a meticulously precise understanding of intentions as bearing on one's rationally and freely chosen ends and means. By means of forming intentions, i.e., the integral parts of their plans or proposals adopted by choice, actors reflexively determine their own moral character.

At the same time, as a corollary to these previous insights, Finnis clarifies the often overlooked role played in moral philosophy by side effects, i.e., consequences of choices and actions that are not intended but which are often foreseen with greater or lesser certitude. Finnis, unsurprisingly, does not approve of every harmful action simply because its bad consequences may be unintended. Rather, given the complexity of human life, with its threats and dangers, he offers a resolution to the dilemma that would

[169] CE Vol. II, *supra* note 3, at 194.
[170] *Id.*

be created by prohibiting any and all damage to basic goods, a human impossibility. He proposes an equitable resolution to any such absolutist norm. Causing evil, even death of another person, may at times, permissibly be caused as a foreseen or foreseeable side effect, i.e., when the death itself does not play any role in an actor's plans or purpose; when the actor does not choose the death as an end or a means. Following Aquinas, he adds the requirement that there must be a reasonable proportion between the good intended and the unintended evil caused; reflection must be given to the intended good of the action weighed against the seriousness of the unintended harm brought about.

5. CONDITIONAL INTENTIONS

In this concluding part of the present article, consideration will be given to Finnis' account of "conditional intentions." He elaborates this concept in reference to two pivotal English spring-gun cases noted in the Introduction: *Ilott v. Wilkes (*King's Bench 1820)[171] and its progeny *Bird v. Holbrook* (Court of Common Pleas 1828).[172] Both examine claims brought with respect to the controversial use of these potentially lethal "man-traps" set to deter would-be trespassers.

As will become clear in the ensuing reflections, Finnis contends that an actor who engages in this sort of defensive practice is, albeit conditionally, just *intending*, i.e., *choosing directly against a basic good,* in causing trespassers to be shot and either killed or severely wounded. Finnis contends that even if the landowner has no desire to harm (in fact there may be a desire not to harm), the harm if it should occur would be intended, conditionally, on the part of the actor.

Finnis describes the practice at issue in the following manner:

> The typical mantrap was in fact a spring gun: a heavily loaded shot-gun, its trigger attached to springs and wires arranged in hidden lines along which the blast of shot would travel when anybody tripped them. Typically, such guns were set in woods and gardens to deter, disable, and punish persons who under the law of the day were no more than trespassers.[173]

Sustained discussion of this issue is found in his *Intention in Tort Law* essay, and commences with allusion to Justice Holmes' comments in the well-known 1922 "attractive nuisance"

[171] (1820) 106 E. R. 674 (K.B.) (U.K.).
[172] (1828) 130 E. R. 911 (C.P.) (U.K.).
[173] *Id.*

case, *United Zinc Chemical Co. v Britt*.[174] In *Britt,* contrasting situations where adults, rather than children, are injured upon trespass, Holmes wrote, "If the children had been adults they would have had no case. They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it would have been entitled to assume that they would obey the law and not trespass."[175] If, however, the landowner prepares a hidden trap for the trespasser, Holmes notes the difference: "The liability for spring guns and mantraps arises from the fact that the defendant has . . . expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."[176]

5.1. NUTS, TULIPS, PEACOCKS, AND SHOTGUNS

Finnis' discussion, however, immediately turns to consideration of the important English tort case decided just over 100 years before *United Zinc.*

5.1.1. *ILOTT V. WILKES* CLASHES OVER INTENT: CONDITIONAL OR OTHERWISE

In this case, the plaintiff Ilott trespassed during daylight hours with a companion onto defendant Wilkes' 50 to 60 acre private wood.[177] Their purpose was to gather nuts. The private wood was situated along a public way, and Wilkes had placed nine or ten spring guns at various hidden locations on his property concealed by trip wires.[178] In addition, "[s]everal boards were affixed, containing notice to the public that such instruments were so placed."[179] Ilott's companion specifically warned him about the presence of the guns, and refused to enter unless Ilott proceeded first. They entered onto the property and Ilott was injured when he tread upon a wire connected to one of the spring-guns.[180] At the end of trial in this case, the judges unanimously rejected plaintiff Ilott's arguments, and found that no action could be maintained against defendant landowner Wilkes.

[174] United Zinc. & Chemical Co. v. Britt, 258 U.S. 268 (1922).
[175] *Id.* at 275.
[176] *Id.*
[177] (1820) 106 E.R. 674 (K.B.) (U.K.).
[178] "Defendant . . . had set a certain spring-gun charged with gun-powder and leaden shot, in a certain part of said wood and premises, near those parts over which the right of way extended, with a certain wire communicating with the lock and other parts of the said spring-gun by the treading on or touching of which wire, the said gun could be let off and fired . . . ." *Id.* at 675.
[179] *Id.*
[180] *Id.*

In his article, *Intention in Tort Law,*[181] Finnis provides a critique of the various judges' opinions in *Ilott*. He introduces his discussion, however, with consideration of some contemporaneous editorial comments on the case offered by Sydney Smith,[182] a popular 19th century English editorialist. Smith's comments along with Finnis' added emphasis set the tone and nicely encapsulate Finnis' critique of the *Ilott* opinion:

> I do not say that the setter of the trap or gun allures the trespasser into it; but I say that the punishment he *intends* for the man who trespasses after notice is death. He covers his spring gun with furze and heath, and gives it the most natural appearance he can, and in that gun he places slugs by which he means to kill the trespasser. The killing of an unchallenged, unresisting person, I really cannot help considering to be as much murder as if the proprietor had shot the trespasser with his gun . . . Does it [matter] whose hand or whose foot pulls the string which moves the trigger?—the real murderer is he who *prepares* the instrument of death, and places it in a position that such hand or foot may touch it, *for the purposes of destruction."*[183]

Finnis, fully endorsing Smith's editorial opinion, restates it in the following way

> Put strictly in the language of intent, . . . just as personally shooting a trespasser engaged in no act or threat of violence is simply killing or wounding with intent to kill or wound. So too setting a spring gun involves intending (conditionally but really) to do the same 'without firing the shot.' And what one cannot, lawfully, with intent, accomplish 'directly' (in person) one cannot, with the same intent, accomplish 'indirectly' (mechanically) (emphasis added).[184]

Thus, Finnis summarizes in one short paragraph the argument that, as he states, "was in fact put squarely by the plaintiff's counsel . . . and unanimously rejected by four well-regarded judges of the Court of King's Bench. Expressly contrary, however, to Finnis' contention that Wilkes had a conditional intention to kill or seriously injure trespassers, the judges of the court unanimously held that Ilott's injury was not caused

[181] *See, e.g.,* Finnis, *supra* note 2.
[182] *See, e.g.,* "Sydney Smith, (born June 3, 1771, Woodford, Essex, Eng.—died Feb. 22, 1845, London), one of the foremost English preachers of his day, and a champion of parliamentary reform. . . . Smith was also famous for his wit and charm." *Sydney Smith,* Encyclopedia Britannica https://www.britannica.com/biography/Sydney-Smith.
[183] Finnis, *Intention in Tort Law, supra* note 2, at 230-231.
[184] *Id.* at 231.

intentionally by Wilkes, and therefore Ilott could maintain no legal action against Wilkes for his injury.[185]

Based on various aspects of Finnis theory of intent and choice considered above, and based on various statements of the judges in *Ilott* and its progeny *Bird v. Holbrook*,[186] good reasons support the conclusion that Finnis simply begs the question when he concludes—as in the quote above—that a person who sets a spring gun necessarily intends to kill conditionally, i.e., *if* a trespasser should disregard warnings and enter. In order to draw out reasons in support of this conclusion, it will be necessary to consider the actual reasoning found in the judges' opinions.

In the opening paragraphs of *Ilott,* a short opinion authored by Chief Justice Abbott, the judge first notes that the case does not require the court to decide "whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action."[187] While Abbott expresses his belief that the use of such engines is inhumane, he nevertheless adds, "at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defense and protection."[188]

After this introductory remark, Abbott proposes:

> I believe that many persons who cause engines of this description to be placed on their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there, will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequence likely to ensue from his trespass.[189]

In response to this judicial finding of no intent, Finnis counters: "The fallacies about intention are in each case clear enough . . . . [U]nless he was supposing a high degree of ignorance or self-deception about the frequent 'accidents' involving spring guns, [Abbott] clearly confuses intending with *hoping*."[190] Here Finnis suggests that Abbott erroneously believed that when landowners set spring guns they subjectively *hoped* that

[185] *See, e.g.,* Abbott's concluding sentence and final holding: "I am of the opinion that this action cannot be maintained." *Ilott* at 677.

[186] *See* (1828) 130 E.R. 911 (C.P.) (U.K.).

[187] This question was not in play, because Ilott, as noted in the recitation of facts, was on actual notice that guns were placed on the property. The question, however, was decided in *Bird v. Holbrook* eight years after *Ilott*. As will be shown *infra* see notes 220 and 221 and accompanying text the question is relevant to the consideration of the *Ilott* holding.

[188] *Id.*.

[189] *Ilott,* at 676.

[190] Finnis, *Intention in Tort Law, supra* note 2, at 232.

no trespasser would be killed. According to Finnis, however, Abbott was wrong, and the landowners in fact intended to kill trespassers. As Finnis explains: "Landowners of this kind [Abbott] envisages may well both desire and hope that no one will trespass and thus that no one will be shot, yet they clearly do intend that those (if any) who do trespass will be shot."[191]

Moving on to Sydney Smith's direct comments concerning Abbott's statements on the subject of the the landowners' beliefs, Smith writes:

> But if this be the real belief of the engineer—if he think the mere notice will keep people away—then he must think it a mere inutility that the guns should be placed at all: If he think that many will be deterred, and a few come, then he must *mean* to shoot those few. He who believes his gun will never be called upon to do its duty, need set no gun, and trust to rumour of their being set, or being loaded, for his protection . . . . He who sets a *loaded* gun *means* it should go off if it is touched.[192]

Here Finnis, again approvingly adopts Smith's logic: "'Means to' is another synonym for 'intends to'."[193]

A few remarks regarding Smith's comments are in order. First, Smith's point hinges on the belief that the population of surreptitious trespassers and poachers was gullible and easily hoodwinked. Yet, these qualities are not often attributed to persons of such stealthy ilk. Presumably, if the facts played out as suggested by Smith, it would arguably not take long for the ruse to be discovered, spread by "rumour," and the faux-deterrent rendered impotent. With respect to necessity of the placement and concealment of the guns for purposes of deterrence, Justice Bayley observes:

> The [plaintiff's] declaration states that the plaintiff had no notice of the places or of the direction in which the guns themselves were placed, or where the wires communicating with the guns were placed; but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields*; for that would deprive the property of the intended protection*. . . . It is sufficient for a party generally to say, "There are spring guns in this wood" (emphasis added).[194]

Here Bayley illustrates his clear understanding that it is the concealment of the guns, combined with the posting of warnings that functions as the deterrent against unlawful

[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Ilott*, at 677.

entry onto the premises. The most secure way for a landowner to guarantee the efficacy of this deterrent against trespass (for whatever reason)—and dispel any public doubt about the reality of the warnings— would be to actually load and set the guns (perhaps in the presence of trustworthy citizens). Smith's and Finnis' proposed subterfuge reeks of glib cleverness exuded by upper class city gentlemen who have no gardens or fields to protect from trespass.

Of course, the principal issue before the court, as evidenced by the judges' laserlike focus on the question of intent, is whether Smith is correct when he states, 'He who sets a *loaded* gun *means* it should go off it if is touched;' and, whether Finnis, is correct in adding 'Means to' is another synonym for 'intends to'.[195] These statements of Smith and Finnis, however, in point of fact, appear to miss the entire object of the spring-gun deterrent as it functions in *Ilott.* This point did not escape the judges hearing the case. Justice Bayley wrote:

> Such instruments may be undoubtedly placed without any intention of doing injury, and for the mere purpose of protecting property by means of terror; and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury that the plaintiff has sustained.[196]

With respect to Bayley's point here, Finnis responds that it "fails to recall that one intends not only one's ultimate ends (say, protecting one's property) but also all the means one has chosen to further those ends (say, injuring or killing poachers as a punishment, and as a deterrent to and disablement from future poaching). One chosen means are indeed, one's *proximate ends*."[197]

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[195] Finnis, *Intention in Tort Law*, supra note 2, at 232.

[196] *Ilott,* at 677.

[197] *Id.* Here Finnis, again following Aquinas, notes that a chosen a means to some end, may itself become a *proximate* end, which in turn may require deliberation and choice about the means by whihow that intermediate end is to be achieved.

> [I]ntention regards the end as a terminus of the movement of the will. Now a terminus of movement may be taken in two ways. First, the very last terminus, when the movement comes to a stop; this is the terminus of the whole movement. Secondly, some point midway, which is the beginning of one part of the movement, and the end or terminus of the other. Thus in the movement from A to C through B, C is the last terminus, while B is a terminus, but not the last. And intention can be of both. Consequently though intention is always of the end, it need not be always of the last end.

[*Intentio respicit finem secundum quod est terminus motus voluntatis. In motu autem potest accipi terminus dupliciter, uno modo, ipse terminus ultimus, in quo quiescitur, qui est terminus totius motus; alio modo, aliquod medium, quod est principium unius partis motus, et finis vel terminus alterius. Sicut in motu quo itur de a in c per b, c est terminus ultimus, b autem est terminus, sed non ultimus. Et utriusque potest esse intentio. Unde etsi semper sit finis, non tamen oportet quod semper sit ultimi finis.*] Thomas Aquinas, Summa Theologiae I-II, q. 12, art. 2. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

Here, Finnis reveals his clearest assessment of how a landowner's practical reasoning unfolds. Apparently, as he envisions it, the landowner begins his practical deliberation with a grasp of the benefit of protecting his property from trespass, poaching, theft, etc. Then, having volitionally set that as his end, he proceeds to deliberate about means, i.e., how he can achieve that protection. At the end of this deliberative process, according to Finnis, the landowner chooses 'to kill or injure poachers' *as the means*, (i.e., punishment, deterrent and disablement of trespassers) to that end.

Finnis' conclusion here, however, openly impugns the unanimous factual findings of the court's members in *Ilott.* That the judges highlight the question of intent confirms that there was no confusion about the critical issue: whether the landowner intended to kill or injure as *a means* to protect their property. They all concluded he did not have any such intention. For Finnis of course, as explained above,[198] having the intention that he attributes to the landowners, to kill or injure to protect property, requires landowners to *choose* the setting of spring-guns precisely '*in order to kill or injure*' as the means to that end.[199] To repeat Finnis' position on intent, choice, and means:

> What consequences, results, outcomes of one's choosing and doing are to be judged intended . . . . is settled simply by considering why one is doing what one is doing, counting as within the proposal one has adopted by choice, everything which one wants for its own sake [end] or for the sake of what one wants for its own sake [means to end].[200]

Therefore, on Finnis' account of the landowners' intention, in answer to the question of why the landowners set the spring-guns, they, if truthful, must answer: 'I want to protect my property from trespassers by means of killing or seriously injuring them.' If this adequately describes the plan or proposal of the landowners, in Finnis' mind this would indeed entail a conditional intention to kill or injure, if they trespass. Of course, based on Finnis' theory of choice this would also entail that the landowners must be understood to choose in a very precise and specific way—the very *deaths* or serious injury of the trespassers—as an integral part of their plan and proposal to protect their property from trespassers.

Justice Bayley in *Ilott*, however, in the act of holding that landowners who set up the spring-guns do so "without any intention of doing injury . . .", immediately adds "for the mere purpose of protecting property *by means of terror* (emphasis added)." If, however, as Baley affirms, a landowner who sets up a loaded spring-gun has no intention to injure,

[198] *See supra* § III.A, note 129 and accompanying text.
[199] *See* esp. *supra* note 131 and text.
[200] CE Vol. II, *supra* note 3, at 171.

how can the judge simultaneously affirm in the same breath that the landowner's true intent is "protecting property *by means* of terror?" If a landowner's intent is not to injure or kill, how then could setting spring- guns achieve its deterrent purpose, as Justice Baley himself proposes, "by means of terror?"

A close review of the *Ilott* opinions reveals the clear answer to this question—an answer to which Finnis devotes scant attention. In the course of their individual opinions the judges repeatedly emphasize that their holding rests solidly upon the fact that *notice* of the presence of spring-guns was clearly communicated to Ilott and the public at large. In short, the judges conclude that Ilott has no action against Wilkes based on his intentional, voluntary decision to enter onto the property despite knowing the character of the risk. The judges go on to explain this triggers two distinct but related legal grounds for absolving Wilkes of responsibility: 1) given the notices, Ilott voluntarily assumed the risk of death or serious injury; and 2) Ilott's intentional choice to enter the property, having been apprised of the danger, is the 'proximate cause' of his own injuries, thus cutting off any liability of Wilkes.

5.1.1.1. ILOTT'S ASSUMPTION OF THE RISK

In support of *Ilott's* 'assumption of the risk' (*volenti non fit injuria)* "to the willing there is no injury" doctrine, consider the following statements of the judges:

> It is sufficient for a party generally to say "There are spring-guns in the wood;" and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril; and must take the consequences of his own act. The maxim of law, *volenti non fit injuria* applies, for he voluntarily exposes himself to the mischief which has happened.[201]

> In this case it is found by the jury that the plaintiff actually knew that the spring guns were set in this wood. . . . [W]e cannot say that an action may be maintained against the defendant for doing an act like the one in question.[202]

> The jury have found that the plaintiff (before he entered the wood) knew that engines like that by which he suffered in consequence of his trespass were placed there; to him therefore, they ceased be latent engines of mischief. [203]

[201] *Ilott*, at 677.
[202] *Id.* at 676.
[203] *Id.*

> Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained.[204]
>
> Where a man . . . is actually apprised before he enters that the guns are there, he cannot afterward complain that there has not been a proper and sufficient notice given.[205]
>
> [T]he party who so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues and falls within the principle of law, *volenti non fit injuria*, for as he knew that the spring guns were placed, there, he can have no right of action for an injury which resulted from his own act alone.[206]
>
> [I]t cannot be unlawful to set spring-guns in an enclosed field, at a distance for any road, giving such notice that they are set, as to render it, in the highest degree, probable, that all persons in the neighbourhood must know that they are so set.[207]

5.1.1.2. NO PROXIMATE CAUSE

In support of a finding of no 'proximate cause' between Wilkes' conduct and Ilott's injuries consider the following court statements:

> The only doubt which I have entertained during the course of the argument arises out of that maxim of law, that a man cannot do that indirectly which he cannot do directly. I am now , however, satisfied , that that principle has no application to the present case, where the plaintiff had express notice that the spring-guns were placed on premises where he wrongfully entered; . . . in that case the act of firing off the gun, which was the cause of the injury, was his act, and not the act of the person who placed the gun there.[208]
>
> Now in the present case, in order to make the firing off of this gun the act of the person who placed it there, we must consider him as doing indirectly the same thing as if he had taken up the gun at the time and shot the plaintiff; and we must consider the latter as a mere instrument, not an actor. If he had seen the wires and trod on them with the intention of firing off the gun, it is clear that that would have been his own act. Here he entered the wood

[204] *Id.* at 677.
[205] *Id.* at 678.
[206] *Id.*
[207] *Id.* at 680.
[208] *Id.* at 678.

> with full notice that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there.[209]

The judges' insistent focus on the role of notice, viz., the posted warnings, in pronouncing Wilkes' innocence, clarifies that they envisioned the "terror" by which the landowners lawfully intended to deter trespassers and poachers, was not—as Finnis contends—the intentional 'killing' of such persons. Rather, the conclusion most consistent with the finding of the judges and common sense was that first and foremost, the landowners' true plan was to protect their property by intentionally generating as a deterrent a great fear of death (i.e., terror). This, it is suggested, is a more plausible account of the landowner's intent. Rather than intending to kill, they intended to deter trespassers by both setting real guns and then adequately warning, as Wilkes did, about their lethal presence. That this was their intention, and not killing, is evidenced precisely by the fact that warnings were posted, as was explicitly recognized by all the judges of the King's Bench in *Ilott.* If the landowners' true intention in setting up spring guns was to deter by killing or seriously injuring trespassers, they would not have posted warnings.

In order to confirm this interpretation of *Ilott v. Wilkes*, it will be useful to briefly consider its companion case which arose eight years after the decision in *Ilott* and in which no notices of hidden spring guns were posted.

5.1.2. *BIRD V. HOLBROOK* (1828)

In this case[210], Holbrook, the defendant, had rented a "walled garden" and was growing and selling "valuable flower-roots, particularly tulips, of the choicest and most expensive description."[211] Holbrook and his wife lived in a small summer-house in the middle of the garden. Holbrook had been robbed, shortly before the events giving rise to the litigation, of flowers and roots valued at 20£.[212] Soon after that theft and in order to protect his property, Holbrook with the aid of another man:

[209] *Id.* at 679.
[210] *See also* (1828) 130 E. R. 911 (C.P.) (U.K.).
[211] *Bird,* at 912.
[212] *See, e.g.,* 20£ Pounds Sterling in 1828 was the equivalent of $1,136 U.S. dollars in 2019. Calculated at https://www.uwyo.edu/numimage/currency.htm.

> placed in the property a spring gun, the wires connected with which were made to pass from the doorway of the summer house to some tulip beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths, which wires were visible from all parts of the garden or the garden wall; but it was admitted by the Defendant, that the Plaintiff had not seen them, and that he had no notice of the spring gun and the wires being there; and that the Plaintiff had gone into the garden for an innocent purpose, to get back a pea-fowl [peacock] that had strayed.[213]

It was also proved at trial that Holbrook had been asked by two persons on two separate occasions prior to the incident whether he had put up any notice of the spring guns; one person advised him to do so. Holbrook, however, responded that he did not "conceive that there was any law to oblige him to do so," and the Defendant desired such person not to mention to anyone that the gun was set, "lest the villain should not be detected."[214] On the evening of March 21, 1825, a neighbor's peacock flew into Holbrook's garden. Bird, a 19 year-old male, climbed Holbrook's garden wall to help a servant of that neighbor retrieve the peacock. After calling out to see if anyone was in the garden and receiving no answer, Bird jumped down into the garden. "And the boy's foot coming in contact with . . . the wires, close to . . . where the gun was set, it was thereby discharged, and . . . its contents, consisting of large . . . shot, were lodged in . . . his knee-joint, and caused a severe wound."[215]

In *Ilott*, as noted above, Chief Justice Abbott had specifically observed that that case did not require the court to decide "whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action."[216] This question, as can be gleaned from the facts related above, was the precise issue raised by Bird's action against Holbrook. In this case, which neither Chief Justice Abbott nor Justice Bayley participated in, the court unanimously held, citing reasoning in I*lott v. Wilkes,* that an action could be maintained by Bird against Holbrook.

Without belaboring the details of the court's analysis, the following statement in Bird of Chief Justice Best, who did participate in Ilott, suffices to summarize its main line of reasoning. After quoting a number of statements from *Ilott* relating to the requirement that notice of spring-guns be posted by landowners if they are to avoid liability, Chief Justice Best writes:

[213] *Bird,* at 912.
[214] *Id.* at 912-913.
[215] *Id*. at 913.
[216] *See supra* note 178 and accompanying text.

> I am, therefore, clearly of the opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on ground distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for when called on to give notice, he said, "If I give notice, I shall not catch him." He intended therefore, that the gun should be discharged, and that the contents should be lodged in the body of this victim, for he could not be caught in any other way." [217]

Bird thus confirms that when no posted warnings are provided, all the views of Finnis about the setting of spring guns and conditional intentions to kill if a trespasser enters are verified. Finnis is correct that the landowner must intend that *if a person enters* the property,the intruder will be severely injured or killed. To what other motivation, apart from gross carelessness, can a conscious failure to post warnings be attributed?

6. SPRING-GUNS, DEATH AND SIDE EFFECTS

Having explored the contours of the judges' logic in their opinions in *Ilott* and *Bird*, it is possible to respond directly to Sydney Smith's and Finnis' argument that, "He who sets a *loaded* gun *means* it should go off it if touched." And Finnis immediately adds '[m]eans to' is another synonym for 'intends to.' "[218] It is relevant and proper to inquire how the landowner in *Ilott* would respond to the accusation or better the question, "what *did you* intend by setting a loaded gun that will go off if it is touched? For, if loading the gun was part of the landowner's plan or proposal he should be able to provide some explanation.

7. SPRING-GUNS, CONDITIONAL INTENTIONS, AND SIDE EFFECTS

The preceding statement of Chief Justice Best in Bird sheds, as described with a term dear to Finnis,[219] "diaphanous" light on *Ilott.* As explained above, the judges in *Bird,* a

[217] *Bird,* at 916
[218] *Id.*
[219] *See generally* Finnis, *Intention in Tort Law*, *supra* note 2, at 233.

case of first impression,[220] clearly reject Finnis' contention that setting spring guns necessarily entails a conditional intention to kill. Rather, as argued above with respect to Ilott, the judges unanimously interpreted the posting of clear warnings as evidence that the injury caused by the spring-gun was not intended; but instead the spring-guns were "set for the purpose of deterring"—not by killing as Finnis would have it—but by means of terror and fear. The court goes on to find, contrariwise, that Holbrook, by failing to give warning, "placed his [guns] for the express purpose of doing injury." Continuing and tying the failure to warn with its proper implication, the court found that defendant Holbrook "intended therefore that the gun should be discharged, and that the contents should be lodged in the body of the victim."

7.1. CONDITIONAL INTENTIONS TO KILL AND INTENT TO DETER BY FEAR AND TERROR

These dicta in Bird confirm the plausibility of the preceding interpretation of *Ilott* offered in response to Smith's and Finnis' query above. In answer to the question "why" set loaded guns, the judges in both *Ilott* and *Bird* appreciated that Wilkes' setting the spring-guns need not, as Finnis vigorously maintains, entail an intention, even conditionally, 'to kill' as a *means* to ensure protection of property. Instead—having given abundant notice of the presence of the lethal guns which had been set—his intention in setting spring-guns can coherently be interpreted as being solely "for the purpose of deterring" by *means* of fear and terror, not a conditional intention to deter by killing as is clearly the case in Bird.

Accordingly, the response to Sydney Smith and Finnis' question would be simply to propose that the question is a non-sequitur. The landowners' real intention in 'setting a spring-gun-cum-warning' is precisely that no one enter the property to begin with, not to seize or disable the trespasser for capture as in Bird. The further response that could be given, as considered above,[221] would be for the landowner to explain that to be effective the guns must actually be loaded and concealed in order—not to kill—but to make the warning believable to the occupants of the community, efficacious to deter trespassers out of real terror and fear. As such, the intent of the landowners in reality is that their deterrent prevent would-be trespassers from entering the property. Wilkes' intention was that the terror of the hidden guns and warnings, with townspeople confirming their lethal nature, would effectively scare trespassers off. Stated in terms of Finnis' account of intention, the landowner could respond : 'my plan or proposal was

[220] *See Bird* at 916, "[T]his case stands on ground distinct from ant that have preceded it."
[221] *See supra* notes 196-197 and accompanying text.

that by letting neighbors clearly observe that the guns were actually loaded and by placing abundant warnings, word would spread. I would be able to protect my property by intimidating away intruders by fear and terror of certain death or serious injury.' If a landowner executes conduct in accord with this proposal—a plan that should reasonably deter trespassers from entering in the first place—it is disingenuous then to accuse him of *intending*, *as part of his plan or proposal*, that "if someone *does* come on the land" they be killed or seriously injured. Their plan or proposal was that the deterrent would be effective, and no trespasser enter onto the land.

7.1.1. KILLINGS NECESSARY FOR THE DETERRENT TO BECOME EFFECTIVE?

While this interpretation of Ilott is consistent with the reasoning of the court in *Ilott* and *Bird*, before moving on, it is necessary to consider yet one final argument of Finnis seeking to establish killing of trespassers is part of the landowners' intent i.e., part of their 'plan or proposal,' in setting spring-guns: Finnis writes "The deterrent 'object' (intent) will be attained only by the infliction of injury or death on at least a few trespassers, culpable or innocent: such injury is thus intended as a means to achieving the deterrent object".[222]

Finnis, here proposes that in order for the bona fides of the deterrent to be established, at least a few persons, presumably either on the owner's land or another's, would have to attempt trespass and be killed or injured in their efforts. And so, *pace* Finnis, those deaths must be intended. This last reprise of Finnis—again contrary to the findings of the judges in *Ilott* and *Bird*—works off the question-begging supposition, argued against above, that the landowners have a conditional intention to kill.

Without any evidence supporting this assertion, Finnis assumes as fact what is in reality a purely contingent, and perhaps doubtful, matter, i.e., that trespassers would not believe the truth of the posted warnings until a few were actually killed or injured by the guns. In point of fact, most trespassers, regardless of recent history, would be aware that spring-guns, like any shot-guns, are extremely dangerous and, at the least, capable of seriously maiming, if not killing. This knowledge of the reality of the deterrent to any would-be trespassers could also be gained, if the landowner took, as suggested above, reasonable measures to ensure knowledge of the truth of the threat. In short, it is mere speculation that the "object" intended as a deterrent could "be attained *only by the infliction of injury or death* upon a few trespassers."

[222] Finnis, *Intention in Tort Law*, *supra* note 2, at 233.

On the other hand, on Finnis' behalf, it is not unrealistic to foresee—that with many landowners employing spring-guns—some rash trespassers and poachers might venture their fortunes and despite posted warnings, breach the close and be injured or killed by activation of spring-guns. Does this confirm Finnis' point? Does the landowner's plan or proposal include a conditional 'intent to injure or kill' at least a few in order for the deterrent to be taken seriously? One cannot, of course, deny that the death of trespassers by spring-guns despite the posted warnings is an associated *risk* of employing that mode of deterrence. But, even assuming a particular landowner might foresee that possibility with greater or lesser certainty, does this prove Finnis' contention that such deaths are therefore conditionally intended by the landowner?

This article has argued—consistent with the judges' holdings in both *Ilott* and in *Bird*—that landowners who set spring-guns with adequate warnings need have no intent to kill, conditionally or otherwise. Rather, their intention, i.e., their plan or proposal, is to deter trespassers by means of genuine terror achieved by setting guns actually loaded with powder and shot, and by posting clear warnings of their lethal presence. In this situation, if an intruder recklessly ignores the warnings and proceeds to enter the land and is killed or seriously injured, would it not be appropriate, given Finnis' own theory, to regard these injuries not as intended but rather as foreseen yet unintended side effects of the landowner's conduct.

In proposing the argument that such killings or injuries must necessarily be intended, Finnis appears to have disregarded his own central thesis regarding the relationship between intent and foreseeable consequences—including deaths foreseeably caused even with certainty. It is difficult to envision why a landowner in these circumstances could not be understood to be situated in a way at least analogous to those described by Finnis above with respect to the cargo bomber, terrorist-hijacker, and commander ordering tactical bombing.[223] In each of those scenarios, Finnis had no difficulty in concluding that the deaths—which were directly caused by the actors and foreseen by them with substantial certainty—were not caused intentionally; but rather, willingly caused as *unintended side effects*.[224]

The same reasoning applies to situations where there may be killings or injury caused by spring-guns with adequate warnings posted. Is it not plausible that the death or serious injury of a trespasser plays no part in the plan or proposal chosen by the landowner? The landowner does not want or need trespassers to be 'made dead' or seriously injured in order to attain the goal of property protection. All he needs to

[223] *See generally supra* § III.A.1, notes 135-139 and accompanying text.
[224] For the non-intentional sense of 'willingly' used here, *see supra* note 158.

protect his property is to avert, divert, or forestall entry. His intention, according to a fair reading of the esteemed judges' opinions in Ilo*tt* and *Bird*, was solely to deter unlicensed entrance (trespass) onto property by means of fear and terror, not by means of killing. Thus, on this analysis any deaths which might foreseeably occur, though tragic, would not occur as part of the landowners plan or proposal. Stated in terms of Finnis' own theory, it would only be fair to construe them as unintended side effects. As Finnis aptly summarizes all this in another context:

> Whatever consequences lie *outside* one's proposal, because neither wanted for their own sake nor needed as a means, are *not* synthesized into one's will. Though one may foresee these results and accept that one will be causing them, or the risk of them, one is not adopting them. They are side effects, incidentals.[225]

7.1.2. A FEW DEATHS WILL STRENGTHEN THE DETERRENT EFFECT

On the other hand, one might ask, what is the implication if any unintended deaths that might occur are welcomed by the landowner insofar as they will increase the deterrent effect of spring-guns? Would this change the evaluation of the landowner's intent?

Precisely such a question is considered by Finnis with respect to the tactical bombing scenario developed above.[226] Recall that in that situation, the deaths of civilians—living or working in proximity to military installations to be bombed—might be foreseen with substantial certainty. Yet, those deaths would be unintended, and come about as a side effect. As was explained, in certain situations, if the military objective is significant enough, such unintended deaths are often regarded as morally justified. Of course, for Finnis, the intentional bombing of *innocent* civilians to lower and demoralize an enemy and undermine its determination to fight, would always be wrong as an intentional destruction of instantiations of the basic good of life, thus violating various intermediate principles.[227] The question posed here, however, considers the situation where morally permissible unintended deaths of civilians caused by such bombing have the further consequence of weakening the morale of the enemy, and play an incremental, albeit critical role in achieving victory for the side of the tactical bombers. As Finnis describes it: "The commanders of a bombing force may regard civilian

[225] Finnis, *Intention in Tort Law, supra* note 2, at 213.
[226] *See supra* § III.A.3.a.ii, notes 152-154 and accompanying text.
[227] *See supra* § II.A.2.b., note 104 and accompanying text.

casualties and the consequent demoralization and highway-obstructing civilian refugee columns as a welcome bonus, yet not intend them."[228]

Does that bonus benefit, possibly foreseeable, of the unintended deaths of civilians, which would be immoral if caused intentionally by strategic bombing, cause the bombing deaths to be deemed intentional? Finnis' response is consistent with his theory of intention and choice:

> Any who welcome and rejoice in an effect of their actions, but who in *no* way adapt their practical reasoning (and thus the plan they adopt and execute) with a view to bringing about that effect, do not intend it . . . . [S]uch bonus side effects can be genuinely side effects even when foreseen (if they are in no way provided for in the chosen proposal) . . . .[229]

Accordingly, even if tragic but unintended deaths of trespassers occur and thereby ensure, to the satisfaction of the landowner, a greater efficacy of the deterrent created by the posted warnings and setting of spring-guns, this would not make those deaths indirectly intended. So long as the landowners did not incorporate achieving this benefit into their practical plan or proposal, this beneficial but unintended side effect would, one might say, remain the unintended side effect of unintended side effects.

7.2. CONDITIONAL INTENTIONS 'TO KILL' AND INTENDING TO 'STOP THE TRESPASS'

The preceding section offered one possible defense of the view, supported by the unanimous findings of judges in Ilott and *Bird*, that landowners who set loaded spring-guns with warnings had no intention, conditionally or otherwise, to kill or injure. Rather, it was argued the landowners intended to deter solely by fear and terror. Further, it was reasoned that if any trespasser flouted the warnings, their deaths could be understood as unintended side effects of the landowner's conduct.

One additional retort, however, can be brought against Finnis' and Smith's sustained effort to impute *intentional* killing to landowners. Whether or not one finds plausible the arguments offered above asserting that the plan or proposal of the

[228] CE Vol. II, *supra* note 3, at 205.

[229] *Id.* at 182; Elaborating this point Finnis states:

> This is possible, provided that (a) they do not regard civilian casualties and their welcome effects as even a secondary aim, and (b) they select only military targets, calibrate the bombs and plan the bombing runs *exclusively* for the purpose of destroying those targets, and desist from bombing areas containing civilians as soon as the military targets are removed.

Id. at 205.

landowner is primarily inspired by an intention to defend property by *means of fear and terror,* not by killing, still one other another approach can be proposed. If a trespasser actually begins the process of unlawful physical intrusion, scorning the posted warnings, the guns might be placed by the landowners as a last defensive resort, to 'stop in its tracks' so to speak, an attempted trespass.

The principal plan or proposal of the landowner would be primarily to deter all such persons out of fear and terror of being shot given the presence of the warnings and *actually loaded* guns. In the event that this deterrent fails, however, and the trespasser actually begins to enter, the reserve plan of the landowner might be that the activation of the guns will achieve the final defense of the property, either by injuring or killing the trespasser.

Of course, this may appear a direct capitulation to Finnis' argument that the killing or injuring would be "conditionally intentional" *if* the trespasser enters. The critical question, however, is whetherthis second type of defensive injuring or killing *must,* in these circumstances, be considered *intentional*?

Here, however, it is again possible, using Finnis' own logic, to argue that the landowner's causing of harm to the trespassers in this situation be understood as not intended. Applying intention in the strict sense he proposes,[230] the landowner's intention could be construed as aimed solely to 'defend against' or 'stop unlawful intrusion.' If all this plays out—a would-be trespasser ignores all posted deterrent warnings, begins to enter, and is killed or seriously injured—must it be concluded that the trespasser was intentionally killed or injured by the landowner? For Finnis the answer is absolute and unproblematic: "Put strictly in the language of intent, . . . just as personally shooting a trespasser engaged in no act or threat of violence is simply killing or wounding with intent to kill or wound. So too setting a spring gun involves intending (conditionally but really) to do the same 'without firing the shot.'"[231]

At this point, however, it is opportune to consider very precisely whether Finnis' contention here is consistent with the implications of his endorsement of the unintended nature of the killing of the cargo plane's pilot, the hijacker-terrorist,[232] assailants in justified self-defense, and civilians by the tactical bomber.[233] In each of these situations, Finnis describes the killings as *unintended.* Consider again Aquinas' account of PDE as it operates in self-defense:

[230] *See supra* § III.A.1.,note 135 and accompanying text.
[231] CE Vol. II, *supra* note 3, at 200.
[232] *See supra* § III.A.3.a.ii, notes 152-154 and accompanying text.
[233] *Id.*

> It is to be stated that nothing prevents there from being two effects of one act, of which only one is in intention [*in intentione*] and the other outside intention [*praeter intentionem*]. Moral acts, however, receive their character from what is intended and not from what is outside of intention. . . . From the act of defending oneself, therefore, two effects may follow: one being preservation of one's life and the other the killing of an attacker. [234]

What prevents this same line of analysis from applying in the spring-gun/trespasser situation? Similar to the person exercising self-defense who seeks, while employing lethal self-defense, only to 'stop the attack,' so too, whether the landowner stands at the edge of his property warning the trespasser not to enter, or the landowner places the spring-gun with warnings on the edge of his property, can't his intention be understood as solely to '*stop the invasion.*' Would it not be entirely consistent for the landowner to assert, analogous to the case of self-defense, that *death* or *serious injury* of the trespasser plays no part of his plan or proposal and brings him no benefit. All the landowner may have as an intention by use of lethal force is to 'stop the *invasion*'. Having disregarded the deterrent warning, there would be no other way to prevent the trespasser from entering.

Applying Aquinas' self-defense analysis *mutatis mutandis* to the trespasser situation, the activation of the spring-gun, or the direct shooting after warning in person, would have two simultaneous effects: first, within the intention [*in intentione*] of the landowner, it would 'directly thwart and prevent unlawful entry onto one's property;' the other effect, outside the landowner's intention, [*praeter intentionem*] 'foreseeable harm to the trespasser.' Here, unlike the earlier example of the hostage killing, the act of the landowner would not be one which "of itself does nothing but damage or impede a realization of or participation in . . . a basic form of human good."[235] From one indivisible act of defending one's property with lethal force from unlawful invasion, two effects immediately follow; first: (the good effect) the protection of land and possessions from illegal invasion; second: (the evil effect) unintended but foreseen injury or killing of the would-be trespasser.

7.3. 'A MAN CANNOT DO INDIRECTLY WHICH HE CANNOT DO DIRECTLY'

At this point, it is appropriate to return to the departure point with which this article commenced. In his article, *Intention in Tort Law*, Finnis introduced his theme with

[234] Thomas Aquinas, Summa Theologiae II-II, q. 64, art. 7. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73); *see also supra* note 149 and accompanying text.
[235] NLNR (2011), *supra* note 64, at 118-19.

discussion of Justice Holmes' comments in United Zinc Chemical Co. v Britt.[236] There, Holmes states: "liability for spring- guns and mantraps arises from the fact that the defendant has . . . expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."[237] Here of course, Holmes is explicitly referring to the well-known maxim of English property law, mentioned in both Ilott and Bird. In *Ilott*, Judge Holroyd wrote: "a man cannot do indirectly which he cannot do directly;"[238] and Justice Best, "you cannot do, indirectly, what you are not permitted to do directly."[239] Both of these judges, however, denied applicability of the maxim in *Ilott*, based on plaintiff Ilott's assumption of the risk and proximate cause analysis.[240] In*Bird*, however, where the defendant posted no warnings, and admitted to setting the gun for the purpose of catching the trespasser, Plaintiff Bird's attorney Sergeant Wilde argued:

> [I]t is clear . . . that such conduct would have been illegal, if the Defendant had been present, and had seen the Plaintiff enter his garden. . . . No man is permitted to do indirectly that which it is unlawful for him to do directly. The Plaintiff was not attacking the Defendant's person, he was not attempting a felony; at the utmost, he was a bare trespasser: The Defendant, if he had been present, could not have apprehended, much less have shot him for the trespass.[241]

Justice Borrough in *Bird*, adopted this same reasoning, "The Plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorized even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly."[242]

Plaintiff's counsel in *Ilott* presented a similar but ultimately unsuccessful statement of the same law on behalf of his client Ilott.

> [A] man shall not do indirectly that which he cannot do directly. The circumstance of the plaintiff's having notice that the guns were fixed in this wood, can make no difference; for, if the defendant had himself stood at the entrance with a loaded gun, and given notice to a trespasser that he would shoot at him if he entered, such an act would not therefore be justifiable.[243]
>
> [T]he law has assigned certain specific remedies for the protection of property; and even if they were insufficient, is it not competent to an

[236] *See United Zinc.*, 258 U.S. at 268; *See also supra* notes 175-177 and accompanying text.
[237] *Id.*
[238] *Ilott*, at 678.
[239] *Id.* at 680.
[240] *See supra* § IV.A. 1.a. i) and ii), note 203 and accompanying and following text.
[241] *Bird*, at 914.
[242] *Id. at 917.*
[243] *Ilott*, at 676.

> individual to have recourse to a contrivance, the effect of which may be to inflict wounds, or even death, upon a mere trespasser.[244]

Of course, applying the maxim to the facts of Bird brings out its sense most lucidly. A landowner may not hide spring-guns and provide no warnings with the express intention of catching trespassers by killing or injuring. In these circumstances, the meaning of the injunction: 'a man shall not do indirectly that which he cannot do directly' is clear. Just as intentionally killing or injuring a trespasser is wrongful because unjustified, so too, intentionally, i.e., purposely, killing or injuring him mechanically is just as wrongful. In such a case, Holbrook's conduct entails, i.e., necessarily involves, an intent to kill or injure trespassers.

7.4. THE MAXIM AND UNINTENDED EFFECTS.

But how would the maxim apply in view of this article's claim that a landowner's causing death or injury to the trespasser can plausibly be interpreted as unintended? Summarizing again the main arguments of this section: first, it was argued, consistent with the holdings of the judges in *Ilott* and *Bird,* that landowners who post warnings did not have an intention to kill or seriously injure trespassers but solely to deter them by means of fear and terror;[245] second, it was argued that setting a spring-gun or even directly shooting at a trespasser after giving a warning not to enter, may be understood—along the lines suggested by Finnis' adoption of Aquinas' account of self-defense—as causing only the unintended side effects of injury or death.

Both actions could be carried out solely with the intention of "stopping the invasion' not in order to kill or injure. Hence the landowner's chosen plan or proposal, i.e., his intention, would not entail an intention to cause death or serious injury as means or end. For, to recap, the landowner has no need for the trespasser to be injured or killed, only that the invasion be halted. Therefore, whether such halting results directly from a shot fired by the landowner in person, or indirectly and mechanically with a spring-gun, if warnings are given, harm to the trespasser could be understood as brought about as an unintended side effect.[246] And thus, on Finnis' own terms, his contention that the injury or killing caused by spring-guns *must be intended*, conditionally or otherwise, is falsified.

Rephrasing the maxim to take into account the possibility here discussed, i.e., that the harms are unintended, it would read: 'One cannot indirectly cause as an

[244] *Id.*
[245] *See supra* § IV.B.1.,note 222 and accompanying text.
[246] *See supra* § IV.B.2.

unintended side effect, what one cannot directly cause as an unintended side effect.' The critical question that remains, then, is whether it is *permissible* to directly cause as an unintended side effect the injury or death of a mere trespasser. Discussion up to this point of the article has focused exclusively on refuting Finnis' specific claim that the use of spring-guns necessarily entailed an *intention* to kill or injure. This article has argued that, on Finnis' own principles, no such intention is entailed. The fundamental moral question, however, still remains, i.e., whether such unintended injury or killing would be morally permissible.

8. DEFENSE OF PROPERTY AND UNINTENDED KILLINGS CAUSED AS SIDE EFFECTS

As discussed above in light of Aquinas' full account of self-defense—causing unintended side effects, standing alone—does not *ipso facto* legally or morally vindicate the conduct and its unintended effect. As Aquinas wrote, in considering the permissibility of causing the unintended death or injury of an assailant:

> Now an act of this type, insofar as the preservation of one's own life is intended, is not illicit since it is natural for every being to keep itself alive to the extent possible. . . . It is not necessary . . . that a man refrain from carrying out a measured act of defense to avoid the killing of another. A person has a greater obligation to provide for his own life than for that of another.[247]

In order to determine whether the unintended injury or death caused to a trespasser either directly by shooting or indirectly by a spring-gun set with warnings may be justified— applying Aquinas' PDE analysis of two effects—it is necessary to compare the nature of the good intended (*in intentione)* by landowners in light of the unintended (*praeter intentionem*) evil effect. In other words, in order to justify causing the unintended "evil effect" (serious harm or death of the trespasser), it is necessary to consider whether the importance of the intended effect (protection of property from unlawful entry, poaching, and theft) provides a reasonable justification for causing such unintended harm. The following section will explore whether common law has provided a resolution to this question.

[247] *See supra* note 149 and accompanying text.

8.1. THE VALUE OF HUMAN LIFE UNDER COMMON LAW

As seen in the preceding sections,[248] under common law, it was not permissible intentionally to use force to repel a mere trespass involving no threat to the household or person of the owner.[249] Yet, scant attention is given in either Ilott or Bird by way of explanation for this expansive protection given to trespassers. The 1877 American case, Simpson v. State,[250] however, is useful on this score:

> It is a settled principle of our law, that everyone has the right to defend his person, and property, against unlawful violence, and may employ as much force as is necessary to prevent its invasion. . . . But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases inflict great bodily harm, or endanger human life. The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent. It is an inflexible principle of the criminal law of this State, and we believe of all the States, as it is of the common law, that for the prevention of a bare trespass upon property . . . human life cannot be taken, nor grievous bodily harm inflicted.[251]

These statements describing common law limitations on the use of force in 'defense of property' and its rationale, in context of the present discussion, can be summarized as follows: a landowner, in defense of his property involving a trespasser who poses no threat to the person of the landowner or who is committing no other felony, cannot lawfully injure or even apprehend the trespasser, much less kill him. Under common law, it was never permissible to inflict serious harm or threaten human life, much less kill, in order solely to protect one's property. The value of human life and the protection of bodily integrity are superior to any mere property interest.

[248] *See generally supra* § IV.B.3., note 238-243 and accompanying text.
[249] *Id.*
[250] Simpson v. State, 59 Ala. 1, 9 (1877).
[251] *Id.* at 9.

8.2. CULPABILITY FOR CAUSING UNINTENDED INJURY OR DEATH TO PROTECT PROPERTY.

8.2.1. MORAL CULPABILITY

The common law interest in subordinating the value and protection of property to the good of human life interfaces neatly with Finnis' understanding of the basic good of life and the various intermediate principles of morality proposed by him.[252] Of course, at the same time, none of these considerations of the value of human life explicitly take up the permissibility *vel non* of causing *unintended* harm. Nevertheless, when considering the moral evaluation of willingly causing side effects, the following remarks of Finnis are clearly germane:

> Moral responsibility and consequent legal liability for intentional infliction of harm are paradigmatic, exemplary. Avoiding such wrongs is only a necessary, not a sufficient condition of acting justly. But the same respect for each individual whom one might have harmed as a means to an end [i.e., as part of one's plan or proposal; intentionally] carries over into, and informs, the quite different principle of fairness. Here one encounters the quite different principle of commutative injustice involved in the imposing of harmful foreseen side effects by persons who in their actions or omissions fail to comply with rational principles such as the Golden Rule.[253]

Applying this to the preceding considerations, it is evident that causing serious injury or death to a person who is a bare trespasser—even if such consequences occur as unintended side effects—could never be justified by appeal to the intended good of mere 'protection of property'.

For Finnis, commutative justice "rectifies or remedies inequalities which arise in dealings . . . between individuals. These 'dealings' may be either voluntary . . . or involuntary, as where one man 'deals with' another by stealing from him, murdering him, or defaming him."[254] Based on the lack of proportion between the good intended 'protection of property,' and the serious harms caused by a landowner who, with warnings, directly shoots a trespasser or sets a spring-guns, such action is clearly unjustified. And this is true, even if the consequences of such actions are—strictly analyzed—properly understood as unintended. Such damage to a trespasser's life and bodily integrity cannot be justified as a legitimate means for protection of property.

[252] *See supra* § II.A.2b., note 103 and accompanying and following text.
[253] CE Vol. II, *supra* note 3, at 215.
[254] NLNR (2011), *supra* note 64, at 178.

Such conduct is clearly a violation of commutative justice: "Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent."[255]

Under a revised version of the maxim, its corollary, it then follows that a landowner cannot 'indirectly (with a spring-gun) cause to a mere trespasser as unintended damage what he could not directly (by shooting him in person) cause to him as unintended damage. Therefore, just as directly shooting a trespasser with a warning 'in order stop the 'trespass ' would be wrong, even if its results were unintended, so too, indirectly causing the same unintended result by setting a spring-gun is wrong, i.e., is a violation of the Golden Rule and commutative justice.

Finnis confirmed in his discussion of the cargo bomber that causing foreseen serious harm or death, even if unintended, can violate the Golden Rule against "arbitrary preferences amongst persons."[256] Applying those considerations here, one would presumably not want oneself or one's loved ones to be subject to unintended serious injury or death for a bare trespass solely in order to allow a landowner to protect his property. By failing to respect practical reason's grasp of a trespasser's basic good of bodily integrity, an instantiation of the basic good of life, landowners would willingly act unfairly.[257]

Similarly, as in the cargo bomber case, causing unintended harm to mere trespassers would violate Finnis' intermediate principle barring "arbitrary preferences amongst values."[258] The landowner may view the protection of property as a means of promoting and ensuring his own well-being from dissipation due to poaching or theft; or, perhaps as vindicated by the sham rational that by "allowing trespassers to go unpunished would be unjust. It would encourage trespass and be a personal failure to exercise my duty as a citizen to aid in enforcement of the law." Here, the landowner would violate this intermediate principle, by exaggerating the value of his own financial wellbeing and social reputation. These goods, however, are not desirable in themselves as instantiations of a basic good, but are purely instrumental goods beneficial for promoting various subordinate goods of life. In no case would it be appropriate to offer defense of property as a justification for seriously wounding or killing a mere trespasser, even if those consequences are unintended.

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[255] *See supra* note 251, *Simpson v. State,* at 9.

[256] *Supra* notes 110-114 and accompanying text.

[257] Finnis uses 'willfully' here in the same sense as "not unintentionally" which he uses to mean unintended, but not the result of accident, mistake, or lack of foresight. "By another nuance of our language, is it also a case, I think, of 'willfully' killing—for 'willfully', to my ear, means not unintentionally. CE Vol. II, *supra* note 3, at 184. *Supra* note 136.

[258] *Supra* § II.A.2.b. i), notes 103-109 and accompanying text.

Accordingly, with respect to the breach of both these intermediate principles, a landowner's decision to set spring guns to shoot or risk shooting a trespasser, even with a warning, would not be in harmony with the first principle of morality: 'the integral directiveness of practical reason.' For to voluntarily engage in such conduct—causing unintended harm to the goods of life and bodily integrity of a mere trespasser—landowners must "fetter" and "deflect"[259] the integral directiveness of practical reason. They do so by unreasonably exaggerating the value of their own participation in the basic good of life and its instrumental necessities (property, wealth, etc.) and by freely excluding practical reason's appreciation of the other's interest in the same goods.

8.2.2. LEGAL CULPABILITY

In earlier considerations relating to the search for a just criminal punishment for the cargo bomber's causing of the unintended but foreseeably certain death to the pilot, it was noted how Finnis proposed that the most grievous form of homicide should be charged, viz., murder.[260] Examining the Model Penal Code it was determined that the most fitting charge for the cargo-bomber would be murder pursuant to § 210.2(1)(a) for 'knowingly' causing homicide without adequate justification. As Finnis stated in that context: "[O]ne who inflicts death, even as a side effect, in order to effect such an instrumentalization of another has in the fullest sense, 'no excuse' for thus knowingly causing death. We should not complain if both law and common moral thought treat this as murder."[261]

What of the landowners causing unintended harm, either by shooting directly at a trespasser in order to 'stop the invasion,' or, alternatively, the landowner who sets a spring gun intending to deter by fear and terror? Given the serious violation of commutative justice in both cases, and Finnis' expressed proclivity for homicide in this context, what charge, if any, could be brought against such landowners under MPC §210? Of course, in this context it is necessary to disregard the judges conclusion that Wilkes was free from guilt due to the fact that Ilott assumed the risk or proximately caused his own damages. As Finnis states: "It is the sort of conduct, the sort of transaction between persons, which cannot be justified by alleged assumption of risk or by appeal to the maxim *volenti non fit injuria*."[262]

[259] *Supra* notes 88-94 and accompanying text.
[260] *See* CE Vol. II, *supra* note 3, at 194.
[261] *Id.*
[262] *Id.* at 202.

To repeat, MPC § 210 provides:

> (1) Criminal homicide constitutes murder when:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

Applying this provision to the current hypotheticals yields varying results. For the landowner who shoots directly at the trespasser without intent to kill, as described above, but only to 'stop the trespass'[263] presumably a 'purposely' state of mind would be excluded. If the landowner aimed and shot at a vital spot of the trespasser as the most effective way to stop the trespass, a murder charge might be brought under § 210.2(1)(a) "knowingly" because he arguably would know with "practical certainty" that the trespasser would be killed. This result is even more likely given the MPC's further provision in § 2.02(7): "Requirement of Knowledge Satisfied by Knowledge of High Probability". When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence [.]" Thus even if the landowner does not know with practical certainty that the death of the trespasser would occur, he can be charged and convicted of murder if the landowner knows when he shoots that the trespasser's death is highly probable.

On the other hand, if he does not aim at a vital spot, he cannot know with practical certainty that death will ensue. In this case, this hypothetical would be assimilated to the other hypothetical where the landowner sets a spring-gun, and it ends up causing unintended harm or death to the trespasser. For in both these scenarios it is neither the landowner's purpose to kill nor does he know with practical certainty that the trespasser will die. In fact, in the spring gun case, the landowner doesn't even know with certainty whether a trespasser will come at all. The landlord should be viewed only as risking the death of the trespasser. In such case, the only remaining option for a murder charge being brought against the landowner would be 210.2(b) for recklessly causing homicide:

> 210.2. Murder.
>
> (1) Criminal homicide constitutes murder when: . . .
>
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

The crucial issue, of course, again relates to how the MPC defines its terms. The relevant definition of "murder" under MPC § 2.02(1)(b) is for recklessness manifesting "extreme

[263] *See supra* § IV.B.2, note 234 and accompanying text.

indifference to the value of human life." The MPC defines recklessly in the following manner.

> *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element . . . will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[264]

Official commentary to this section explains that § 210.2 (1)(b) was adopted to capture a kind of recklessness more culpable than that required for mere 'reckless manslaughter.' "This provision reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly."[265] MPC commentary further notes that this subsection was adopted to capture common law "depraved heart" murder.[266]

The commentary clarifies that the critical distinction between reckless murder and the lower graded reckless manslaughter relates to the nature of the risk created and consciously appreciated by the actor given the nature of his conduct, i.e., the seriousness of the "substantial and unjustifiable risk." The commentary states that a distinction between the recklessness required for manslaughter versus that for "extreme indifference" recklessness murder, "is a matter of degree and the motives for risk creation may be infinite in variation."[267] Accordingly, the MPC provides that the distinction between the recklessness *mens rea* justifying conviction for murder versus manslaughter cannot be defined more precisely. ". . . [I]it must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter."[268]

Here, even assuming, as just argued above, that the killings were not practically certain to follow but were risked as unintended side effects, they would have been utterly

[264] Model Penal Code, § 2.02(2)(c) (Am. Law Inst, 1985). As applied to homicide, the commentary indicates that it requires a finding that "presupposes an awareness of the creation of a substantial homicidal risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves."

[265] Model Penal Code, § 2.02(2) cmt. 4 (Am. Law Inst, 1985).

[266] "Insofar as Subsection (1)(b) includes within the murder category cases of homicide caused by extreme recklessness, though without purpose to kill, it reflects both the common law and much pre-existing statutory treatment usually cast in terms of conduct evidencing a "depraved heart regardless of human life" or similar words." *Id.*

[267] *Id.*

[268] *Id.*

unjustified. And given that a serious unjustified risk of causing death would rank very high on a culpability scale, it would clearly involve "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[269] The callous and ruthless disregard for trespassers' lives and their bodily integrity, combined with lack of any truly justifying considerations, makes this scenario a paradigmatic illustration of 'extreme indifference to the value of human life' or 'depraved heart' murder.

Accordingly, notwithstanding Finnis' resolute efforts to attribute culpability to landowners based on their purportedly *intended* killing when they shoot trespassers directly or set spring-guns, in fact the preceding analysis has shown that on his own principles it would make little difference in terms of moral or legal culpability. As explained above, the cargo bomber's unintended causing of the death of the aircraft pilot was deserving of the highest form of moral censure and the highest levels of legal culpability (murder). So too, foreseeably causing, or risking causing, without justification, trespasser deaths—plausibly construed on Finnis' own principles as unintended side effects—would rightly be condemned as morally corrupt and deserving of the most severe criminal punishment for murder by "depraved heart."

CONCLUSION

The central purpose of the preceding article, as stated in the introduction, has been to challenge Finnis' contention that a landowner who sets a spring-gun or uses other lethal force to deter a trespasser, even if the landowner has posted clear warnings, entails that the landowner intentionally kills or seriously injures that trespasser, Defense of the thesis, challenging Finnis' contention, culminates in the arguments presented in the last part, Part IV. These concluding arguments propose, employing Finnis' own principles, that threatening a trespasser with lethal force, either by a hidden spring-gun, or by directly shooting at him solely in order to 'stop the trespass' can—by analogy to Aquinas' account of self-defense— cause consequences that can be regarded as *unintended side effects,* aimed solely and defensively at 'stopping the invasion' i.e., the trespass. While causing such unintended side effects would be deserving of the most severe criminal punishment, this article has been devoted to arguing, a fine but critical point, viz., that, in keeping with the Judges' opinions in *Ilott* and *Bird* and based on Finnis' own principles, they are not necessarily intentional or part of the actor's intention.

[269] Model Penal Code,§2.02(2)(c) (Am. Law Inst, 1985).

More specifically, this thesis is dependent upon the considerations developed in earlier parts of this article. Fundamentally, all these considerations flow from analysis of Finnis' natural law theory of basic goods. For, as Finnis explains, these basic goods provide incipiently all the reasons for whatever a person may rationally choose and do. This theory of the basic goods, in turn, leads Finnis to his first principle of morality, the integral directiveness of practical reason. This principle, naturally grasped by practical reason in view of all the basic goods, taken integrally, requires a person in all their deliberations and choices to respect each of those basic goods. Taken together, in their entirety, they engender a 'moral' sense of 'ought' in the practical cognition of a human person. This moral ought, however, is violated whenever a person chooses, not from robust deliberations taking into account all the basic goods, but in circumstances where one has willingly permitted the fullness of practical reason to be 'fettered' due to the influence of feelings or other truncated considerations. In these situations, the person acts unreasonably, i.e., immorally by failing to apply all of one's naturally grasped rational principles.

At the same time, Finnis recognizes that it is impossible to act in the world without causing some harm, even to instantiations of basic goods. The principle he develops to account for this is the maxim "Respect for Every Basic Value in Every Act." Accordingly, this maxim functions as a prohibition only on *intentionally* causing damage or destruction to an instantiation of any one of the basic goods. For choosing to intentionally destroy or seriously damage an instantiation of a basic good would be to deny and pervert one's very identity as a rational acting person, thus creating a moral schizophrenia and making oneself to be the kind of person who voluntarily acts immorally. As Finnis writes: Thus one who *intends* to destroy, damage, or impede some instantiation of a basic human good necessarily acts contrary to reason."[270]

This article, of course, has been primarily concerned with damage to the basic good of 'life.' While the intermediate principle prohibits all direct intentional damage or destruction of basic goods, it does not, and from a practical point of view cannot, absolutely forbid causing harm to basic goods, even the good of life. Finnis resolves this problem by developing a very precise conception of intention and choice. In particular he posits that an intention bears precisely on what one chooses as part of one's plan or proposal in acting. Anything caused by one's conduct that is outside of that plan or proposal comes about as an unintended side effect. Of course, Finnis following Aquinas, recognizes that just because something is unintended on this schema, does not make it

[270] CE Vol. II, *supra* note 3, at 195.

morally permissible. Rather, causing or accepting unintended side effects, can and must be justified only in terms of the good one does intend.

The concluding arguments of this article employ Finnis' own very precise account of intention and choice. Building upon his general natural law theory, it proposes that using lethal force against a trespasser in order to 'stop a trespass,' can by analogy to Aquinas' account of self-defense, as adopted by Finnis, be regarded as an unintended side effect *praeter intentionem* (outside one's intention). As Finnis puts this critical point, "Whatever consequences lie *outside* one's proposal, because neither wanted for their own sake or needed as a means, are *not* synthesized into one's will . . . . They are side effects, incidentals."

Of course Finnis also points out that simply because some consequences of conduct lie outside one's plan or proposal and can properly be understood as unintended, does not *eo ipso* settle the question of whether that conduct is permissible, i.e., moral. Referring to unintended side effects, Finnis states: "One may well be culpable in accepting them. But the ground of culpability will not be that one intended them, but that one wrongly, for example unfairly, accepted them as incidents of what one did intend."[271]

This article, applying these critical points, argues, in keeping with the opinions of the judges in *Ilott* and *Bird*¸ that a landowner's intention in setting spring-guns with warnings is not necessarily to kill or injure, even conditionally, but instead to use the real threat of lethal force to deter by terror and fear. Further, this article contends that if that deterrent fails, even the direct application of lethal force 'to stop the trespass' and its subsequent causing of serious harm or death could be viewed on Finnis' own principles as unintended. A landowner does not need the trespasser to be made dead or seriously injured to protect his property. He only needs to scare him off. Further, just as in Aquinas' self-defense argument, the victim does not need the death of an assailant, but even so is entitled to use deadly force to 'stop the attack.' The lethal consequence need play no part in his plan or proposal. So too, death or serious injury of the trespasser is not necessary for the landowner to accomplish his goal of protecting his property. All he needs is to 'stop the trespass' to 'stop the invasion.' Thus, if any killing or serious injury occurs, caused by the landowner's conduct, albeit immoral and unlawful, could be understood as unintended.

These are the main arguments proposed by this article in support of the view that Finnis has erred in maintaining that a landowner's use of lethal force, backed up by warnings, *must* include a conditional intention to kill or seriously injure, if the trespassers enter.

[271] *Id.* at 213.

Yet, even if this article is successful in putting Finnis' main thesis into doubt, i.e., if the arguments presented above plausibly undermine his thesis, there is an important point of convergence. For whether one understands, as Finnis does, the triggering of the guns and injury or death to the trespasser as part of the landowner's plan or proposal, i.e., as his intention; or whether one interprets the triggering of the weapons as an unintended side effect, either option would represent instances of conduct whose consequences would be unlawful and grievously immoral. As the article also argues, under common law, no adequation exists between the good of protecting property and causing death or serious bodily harm, even if unintended, to trespassers who pose no threat to the landowner's person. As was stated in *Simpson v. State*,[272] "Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent."[273]

In fact, the penal result under either approach may not differ in substantial degree. Both would describe landowners who are prime candidates for murder charges under Model Penal Code § 210.2. A landowner who intentionally kills or injures will be liable for "purposely" killing under § 210.2(1)(a). The landowner who causes such unjustified killing as unintended side effects, should appropriately be charged with "depraved heart killing," pursuant to § 210.2(1)(b), for recklessness manifesting "extreme indifference to the value of human life."

The distinction between Finnis' theory of these mantrap cases and that advocated by this article may seem of little consequence. But its significance can be best appreciated by considering Finnis' discussion of the difference for one's moral character between on the one hand choosing, and thus intending, to harm a basic good directly, and, on the other, causing such damage as an unintended side-effect.

> [C]ommon morality is not indifferent to outcomes. But it includes among the significant outcomes the impact of choosing and intending upon the character of the chooser. It attends to the fact that *choices last.* The proposal which one adopts by choice in forming an intention, together with the reasoning which in one's deliberation made that proposal intelligently attractive, *remains,* persists, in one's will, one's disposition to act. The proposal (and thus the intention) is, so to speak, synthesized into one's will, one's practical orientation and stance in the world.[274]

[272] *See generally Simpson*, 59 Ala. 1.
[273] *Id.* at 9.
[274] CE Vol. II, *supra* note 3, at 213.

The actor who conditionally intends the death of a person as part of their plan or proposal, either as an end or as a means to an end, is the kind of person who chooses to subordinate all the good in that person completely to the interest of another. This kind of person reflexively makes themselves to be a murderer, of the worst kind.

On the other hand, one may act culpably, but without any intention to kill or seriously injure the trespasser. In this case, one acts wrongfully in accepting that side effect when there is no justifying reason.

> Whatever consequences lie *outside* one' proposal, because neither wanted for their own sake nor needed as a means, are not synthesized into one's will. Though one may foresee these results and accept that one will be causing them, or the risk of them, on is not adopting them. But the ground of culpability will not be that one intended them, but that one wrongly, for example unfairly, accepted them as incidents of what did intend. The effect on one's character of accepting them is not like the dynamic, shaping effect that forming an intention (even a reluctant intention) has. [275]

One has committed a wrong, and perhaps a serious wrong. Yet, one has not reflexively constituted one's own self, one's basic character, into that of a killer, but less culpably, a reckless person. While this distinction may fade in importance to some, at least the reckless person has some residual, perhaps tenuous, attachment to the basic good of life, an attachment that remains and can be used to correct their moral compass. The direct man-killer on the other hand, like Aristotle's intemperate man, has lost the first principle by which he could work to amend his character. A true man-killer is one who has lost sight of and appreciation for the basic good of life.

One scholar, providing commentary on a pertinent passage from Aristotle—appropriate for summing up and closing the present study—describes the Greek philosopher's assessment of the devastating impact on a person's moral character that occurs when one loses the first principle of right action, i.e., Aristotle's intemperate man:

> The intemperate man, for example, does not suffer regret and his actions are fully in conformity with his choice. Indeed, lack of regret is his salient feature. . . . His ruling principle has been destroyed and so he no longer cares about being virtuous. As a result, he experiences no psychological turmoil. His soul, like that of the virtuous, is harmonious; his reason and his desires drive him in the same vicious direction. He is clear-headed about his actions even though,

[275] *Id.*

> because he is morally obtuse, their ultimate import eludes him. As Rorty puts it, 'he has ends—he is the sort of person who can act in the light of his ends—but he has the wrong ends.' Because his reason is corrupt, the intemperate person is . . . neither pardonable nor curable. [276]

[276] David Roochnik, *Aristotle' account of the Vicious: A Forgivable Iinconsistency,* 24 Hist. Phil. Q. 209 (2007) (Internal cites to Aristotle omitted), commenting on a passage from Book VII of the Nichomachean Ethics. In this passage he is quoting Amélie Oksenberg Rorty, *Akrasia and Pleasure*, *in* Essays on Aristotle's Ethics 267, 271 (Amélie Oksenberg Rorty ed., University of California Press, 1980).

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Brexit, the Misrepresentation of Democracy, and the Rock of Gibraltar

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ABSTRACT

This short essay makes three points regarding Brexit that have not been widely considered in public or academic debate.

First, Brexit advocates (Leavers) successfully misrepresented the referendum of June 2016 as a definitive expression of democratic will. ("The people have spoken.") The slim majority result was less than such an expression, particularly because it ignored intercommunal and intergenerational democratic values—most profoundly, overriding clear majorities in Scotland and Northern Ireland which had voted to remain in the EU.

Second, even though within a year of that referendum, a majority of Britons (Remainers) had come to oppose Brexit, political leadership among the Remainers was woefully ineffective. Some, like Prime Minister Theresa May, simply changed sides, wrongheadedly accepting the people-have-spoken rhetoric. Other Remainers continued to make their case, but did not effectively argue that people had not spoken. Perhaps, most crucially, the British "first past the post" electoral system provided no viable remain option in the December 2019 Parliamentary elections. Put simply, in the December 2019 Parliamentary elections, Remainers had no one to vote for.

Third, hopes that the UK could easily rejoin the European Union (encouraged in part by remarks of EU leaders) are false. Article 49 of the Treaty on European Union (TEU) requires that a state which has left the EU should go through a rigorous admission process. Since Article 49 requires unanimity among EU member states, any member with an objection to Britain rejoining could block readmission. Most troubling for Britain could be Spain's long-standing claim for the return of Gibraltar to which the UK would be loathe to accede and from which Spain would be loathe to retreat.

KEYWORDS

Brexit; Referendum; European Union (EU); Gibraltar; United Kingdom (UK)

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INTRODUCTION

Brexit advocates successfully misrepresented the referendum of June 2016 as a binding expression of democratic will — ignoring its lack of inter-communal and intergenerational democracy. This misrepresentation has fostered a violation of the internationally recognized right of self-determination of the Scots as well as of the Irish.[1] Furthermore, the referendum of 2016 merely proved that, on a single day in June, a transient bare majority (51.9%) of that day's voters purported a desire to leave the European Union (EU),[2] failing to speak for two generations of Britons who had constructed profound ties with the Union or for future generations of Britons who would not enjoy those ties.

Brexit threatens political morality and economic well-being. It is a bad thing. Regrettably, it will be hard to undo.

[1] The global community has recognized *self-determination* as a binding rule of international law at least since the entry-into-force in 1976 of the United Nations Covenant on Civil and Political Rights. The very first substantive sentence of that important and universal treaty reads, "All peoples have the right of self-determination." International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The development of the principle of self-determination probably traces its modern state practice to Woodrow Wilson's conception of a post-colonial world order after World War I. The American and French Revolutions of the late 18th Century and their declaratory documents implicitly sowed the seeds of the doctrine. The rule was probably customary law well prior to its legislation into treaty law in 1976 by the ICCPR. The UN Charter references it in Article 1 as supporting the "purposes" of the United Nations. U.N. Charter art 1, ¶ 2. While jurists, statespeople, and scholars have debated the parameters of self-determination (see the Canadian Supreme Court's excellent analysis in the *Quebec* Opinion), it seems undeniable that the Scots are a distinct "people" and that Scotland being yanked out of the EU against its will would seem to deny that right. The *Quebec* opinion persuasively concludes that a people enjoying internal self-determination within a larger state (such as the Québequois in Canada) are not entitled under international law to seek external self-determination, that is, separation from the larger state. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 135–37 (Can.). However, if self-determination within the larger state is denied, then external self-determination would be appropriate. *Id.* at ¶ 138. Being forced to leave the European Union against the will of the majority of Scots would seem to fit in the latter category.

[2] *See e.g.,* EU Referendum: Results, BBC, https://www.bbc.com/news/politics/eu_referendum/results .

1. INTERCOMMUNAL DEMOCRACY

Four nations constitute the United Kingdom (UK) — England, Scotland, Wales and Northern Ireland.[3] Two of those four, Scotland and Northern Ireland, voted against Brexit.[4] But England is more populous than the other three combined.[5] So, on that one June day in 2016, the English vote was sufficient to create the slim UK majority for leaving Europe. The wishes of Scotland and Northern Ireland counted for naught. Such a summary procedure dominated by one nationality does not serve deeper democracy in a multinational state like the UK, particularly when faced with a fundamental constitutional change.[6] The whim of a one-time popular vote should not alter the complex structure and balance of a modern representative democracy.

For Scotland, Brexit once again raises the question of independence. Britain's exit from Europe may be followed by Scotland's exit from Britain. In the 2014 Scottish referendum, 45% of Scots favored independence.[7] The Sottish National Party holds Scotland's largest Parliamentary block.[8] With the will of the Scots to remain in the EU overridden by the English vote to *leave*, that 45% could easily swell above 50%.[9] British Prime Minister Johnson (if still in office) could find himself the head of government of a much smaller state.

For Northern Ireland, Brexit's result may be even more traumatic.

It is "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British or both . . .".[10] Thus, the Good Friday (Belfast)

[3] *See e.g.,* Nicholas A. Barr et al., *United Kingdom*, in ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/place/United-Kingdom/The-lowland-zone.

[4] *See* EU Referendum: Results, *supra* note 2. Gibraltar, discussed below, overwhelmingly voted *Remain* as well. *Cf. EU Referendum: Local Results*, BBC, https://www.bbc.com/news/politics/eu_referendum/results/local/g. Supporters of Brexit came to be known as *Leavers* whereas opponents of Brexit came to be known as *Remainers.* Similarly, the press, politicians, and public came to speak of the *remain* vote and the *leave* vote.

[5] *See e.g.*, Population Estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2018, OFFICE FOR NATIONAL STATISTICS , https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2018#englands-population-continued-to-grow-at-a-faster-rate-than-the-rest-of-the-uk-in-mid-2018.

[6] In contrast, for the United States to alter its constitution (a fundamental change approximate to a Brexit), an amendment must pass both houses of Congress, then be ratified by the legislatures of three-quarters of the states. *See* U.S. Const. art. V.

[7] *See e.g., Scotland Decides: Results,* BBC, https://www.bbc.com/news/events/scotland-decides/results .

[8] *See e.g.,* Current State of the Parties, THE SCOTTISH PARLIAMENT, https://www.Parliament.scot/msps/12450.aspx.

[9] Ironically, Spain, often at odds with Britain over the last half millennium or so, might support the UK in opposing independent Scottish entry into the EU, because of Catalonia. *See* Eddy Wax, *Spain Fires Diplomat in Scotland over EU Membership Letter*, Politico (Jun. 8, 2019), https://www.politico.eu/article/spain-fires-diplomat-in-scotland-over-eu-membership-letter/. If Scotland may break away from Britain by referendum, why not Catalonia from Spain? Northern Ireland would be a less threatening case to Spain, since Northern Ireland would not enter as an independent break-away state, but as a region of an already existing EU member — Ireland.

[10] The Belfast Agreement art. 1.6, U.K.- Ir, Apr. 10, 1998, https://www.gov.uk/government/publications/the-belfast-agreement.

Agreement in 1998 marked the end of "The Troubles" — two decades of intercommunal violence —[11] with the recognition that national identity need not be exclusive and competitive. The agreement among the United Kingdom, the Republic of Ireland, and both the Protestant and Catholic communities of Northern Ireland, declared peace after thirty years of market bombs, rubber bullets (and lead ones), assassinations, and interments without trial — the Troubles.[12] The European Union played a part in enabling such peace. Its chief contribution was not as a mediator, but as a re-constructor of identity — not by any particular acts of Brussels Eurocrats, but by the EU's very existence as a supra-national political, social and economic space. Young people, particularly, had begun to think of themselves as European as well as French or German or Dutch. Development of such multilayered identities — European, as well as "Irish or British or both" — fostered a mentality of shared and variable belonging that contributed to the Good Friday peace, a monumental political achievement for the two great, but sometimes distrustful, island neighbors of Britain and Ireland.

Brexit screws this up — re-emphasizing exclusive and competitive identities and ignoring the wishes of Northern Ireland which voted to remain. Leaving the EU reimposes a border in the interior of the island of Ireland or else a border in the Irish Sea partitioning Ulster[13] from the rest of the UK. Either the Catholic community will feel wronged being separated from the Irish Republic or the Protestant community will feel wronged being separated from Britain. Or both. The renewed ascendancy of *difference*, other-blaming and rekindled violence could follow. Brexit brings back the us-and-them mentality that the Good Friday Agreement had wisely finessed, as that accord turned a page away from the violent Troubles. Brexit, in contrast, highlights the differences between Catholics and Protestants[14] in Ireland and roils the peace.

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[11] Actually, the violence was more complicated than merely intercommunal, Protestant against Catholic. Militias from each community warred at times with British troops sent to Ulster to keep the peace, and even on occasion, fought with each other for dominance within the Catholic or Protestant camp. *See generally* Paul Dixon, Northern Ireland: The Politics of War and Peace (2001); John Coakley, Changing Shades of Orange and Green (2002); Roger MacGinty & John Darby, Guns and Government: The Management of the Northern Ireland Peace Process (2002).

[12] Jeff Wallenfeldt, *The Troubles*, in Encyclopaedia Britannica (May 14, 2019), https://www.britannica.com/event/The-Troubles-Northern-Ireland-history.

[13] Ulster is the historic geographical region now made of the six counties of Northern Ireland. Within this essay, the two names for this territory are used interchangeably, although some experts might find different cultural or political connotations for each. For example, after the Good Friday Agreement and resulting joint commission recommendations, the name of the regional police force was changed from The Royal Ulster Constabulary (RUC) to the Northern Ireland Police Service (NIPS), the former sounding more British imperial and the latter more neutral. *See e.g.,* Clive Walker, *The Patten Report and Post-Sovereignty Policing in Northern Ireland*, *in* Aspects of the Belfast Agreement 142, 155–56 (Wilford ed., 2001).

[14] Differences between Protestants and Catholics in Northern Ireland are not so much religious as political and national. Protestants, mostly of Scottish and English heritage, see themselves as British and mostly want to maintain their region's place within The United Kingdom. Catholics see themselves as Irish and tend to want

Two additional factors reinforce Brexit's tendency to detach Northern Ireland from the UK and join it to the Irish Republic.

First, the recent unprecedented plurality victory of Sinn Fein in Irish elections gives power to a party (whose genesis was the political wing of the Irish Republican Army)[15] which is likely to be more demanding of immediate reunification of Ireland than have been the duopolist Fine Gael and Fianna Fail centrist parties.[16]

Second, demographics have shifted substantially. Catholics are probably now a plurality in Northern Ireland, outnumbering Protestants for the first time.[17] When Ulster was split from the newly independent Irish Free State (precursor to the Republic) in 1921, Protestants in the northern six counties had a two-to-one majority.[18] By the time of the Good Friday Agreement, Catholics made up about 40% of the population.[19] Recent estimates now give Catholics the demographic edge.[20]

These three factors taken together — Brexit, Sinn Fein and demographics — portend a future united Ireland and a shrunken UK.[21] Probably not a result sought by Boris Johnson and the Brexiteers.

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their region to unite with the Republic of Ireland. They also see themselves as historically discriminated against by the Protestants who have dominated Northern Ireland politically and economically for centuries.

[15] *Is Sinn Fein Now a Normal Political Party?*, Economist (Mar. 5, 2020), https://www.economist.com/europe/2020/03/05/is-sinn-fein-now-a-normal-political-party (last visited Apr. 15, 2020); *see also* Paul Arthur & Kimberly Cowell-Meyers, *Sinn Fein*, in Encyclopaedia Britannica (Feb. 14, 2020), https://www.britannica.com/topic/Sinn-Fein.

[16] These two centrist parties have alternated power in the Republic ever since the 1930s, with their differences less found in policy than in the mists of history — related to the civil war fought in the South over acceptance or rejection of the treaty with Britain that divided Ireland and created the Irish Free State. Sinn Fein today occupies a political space to the left of both. All three purport to want a united Ireland, but Sinn Fein is the only one likely to push the issue hard. *Irish Unification is Becoming Likelier*, Economist (Feb. 13, 2020), https://www.economist.com/leaders/2020/02/13/irish-unification-is-becoming-likelier.

[17] *Is Some Revelation at Hand? Brexit and Sinn Fein's Success Boost Talk of Irish Unification*, Economist (Feb. 13, 2020), https://www.economist.com/briefing/2020/02/13/brexit-and-sinn-feins-success-boost-talk-of-irish-unification [hereinafter *Is Some Revelation at Hand?*].

[18] Wallenfeldt, *supra* note 12.

[19] In comparison, Protestants numbered closer to 45% of the population in the 2001 Northern Ireland census; *see, e.g.*, *Religion KS07c (NI)*, Northern Ireland Statistics and Research Agency, https://www.ninis2.nisra.gov.uk/public/Theme.aspx?themeNumber=135&themeName=Census+2001. (In the Subset field, select "Ethnicity, Identity, Language and Religion"; in the Geography field, select "NI"; in the Year field, select "2001"; click Apply) (last visited Apr. 5, 2020).

[20] Gareth Gordon, *Catholic Majority Possible*, in *NI by 2021*, bbc (Apr. 19, 2018), https://www.bbc.com/news/uk-northern-ireland-43823506.

[21] *Is Some Revelation at Hand?*, *supra* note 17.

2. INTERGENERATIONAL DEMOCRACY

The referendum of 2016 proved only that on a single day in June, a transient bare majority (51.9%) of that day's voters wanted to leave the European Union. Maybe it proved even less than that. Because (rather than caring about severing ties with Brussels) some of that 52%, in fact, may have been protesting about immigration, or economic woes, or the displacement of beer culture by wine culture among the London elite, etc.[22] Furthermore, false campaign claims and Russian meddling likely swelled the "Leave" vote.[23] In any event, a very bare majority at most, on that single day in June. But this thin and transient majority has undone the will and work of generations.

Millions of British citizens have contributed many millions of hours and energy and Pounds Sterling over the last half-century in the complex process of integrating the UK into the European Union. Laws were changed, industrial and commercial standards were harmonized, people were schooled in the arcane processes and institutions of Europe.[24]

But the benefits of EU membership more than repaid such effort. Barrier-free access to the largest economy in the world.[25] Free movement of British labor and capital *into* a market of 400 million people, as well as free access to needed workers and small entrepreneurs *from* that market (better food in London bistros).[26] A major share in the powerful voice of the EU in world affairs, particularly economic matters. A foundation

[22] *See* George Friedman & John Mauldin, *3 Reasons Brits Voted for Brexit*, Forbes (July 5, 2016), https://www.forbes.com/sites/johnmauldin/2016/07/05/3-reasons-brits-voted-for-brexit/#3cf3a33e1f9d.

[23] Jane Mayer, *New Evidence Emerges of Steve Bannon and Cambridge Analytica's Role in Brexit*, New Yorker (Nov. 18, 2018), https://www.newyorker.com/news/news-desk/new-evidence-emerges-of-steve-bannon-and-cambridge-analyticas-role-in-brexit; Mark Townsend & Carol Cadwalladr, *Emails Reveal Arron Banks' Links to Steve Bannon in Quest for Campaign Cash*, Guardian (Nov. 17, 2018), https://www.theguardian.com/uk-news/2018/nov/17/arron-banks-emails-steve-bannon-brexit-campaign-funds; Manuel Roig-Franzia et al., *How the 'Bad Boys of Brexit' Forged Ties with Russia and the Trump Campaign — And Came Under Investigators' Scrutiny*, Wash. Post (Jun. 28, 2018), https://www.washingtonpost.com/politics/how-the-bad-boys-of-brexit-forged-ties-with-russia-and-the-trump-campaign–and-came-under-investigators-scrutiny/2018/06/28/6e3a5e9c-7656-11e8-b4b7-308400242c2e_story.html.

[24] *More than 50,000 EU laws introduced in the UK over last 25 years highlights scale of challenge facing lawmakers following 'Brexit'*, Thomson Reuters (Mar. 27, 2017), https://www.thomsonreuters.com/en/press-releases/2017/march/eu-laws-introduced-in-the-uk-highlights-scale-of-challenge-facing-lawmakers-following-brexit.html.

[25] *See* Ottavio Marzocchi, *Free Movement of Persons*, European Parliament: Fact Sheets on the European Union (Feb. 2020), https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons ("While the Schengen area is widely regarded as one of the primary achievements of the European Union, it has recently been placed under considerable strain by the unprecedented influx of refugees and migrants into the EU."); *see also EU Position in World Trade*, European Commission (Feb. 18, 2019), https://ec.europa.eu/trade/policy/eu-position-in-world-trade/.

[26] *See UK and Non-UK People in the Labour Market: February 2020*, Office for Nat'l Statistics (Feb. 18, 2020), https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/ukandnonukpeopleinthelabourmarket/february2020; *see generally* Susanna Kraatz, *Free Movement of Workers*, European Parliament (Dec. 23, 2016), https://www.europarl.europa.eu/factsheets/en/sheet/41/free-movement-of-workers.

upon which London's expertise in finance and other professional services enables the UK to "punch above its weight" globally.[27] And a shared identity with other Europeans, particularly appreciated by young peripatetic Brits. Future generations of Britons should be heirs to all these advantages, but they will not be as Brexit goes forward. A transient bare majority on a single day undoes the work of two generations past and the rightful expectations of generations to come. Democracy should not merely reflect the moment. It should reflect the interests of past and future stakeholders as well.

Most young people voted to remain.[28] Those younger than the voting age would likely share this sentiment. While living in Spain in the 1990s, I was struck by the *Europeanness* of young people in the EU's Erasmus student exchange program,[29] including Britons. They reveled in their cosmopolitan and mobile life — a pan-continental moveable feast of young Dutch, French, Irish, Italians, Spaniards, English, Scots, etc. Brexit denies to future young Britons the chance to fully partake of this feast — both its cultural joys and its economic opportunities.[30] Such denial surely goes against their will.

3. A CORRUPT AND XENOPHOBIC REFERENDUM

This essay principally deals with the *constitutional* deficiencies of the June 2016 referendum and the mischaracterization of its result to thwart long-term shared democracy. However, we should note the referendum's internal weaknesses. Such flaws reinforce the unwisdom of allowing that single vote to rule British national policy for generations.

Other writers and investigators have documented both the procedural anti-democratic flaws in the June 2016 vote (chief among them, Russian meddling), as well as the substantive flaws (chief of those, xenophobic rhetoric bordering on hate speech).[31] Such problems support my constitutional argument, but are not necessary to it. Even a good referendum (with such a slim majority) should not be the principal basis of sweeping international and intergenerational change — less so, a bad referendum.

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[27] *See* Mark Yeandle & Mark Wardle, The Global Financial Centres Index 26 (2019).

[28] *EU Referendum: The Results in Maps and Charts*, bbc (June 24, 2016), https://www.bbc.com/news/uk-politics-36616028.

[29] *Erasmus* is the EU's program to support education, training, youth and sport in Europe. University-age students from one member state may study in another EU state with the EU financially supporting the exchange. *See What is Erasmus+?*, Eur. Comm.: Erasmus+, https://ec.europa.eu/programmes/erasmus-plus/about_en.

[30] *Id.*

[31] ICCPR, *supra* note 1, at art. 20; Norwood v. United Kingdom (No. 23131/03), 2004-XI Eur. Ct. H.R. 730.

3.1. CORRUPTED PROCESS — DARK MONEY AND RUSSIAN INFLUENCE

Putin's Russia stood to benefit from a vote for Brexit, just as it did from the election of Donald Trump. Both weakened the Western Alliance, a goal dear to Putin's global strategy. Cambridge Analytica, Steve Bannon, the Giuliani law firm, and related actors had their fingers in both pies. The largest individual bankroller of the "Leave" campaign, Arron Banks, met with Russian operatives on a number of occasions in 2015–16. He reportedly also met with Trump's staff at Trump Towers during this period.[32] Press, government and academic reports provide extensive further examples of Russian-initiated corruptive efforts during the Brexit campaign.[33]

3.2. CORRUPTED SUBSTANCE — XENOPHOBIA, ANTI-IMMIGRANT PROPAGANDA

Undertones of xenophobia have for decades pervaded British populist criticism of the European Union.[34] However, such close-to-racist noise grew louder during the Brexit campaign of 2015–16, reaching a crescendo in the final weeks before the June 2016 vote.[35] Brexiteers made a conscious decision to play on the alienation and anxieties within the middle and working classes, to blame the Other for their (often otherwise legitimate) economic and social grievances, and to blame the EU for the perceived

[32] Roig-Franzia et al., *supra* note 23; Carol Cadwalladr & Peter Jukes, *Revealed: Leave.EU Campaign Met Russian Officials as Many as 11 Times*, Guardian (July 8, 2018), https://www.theguardian.com/uk-news/2018/jul/08/revealed-leaveeu-campaign-met-russian-officials-as-many-as-11-times;
Dan Sabbagh, *Arron Banks Tells MPs: I Have No Business Interests in Russia*, Guardian (June 12, 2018), https://www.theguardian.com/politics/2018/jun/12/arron-banks-tells-mps-i-have-no-business-interests-in-russia; *Email Trail Shows How Arron Banks and Andy Wigmore Were Cultivated*, Sunday Times (June. 10, 2018), https://www.thetimes.co.uk/edition/news/the-email-trail-how-arron-banks-and-andy-wigmore-were-cultivated-fg7tjd87l.

[33] Staff of S. Comm. on Foreign Relations, 115th Cong., Putin's Asymmetric Assault on Democracy in Russia and Europe: Implications for U.S. National Security 115–21 (Comm. Print 2018);
See also David D. Kirkpatrick, *Signs of Russian Meddling in Brexit Referendum*, N.Y. Times (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/world/europe/russia-brexit-twitter-facebook.html. Notably, Boris Johnson refused to release the UK's report prior to the Parliamentary elections. Despite authorizing the report's release in December 2019, it has yet to be published. Daniel Kraemer, *Russia Report: When Can We Expect It to be Published?*, bbc (Feb. 7, 2020), https://www.bbc.com/news/uk-politics-51417880.

[34] *See* Rob Merrick, *Ukip: A Timeline of the Party's Turbulent History*, Independent (Sept. 29, 2017, 5:07 PM), https://www.independent.co.uk/news/uk/politics/ukip-timeline-party-westminster-alan-sked-nigel-farage-conference-key-events-brexit-leadership-a7974606.html; David Wearing, *Racism and xenophobia are resurgent in the UK, and the centre-left is partly to blame*, openDemocracy (July 11, 2016), https://www.opendemocracy.net/en/opendemocracyuk/racism-and-xenophobia-are-resurgent-in-uk-and-centre-left-is-partly-to-blame/; Zack Beauchamp, *Brexit isn't about economics. It's about xenophobia*, Vox (Jun. 24, 2016, 7:53 AM), https://www.vox.com/2016/6/23/12005814/brexit-eu-referendum-immigrants.

[35] *See* Adam Taylor, *The Uncomfortable Question: Was the Brexit Vote Based on Racism?*, Wash. Post (Jun. 25, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/25/the-uncomfortable-question-was-the-brexit-vote-based-on-racism/.

intrusion of the Other. No matter that many such immigrants contributed heavily and healthily to British society and that many other immigrants (particularly the undocumented, often un-white) would be unaffected by the breaking of EU bonds.

However, these internal flaws of the June 2016 Referendum do not form the heart of this article. Journalists and researchers have already documented these flaws in detail, beyond the scope of the present essay. This essay merely references such flaws to reinforce the folly of accepting the referendum as the voice of the people.

4. VOTE AGAIN

By 2017–18, an argument for a second referendum seemed strong. A majority in the UK had come to oppose Brexit by that time. Those flaws of foreign meddling and xenophobia factually particular to the 2016 Brexit referendum, as well as the profound structural deficits, at the heart of this essay, regarding intercommunal and intergenerational democracy, further supported a new poll. Polls also reflected the increasing concern regarding the real economic consequences of Brexit. Some of those who had voted for Brexit now realized the toll that such a departure from Europe would take on their pocketbooks.[36] However, in a flourish of political jujitsu, Boris Johnson delivered an election which he *styled* as a second referendum on Brexit, but which clearly was not. Such a slight-of-hand was the Parliamentary vote in December 2019.[37]

The December 2019 vote did not provide a fair chance to revisit Brexit. It was not the second referendum that Boris Johnson claimed it to be. His get-it-done-already sloganeering[38] posed it as such. That Parliamentary election did not give voters the means to use such an electoral poll as a new plebiscite on Brexit. This failure of the

[36] *See* Jen Kirby, *Brexit will hurt the UK's economy no matter what — says the government's own analysis*, Vox (Nov. 28, 2018, 7:50 PM), https://www.vox.com/2018/11/28/18116763/brexit-economy-bad-deal-no-deal; Iain Begg & Fabian Mushövel, *The economic impact of Brexit: jobs, growth and the public finances*, LSE Eur. Inst. (2016), https://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-11—The-impact-of-Brexit-on-jobs-and-economic-growth-sumary.pdf (last visited Apr. 17, 2020).

[37] *See, e.g.*, William James & Andrew MacAskill, *Factbox: How Does UK PM Johnson Call an Early Election?*, Reuters (Oct. 24, 2019),https://www.reuters.com/article/us-britain-eu-election-factbox/factbox-how-does-uk-pm-johnson-call-an-early-election-idUSKBN1X32BL; Jason Douglas, *Why Boris Johnson Might Call an Election, and How He Could Get There*, Wall St. J. (Sept. 3, 2019),https://www.wsj.com/articles/why-boris-johnson-might-call-an-election-and-how-he-could-get-there-11567515347.

[38] *See generally* Karla Adam, *'Get Brexit done': Boris Johnson's Effective but Misleading Slogan in the British Election*, Wash. Post (Dec. 12, 2019), https://www.washingtonpost.com/world/europe/get-brexit-done-boris-johnsons-effective-but-misleading-slogan-in-the-uk-election/2019/12/12/ec926baa-1c62-11ea-977a-15a6710ed6da_story.html.

Parliamentary vote to be a true second Brexit referendum was due to the nature of the British Parliamentary electoral system and to the nature of British politics.

The December voters had no real *remain* option available because neither of the two major parties — Conservative or Labour — offered such an option. And of the two minor parties, both anti-Brexit, one (the Liberals) was not viable because of Britain's first-past-the-post electoral system,[39] and one, the *pro-remain* Scottish National Party (SNP) only campaigned regionally for about 9% of Parliamentary seats — almost all of which it won (validating the Scots' self-determination argument made above).

The Brexit referendum in June 2016 revealed splits in both major UK parties. Divided factions in each of the Conservative (Tory) and Labour parties supported and opposed Brexit. 58% of Tories and 37% of Labour party members voted for Brexit in that referendum.[40] Thus, the traditional divide between Labour voters on the left and Tory voters on the right broke down with the Brexit referendum in 2016. There seemed to be more of a populist-versus-cosmopolitan split, akin to the 2016 US presidential election, which a few months later would put Donald Trump in office. On the other hand, among Liberal Party members, the *Remain* vote dominated substantially.[41] That was also the case among voters loyal to the regional parties in Scotland and Northern Ireland.[42] Probably a majority of Tory Members of Parliament (MPs) sitting as of June 2016 opposed Brexit, in contrast to their constituents.[43] However, a number of circumstances caused the anti-Brexit Conservative majority to disappear. After Prime Minister Cameron resigned in the wake of his ill-called Brexit referendum (which he had initiated with the expectation that his anti-Brexit sentiments would be vindicated), Theresa May took the helm of the Tory party. Thus, without a new general election, May became Prime Minister, as leader of the Parliamentary majority. Although she had originally opposed Brexit, once in power as head of the Conservatives, she changed position and supported it. Her expressed reason for the change was that "the people had spoken." [44] It is hard to

[39] A first-past-the-post parliamentary system awards a seat in each district to that candidate with a plurality of the vote. This contrasts to a proportional representation system, where a party receives a number of seats corresponding to its national percentage of the popular vote. It also contrasts to that variant of a district-by-district system, where a run-off election is held when there is not a 50%-plus-one majority for any candidate in that district. A first-past-the-post system favors two dominant parties and disfavors third parties.

[40] *See* Statista Research Department, *Brexit Votes in the United Kingdom by Political Affiliation 2016*, STATISTA (Jun. 24, 2016), https://www.statista.com/statistics/518474/eu-referendum-voting-intention-by-political-affiliation/.

[41] *Id.*

[42] *See id.*

[43] *See, e.g.*, *EU vote: Where the cabinet and other MPs stand*, BBC (Jun. 22, 2016), https://www.bbc.com/news/uk-politics-eu-referendum-35616946 (showing 185 Conservative MPs declared a *remain* stance, compared to 138 declaring a *leave* stance).

[44] BBC News, *Theresa May (FULL) interview Andrew Marr (02/10/2016) - BBC News,* YOUTUBE (Oct. 2, 2016), https://www.youtube.com/watch?v=4b0kULuS5o8 ("The British people have determined that we will leave the European Union . . . . The people have spoken, we will deliver on that.").

know whether she sincerely believed this, or whether she felt her new stance on Brexit to be politically expedient. For reasons discussed above, and central to this essay, that position was philosophically wrong-headed. The people had *not* spoken. At least not clearly and fully on the question of separating from Europe. Only some of them had spoken for leaving Europe, on one day in June, in a corrupted poll. And with Scots and Irish dissenting.

Nonetheless, May pushed Brexit but soon realized that Parliament opposed her — including substantial elements of her own House of Commons majority. She therefore called a Parliamentary election in April 2017,[45] hoping to bolster her majority and get Brexit through the legislature. She was mistaken in that tactic. The Conservatives lost seats in that election. In order to form a governing majority in Parliament, she had to ally herself with the Democratic Unionist Party (DUP) MPs representing Northern Ireland. The DUP is a Protestant-dominated party dedicated to a continued union between Ulster and Britain and vehemently against unification with the Irish Republic. Such an alliance made May's task of pushing Brexit through the legislature harder still, since the DUP was adamantly opposed to any tariff and customs checks between Britain and Northern Ireland. However, the DUP's position in that regard left only a possibility, if Brexit was to go forward, of re-establishing customs checks between the Irish Republic (an EU state) and Ulster. The re-establishment of a hard border within the island of Ireland was totally unacceptable to the Republic of Ireland and to the EU of which it was a member.

Economists and financial experts broadly agreed that for Britain to leave the European Union without truly dire consequences to business, workers and citizens, an exit deal needed to be negotiated with The EU. However, a number of sticking points made such a deal difficult. First, what would Britain pay the EU to leave, reflecting obligations for future European projects and programs that Britain had already committed to as a member. Second, what would the nature of the trade relationship between the UK and the EU look like after Brexit? Britain wanted it to look pretty much the same from the point of view of tariffs on goods and trade in services. EU members did not want Britain to have its cake and eat it too — that is, leave the Union and its obligations thereto, but still enjoy the advantages of a free trade zone. Third, and most problematic, was the question of the Irish border. The Conservative government could not agree to customs checks between Northern Ireland and the rest of Britain, particularly because of its dependence on DUP votes in the House of Commons.

[45] *See General Election 2017: Why did Theresa May Call an Election?*, BBC (Jun. 9, 2017), https://www.bbc.com/news/election-2017-40210957.

On the other hand, European Union negotiators were firm in their resistance to any customs checks between Northern Ireland and the Republic of Ireland. To be out of the European Union certainly meant border checks for the passage of goods in one of those two locations. While May's negotiators tried to finesse this last issue in the draft agreements for exiting the EU, Parliament was unconvinced, suspicious that she was agreeing to a customs border within the UK between the islands of Britain and Northern Ireland.[46]

After losing three votes in Parliament on her exit plan negotiated with the EU, May resigned. Boris Johnson took over as leader of the Conservative Party (and therefore as Prime Minister without any popular vote). When it became clear that, like Mrs. May, Johnson would not be able to push Brexit through Parliament with his bare Tory plurality, only governing with the participation of the DUP, he called elections for December 2019. In the process of consolidating his power among the Tories he successfully purged the party of most of the MPs who still opposed Brexit — either by kicking them out or convincing them to accept Brexit. By the time of the December 2019 Parliamentary election, the Conservative Party, which had been divided regarding Brexit, campaigned as a unified *Leave* party.

In contrast, in the election of 2019, the Labour Party was still split over Brexit (as it had been in the 2016 referendum), led by the unpopular Jeremy Corbyn, riddled with the charges of antisemitism[47] and obfuscational[48] in its stance toward a new referendum on Brexit. The London progressives in the party were mostly *Remainers*, while the Rust Belt northern workers were mostly pro-Brexit. Corbyn pleased neither. He lost worker constituencies in the North to the Conservative Party for the first time in recent history. They defected to the Tories, reversing decades of animosity of working people toward the Conservative Party. Populist Johnson, though a Tory, at least (in their minds) showed respect (lacking in Corbyn) for their 2016 vote to leave Europe, by which they blamed the continent for immigration, unemployment and other real and imagined wrongs — for which Europe was not really responsible.

[46] *See, e.g.*, *Irish Backstop*, Institute for Government, https://www.instituteforgovernment.org.uk/explainers/irish-backstop (last updated Feb. 24, 2020); John Campbell, *Brexit: What are the Backstop Options?*, BBC (Oct. 16, 2019), https://www.bbc.com/news/uk-northern-ireland-politics-44615404; Richard Pérez-Peña, *What is the Irish Backstop, and Why is it Holding Up Brexit?*, N.Y. Times (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/world/europe/irish-backstop-brexit.html.

[47] *See generally* Jerusalem Post (Apr. 6, 2020).

[48] During the campaign leading up to the December 2019 Parliamentary elections, Corbyn refused to be pinned down on whether he favored a new referendum on Brexit, undoubtedly knowing that his base was divided on the issue. He tried to deflect the debate to charges that the Tories were intent on gutting the National Health Service. Obviously, such a tactic of deflection did not work. Labour suffered its worst defeat in decades.

In any event, by the December 2019 Parliamentary vote, the Labour Party was neither a remain party nor a leave party. It therefore presented no electoral option for those Britons who wanted to stay in the EU.

The Liberal Party would have seemed to have represented a true *remain* alternative in December 2019 to the then Brexit-converted Conservative party and the obfuscational and Brexit-non-committal Labour Party. For decades, the Liberal Party has been the only Britain-wide third party alternative to Labour and the Tories. It campaigned in 2019 on an explicit platform for staying in the EU. Unfortunately for *Remainers*, it was not an option that could possibly lead to either electoral victory or to staying within Europe. Britain's first-past-the-post electoral system made this impossible. For decades the Liberals have collected between 10% and 20% of the popular vote in British elections but generally only claimed a much smaller percentage of Parliamentary seats. Rather than having proportional representation as many Parliamentary democracies do, Britain has a system under which in any given district the candidate with the plurality goes to Parliament. So British voters knew that even though the Liberals offered a *remain* option, they did not offer a viable electoral choice. Hence, even though probably more than half of the voters in the UK supported remaining in Europe, in the December 2019 Parliamentary elections they had no one to vote for (except in Scotland). Therefore, those elections were *not*, as Boris Johnson claimed them to be, a second referendum on Brexit, one which according to Johnson confirmed the results of the 2016 Brexit vote.

Put simply, in the December 2019 Parliamentary elections, *Remainers* (although probably a majority) had no one to vote for.[49]

In the only location within the UK where a party with viable electability campaigned on a *remain* platform — Scotland — the *Remain* party, that is the SNP, won overwhelmingly, collecting almost all Scottish seats in the Westminster Parliament.

Tory opponents of Brexit had disappeared. Labour was split, ill-led and obfuscational. Liberals were impeded by first-past-the-post (and a nice, but inexperienced and uncharismatic leader). There was no electorally viable *remain* party. Thus, the December 2019 Parliamentary vote was not a second referendum on Brexit and could not have been such.

In seeking a second referendum, opponents of Brexit did not effectively argue the democratic defects in the June 2016 referendum, identified above, but seemed cowed by

[49] The author spent Parliamentary election week, December 9–15, 2019, in Britain. Many conversations with Britons that week, as well as local exposure to UK news media during the days prior to and after the vote, have contributed to his conclusions in this essay.

the "people have spoken" rhetoric of the "*Leavers*." Some, like Theresa May, not only were cowed by such rhetoric, but switched sides, becoming *Leavers* themselves.

5. COME AGAIN? (REENTRY AND "THE ROCK")

Some *Remainers* might continue to underestimate the tragedy of the misrepresented June 2016 referendum and assume that re-entry into the European Union can occur easily, in the hope that Britons continue to sour their attitude toward Brexit and a new government eventually comes into power. They are profoundly mistaken.

Article 49 of the Treaty on European Union, as amended by the Treaty of Lisbon, governs the admission of new states to the EU.[50] Article 50 of the Treaty of the European Union, first introduced by the Lisbon Treaty, makes clear that any UK re-entry would be subject to the demanding process of Article 49.[51] Confusingly, statements from other EU officials blithely held out a false promise of easy re-entry.[52]

It would *not* be easy. First, law and regulation that will have fallen out of sync with European rules would have to be re-promulgated by Parliament or the British executive, as jurisdiction (not always clear) dictates.[53] Second, the return to certain favorable arrangements, such as the large EU budget rebate to Britain, might not be

[50] Consolidated Version of the Treaty on European Union art. 49, June 7, 2016, 2016 O.J. (C 202) 44 [hereinafter TEU].

> The applicant State shall address its application to the Council, which shall act *unanimously* after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements (emphasis added) .

See also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1(57), Dec. 13, 2007, 2007 O.J. (C 306) 40.

[51] *See, e.g.*, TEU, *supra* note 50, art. 50(5).

[52] Notably, Frans Timmermans, Executive Vice-President of the European Commission, penned a "love letter" to Britain stating that the UK "will always be welcome to come back" to the EU, suggesting re-entry to the UK may be easy. *See also* Frans Timmermans, *My love letter to Britain: family ties can never really be severed*, Guardian (Dec. 26, 2019, 1:00 PM), https://www.theguardian.com/commentisfree/2019/dec/26/my-love-letter-to-britain-family-ties.

[53] *See* Anthony Salamone, *Membership 2.0: what the UK rejoining the EU would involve*, LSE Blogs (Jan. 23, 2020), https://blogs.lse.ac.uk/brexit/2020/01/23/membership-2-0-what-the-uk-rejoining-the-eu-would-involve/.

available were the UK to seek readmission, hat-in-hand. A multi-billion Euro penalty to the prodigal state.[54]

Third (and most profoundly), EU law requires *unanimous* consent of all its member states for admission of a new member.[55] And, presumably, readmission.[56] That's twenty seven "yea" votes.[57] And no "nays".

Any EU member state with a gripe against Britain would have significant leverage to wrangle large concessions or to block reentry. Greece wants the Elgin Marbles back. It has demanded them for decades to deaf British ears.[58] It prevented progress on Macedonia pursuing EU and NATO membership until Macedonia changed its very name (to *North Macedonia*). So, it knows how to use a veto to apply the brakes in unanimity-based fora.

Perhaps Britain might be willing to return some Greek statues to get back into the EU. But Spain wants Gibraltar back.[59] A rock considerably more massive and strategic than the Parthenon marbles pilfered by Lord Elgin from the Acropolis.[60] One historian writes,

> The concessions of territory made in 1713 were painful ones. Gibraltar had been captured in August 1704 by an Anglo-Dutch expeditionary force, and its loss was a bitter pill that the Spanish government always refused to accept, for it wounded national dignity . . . . On the other hand the British had spent effort and lives in capturing the town and later in resisting the various sieges that took place during the war . . . . Gibraltar became a symbol of victory that no British government would contemplate relinquishing.[61]

[54] The UK rebate (or UK correction) was a financial mechanism that reduced the UK's contribution to the EU budget in effect since 1985. It was a complex calculation which equated to a reduction of approximately 66% of the UK's net contribution — the amount paid by the UK into the EU budget less receipts from the EU budget. *See generally* Iain Begg, *What if Britain rejoined the EU? Breaking up may be less hard than making up*, LSE Blogs (Sept. 25, 2018), https://blogs.lse.ac.uk/brexit/2018/09/25/what-if-britain-rejoined-the-eu-breaking-up-may-be-less-hard-than-making-up/.

[55] *See, e.g.*, TEU, *supra* note 50, art. 49; *see also Unanimity*, Council of the EU (last reviewed Jan. 28, 2020), https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/.

[56] *See, e.g.*, TEU, *supra* note 50, art. 50.

[57] *Countries*, European Union: About the EU, https://europa.eu/european-union/about-eu/countries_en.

[58] The Parthenon Marbles, also known as the Elgin Marbles, are a collection of Classical Greek marble sculptures made by the architect and sculptor Phidias and his assistants. They were originally part of the temple of the Parthenon. They were acquired by Lord Elgin in the early 19th Century. *See Elgin Marbles*, Encycl. Britannica (Feb. 19, 2019), https://www.britannica.com/topic/Elgin-Marbles (last visited Apr. 3, 2020).

[59] After the War of Spanish Succession, Spain ceded Gibraltar to Britain in 1713 under the Treaty of Utrecht. *See* T.W., *Why is Gibraltar a British Territory?*, Economist (Aug. 8, 2013), https://www.economist.com/the-economist-explains/2013/08/07/why-is-gibraltar-a-british-territory.

[60] Gibraltar is colloquially referred to as "The Rock" — got its nickname before the wrestler.

[61] Henry Kamen, Empire: How Spain Became a World Power 1492-1763, at 447 (2003).

Beyond the substantial loss to the British military[62] and the insult to the British ego, such a territorial cession would raise yet another self-determination issue. The people of Gibraltar do not want to be part of the Spanish realm.[63] Their overwhelming *remain* vote (even more lopsided than the Scottish rejection of Brexit in the same 2016 referendum) partly reflected this preference. Just as Brexit would re-invigorate nationalism in English, Scots and Irish, so it might with the Spaniards, reminding them that a tip of their peninsula, a thousand miles from London, but only a hundred from Sevilla was still in English hands. Again, as with Scotland and Ireland, the mitigating European commonality would be gone. All this scared Gibraltar's voters. So, Gibraltar's popular claims to self-determination[64] would bump heads with Spanish arguments for Iberian territorial sovereignty — oh, the aggravation Brexit hath wrought.

5.1. SOVEREIGNTY OVER GIBRALTAR AND INTERNATIONAL LAW

The international law arguments concerning Gibraltar leave us with equivocal conclusions. On the one hand, the UK and Gibraltar itself (to the extent it is a separate international entity) have treaty law and the principle of self-determination on their side. The Treaty of Utrecht of 1715 clearly cedes Gibraltar from Spain to Britain, confirming the British occupation of the Peninsula in 1704. Treaties in 1729 Seville and 1783 Paris — the same treaty that recognized the independence of the United States — confirmed such British sovereignty over Gibraltar. Furthermore, in more recent times, the people of Gibraltar have voted twice overwhelmingly in 1967 and 2002 not to subject themselves to Spanish rule. So Britain and the Gibraltarians argue that any return of the territory to Spain without the consent of its residents would violate the law of self-determination. These arguments would seem to be quite weighty. Explicit treaty law such as Utrecht trumps all other sources of law except perhaps *jus cogens* and specific provisions of the UN Charter. The only *jus cogens* applicable here would seem to be

[62] For centuries, the fortress of Gibraltar has enabled British naval dominance at the strategic narrow straight between the Atlantic Ocean and the Mediterranean Sea. *See generally* Vincente Rodriguez, *Gibraltar,* in Encyclopaedia Britannica (2019).

[63] A referendum in Gibraltar in 1967 gave residents a choice of opting either for Spanish sovereignty or for continued close association with Britain; the result was an overwhelmingly pro-British vote (12,138 votes to 44).... The status of Gibraltar has remained a source of friction between the Spanish and British governments. In a nonbinding referendum in 2002 recognized by neither government, 99[%] of Gibraltar's voters rejected joint British-Spanish sovereignty.

See generally id.

[64] Ironically, Britain used its EU (then EC) veto leverage in 1985 to force Spain to lift its land blockade of Gibraltar, in exchange for Spain's admission to the EC.

Gibraltarians' claim for self-determination supporting not competing with British sovereignty under the Utrecht grant.

However, Spain puts forth arguments that are far from trivial. It claims that Gibraltar is a colony and that its occupation by the United Kingdom violates the legal principle of territorial sovereignty also found in the UN Charter along with that of self-determination. It argues further that the Gibraltarians are not a people entitled to self-determination but colonial settlers. United Nations General Assembly resolutions tend to support the Spanish position.

From a legal point of view, Britain would seem to have the better of the arguments. Treaty law certainly trumps General Assembly resolutions, which do not have the status of binding law but only of recommendations. While General Assembly resolutions may be considered as evidence of state practice or of *opinio juris* for the purpose of establishing international customary law, again treaty law is a superior source of international law when in conflict with custom. Spain's argument that the Gibraltarians are settlers and not people entitled to self-determination seems weak given temporal considerations. They are the descendants of people that have been on the Peninsula for centuries. If they are not entitled to self-determination because their distant ancestors were originally settlers then neither are Australians, Brazilians, Canadians, Americans, or many others entitled to that basic human right. An unlikely conclusion. On the other hand, the tendency of political bodies on the international stage to support claims against the legal validity of even very old European conquests would cut in Spain's favor (ironically, given its own colonial history and its continued occupation of its North African enclaves of Melia and Ceuta).

Thus, though Britain probably has the stronger argument in international law, Spain's argument is not frivolous. Spain could demand the return of Gibraltar without appearing to flout the law. The unanimity required for an Article 49 admission gives Spain the power to make this demand.

England will not both keep Gibraltar and re-enter the EU. And by that time (of attempted re-entry) we may indeed only be able to speak of *England*, not *Britain* — let alone the *United Kingdom.*

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Achieving the Right to Work in the Face of Technological Advances: Reflections on the Occasion of the ILO's Centenary

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ABSTRACT

The process of transforming human labour into machine work has long been on the agenda of the International Labour Organization. The difference is that today, in industry 4.0, artificial intelligence and big data are undermining highly technical qualified work as well as "heavy labour". Therefore, on the ILO's centenary, it becomes relevant to reflect on its roles in the face of the challenges posed by technological innovations. Of these, we highlight the need to reinvent education to increase employability and to create protection mechanisms for those in uninterrupted 24-hour online employment, because summarize the contradictions experienced in the current world of work facing new technologies. The ILO cannot be indifferent to this focal point: promoting training and legal protection for workers so that they can keep up with technological innovations and simultaneously have health and welfare.

KEYWORDS

International Labour Organization; United Nations; Fourth Industrial Revolution; Automation; Educational technology

TABLE OF CONTENTS

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INTRODUCTION

The International Labour Organisation [hereinafter ILO], a United Nations [hereinafter UN] agency dedicated to social justice through formulation and application of international labour standards, completed its centenary. Headquartered in Geneva, it has about 2000 staff and more than 800 experts on mission, acting with the guarantee of independence and autonomy in relation to national governments. It has a budget composed of obligatory contributions from Member States and its organizational structure is classic: an Assembly, a Council and a permanent Secretariat under the direction of the Board of Directors. However, it stands out as the only UN agency with a tripartite structure, with representatives of governments, employers' organizations and workers from the 183 Member States, acting on an equal footing.

According to the preamble of its Constitution, the ILO's existence is justified by the poor working conditions, which cause injustice, misery, deprivation and fears of the negative social effects that may result from unfair international competition. Its mission is the pursuit of universal and permanent peace based on social justice. Its principal mode of operation is through the establishment of international standards, via conventions and recommendations. These conventions are submitted to the Member States for ratification. Recommendations establish the "directive" principles to guide national policies and practices.

The ILO was created at the end of World War I (1919), through the Treaty of Versailles, to work together with the League of Nations, an international organisation that centralised the new world order. From its beginning to the present day, it stood out in its defence of workers' rights, in different moments and contexts in which it was inserted: it survived World War II and in 1946 became the first specialized international organization of the UN, and it was awarded the Nobel Peace Prize on its fiftieth anniversary, while it was still observing the Cold War.

Currently, it continues to work on behalf of old labour demands, such as ending slave and child labour, but at the same time it faces new questions coming from a new wave of globalization, financial crisis, and the use of innovative technologies in the entire production chain. Artificial intelligence, big data, and industry 4.0 are shaking both "heavy labour" jobs and high-tech jobs ("white-collar" jobs). Therefore, in the ILO's century of work, it is relevant to reflect on its guidelines and identify ways to be able to act in the face of all this news.

1. WHAT CHALLENGES DO NEW TECHNOLOGIES IMPOSE?

The twentieth century was marked not only by world conflicts, but also by technological innovation. The inventions of this period include the airplane, the cloning of Dolly - the sheep, the invention of television (1923), the discovery of penicillin (1928), the emergence of the transistor (1947), the discovery of the DNA molecule (1953), the invention of optical fibre (1952), and the orbit of first artificial satellite (1957).

Moreover, as Manuel Castells points out, notably from the seventies onwards, a new economy, society and culture began to be built on the basis of information technology. From Silicon Valley, a new technological paradigm expanded in several countries that, despite their differences, have produced more technological innovation and enlarged the scope of transformations, diversifying their sources.[1]

As a result, in 1990, a new socio-economic, informational, networked, and global context was consolidated. The World Wide Web was also created in this decade and expanded the applications of artificial intelligence, with the emblematic example of the robot Deep Blue (IBM) defeating the chess champion Garry Kasparov.[2]

From the nineties onwards, many other technological innovations emerged and shook labour relations in a profound way. Kasparov's defeat by Deep Blue boosted investment in human-computer cooperation; today, computers are becoming so sophisticated that their human collaborators have begun to become irrelevant.

In December 2017, a new milestone was reached when the AlphaZero (Google) program defeated the Stockfish 8 program, which was the 2016 computer world champion of chess. The most surprising thing was that the outdated computer had access to centuries of human experience accumulated in chess as well as decades of computer experiments and was able to calculate 70 million positions per second. The newcomer and winner, AlphaZero, estimated only 80,000 positions per second, was never taught chess strategies by its human creators, and it was prepared for the match in just four hours. AlphaZero played against itself, using the latest principles of machine self-learning and thus made "creative" moves and strategies.[3]

In addition, since 2008, a global financial and economic recession has made it difficult to bear repercussions and has undermined the foundations of states to levels which were previously unimaginable. This has led to the expansion of multilevel governance in various public and private sectors and to the breakdown of territorial and

[1] Manuel Castells, The Rise of the Network Society 142-76 (Wiley, 2d ed. 2000).
[2] *See, e.g., Deep Blue*, Stanford CS221 (2013), https://stanford.edu/ cpiech/cs221/apps/deepBlue.html.
[3] *See* David Silver & Demis Hassabis, *AlphaGo Zero: Starting from scratch*, DeepMind (Oct. 18, 2017), https://deepmind.com/blog/article/alphago-zero-starting-scratch.

sovereignty barriers, as was the case of Portugal, Greece and Ireland when they requested financial rescue from the Troika.

Indeed, everything has changed since the creation of the ILO. Since the beginning of the twentieth century, society, politics and economics do not represent any identity. Technological innovations have always been the fuel of these transformations throughout history. It is no different now: reflecting on achieving the human right to work and on the role of the ILO in its centenary is completely entwined with the new technologies in our lives.

In this respect, the following issues stand out: In the face of unemployment, what skills are necessary for a professional to return to the market? In current labour relations, do employees present new weaknesses and therefore, do they have to be given new rights?

1. 1. REINVENTING EDUCATION TO INCREASE EMPLOYABILITY

Human work has been replaced by machines equipped with artificial intelligence, capable of working with big data and of being inserted throughout the production chain of the digitized industry (industry 4.0), typical of a fourth Industrial Revolution. In turn and far from keeping up with the changes, most schools continue to teach based on a syllabus developed many years ago which, as the Canadian Rod Allen states, needs urgent revision because it is preparing students for a world that no longer exists.[4]

The study "Ready to Work?", carried out by around 800 employers, identified the most valued skills in the job market. The skills chosen as priorities were: analysis and problem solving, creativity and innovation, adaptability and flexibility, planning, organization and motivation for excellence, linked to the ability to maintain a positive attitude and to be persistent. The specific technical-scientific skills acquired in formal education and training programs (*hard skills*) appeared in sixth and last place, evidencing that the employers "attach greater importance to the personal and interpersonal skills", also called transverse or *soft skills.*[5]

If the recruiter does not seek to first identify what the candidates know cognitively, it seems clear to us that an update of the education system is necessary in order to invest in the socio-emotional and behavioural skills that are being demanded.

[4] *See* Francisco R. Pereira, *Escolas preparam alunos para um "mundo que já não existe"* [*Schools prepare students for a "world that no longer exists"*], Observador (Jun. 4, 2019, 6:32 PM), https://observador.pt/2019/06/04/escolas-preparam-alunos-para-um-mundo-que-ja-nao-existe/ (Port.).

[5] Diana Aguiar Vieira, *Transição para (ou durante) a vida profissional: quais competências mais importantes e como desenvolvê-las?* [*Moving to (or during) Professional Life: What Are the Most Important Skills and How to Develop Them?*], Dirigir&Formar (IEFP), Jan.-Mar. 2019, at 36 (Port.).

The development of these skills can be done, for example, through physical, artistic, dramatic or musical activities, as they are relevant vehicles for stimulating creativity and self-confidence.

However, in addition to these transversal competences, current society must have digital literacy, and this highlights the role of technology in education. On the one hand, we have seen many high-standard private schools introduce attractive state-of-the-art equipment for students without a clear pedagogical purpose for its use and on the other hand there are a majority of low-income schools that fear for the future of education that they provide because they are unable to acquire technological equipment.

Neither of these perspectives is correct. First, having cutting-edge gear in the classroom is not enough. Technology has to be introduced with the aim of encouraging students to think, to question, to be creative, to be flexible when facing quick changes, and to be supportive in crisis management. The excess of technological equipment without these well-defined purposes can generate undesirable side effects, contrary to the development of the aforementioned transversal competences.

Second, there is no need for high-tech state-of-the-art equipment because students do not have to deal with major market launches to acquire cross-cutting skills and technological skills. As an example, even a small robot with an average cost of twenty euros can be used in a satisfactory way in the teaching of several subjects, with the students programming it to overcome challenges launched by the educator.[6] Besides, not every single student needs to have electronic equipment for individual use. On the contrary, it is important that they work in pairs, at least, to develop certain skills related to team spirit, collaboration, solidarity and constructive criticism.

Teaching computational thinking is an excellent way to combine the development of transversal skills and digital literacy, even for those with low purchasing power. It is about using fundamental concepts of computer science as the basis for teaching problem solving, systems projection, and understanding of human behaviour.

According to Jeannette M. Wing, when facing a problem, we can question how difficult it is to solve it and the best way to do it. Following computational reasoning, we have solid theoretical bases for answering these questions accurately. In addition, "equipped with computing devices, we use our intelligence to solve problems we would

[6] *See* Rita Laranginha, Juliana Lopes, Maria Catarina Sousa & Neusa Branco, *Representar Retângulos com um Robot* [*Representing Rectangles with a Robot*], Educação e Matemática [Education and Mathematics], Jan./Feb./Marc. 2019, at 45 (Port.).

not have dared to even try before the computer age, and to build systems with features limited only by our imagination."[7]

To do so, it is necessary to have enough political will for a minimum investment and partnerships with the private sector. This is what is happening, for example, in Kenya, where the Kiltamany Elementary School in the Samburu Reserve has become an example of wireless, technology-enabled classroom success thanks to the country's expanding technology community. Using Kio tablets designed by Nairobi-based software company BRCK, children and adults in Samburu are learning not only languages and math, but also acquiring digital literacy, cross-curricular skills and self-confidence.[8]

1.2. RIGHT TO DISCONNECT

In addition to technological innovations may have the potential to both eliminate and create jobs, they also greatly affect existing labour relations. According to a survey conducted in Brazil by PWC and Fundação Getúlio Vargas, 80% of global CEOs believe that technology can have a significant impact on their business within five years. In fact, the digital revolution has empowered people, with collaborative networks transforming traditional corporate operating models, consumers swapping large amounts of information, and citizens taking on roles that were once the media's monopoly on communications and information.[9]

Current labour relations are different not only from the employer's perspective, who demands new skills and competences but also from the employees, who value more flexible work regarding schedules and locations. It has not yet been properly evaluated what real benefits and disadvantages for the worker's health this dynamic can bring.

The ILO recently launched the "Working Anytime, Anywhere" report with research conducted in fifteen countries with employees using new technologies to work outside their employers' facilities. Its conclusions showed several positive effects, such as greater autonomy of working time, more flexibility and the possibility of organizing working and personal life, while reducing travel time and increasing productivity. However, the study also identified disadvantages to employees, such as the tendency to

[7] Jeannette Wing, *Computational Thinking*, Comm. ACM, Mar. 2006, at 33.

[8] *Na África Rural, os Tablets Revolucionam a Sala de Aula* [*In Rural Africa, Tablets Revolutionise the Class*], National Geographic (Jan., 2018), https://www.natgeo.pt/ciencia/2018/01/na-africa-rural-os-tablets-revolucionam-sala-de-aula (Port.).

[9] *O futuro do trabalho: impactos e desafios para as organizações no Brasil* [*The future of work: impacts and challenges for organizations in Brazil*], PwC (2014), https://www.pwc.com.br/pt/publicacoes/servicos/assets/consultoria-negocios/futuro-trabalho-14e.pdf (Port.).

work longer hours than they would work in the traditional dynamic, resulting in poor health and well-being.[10]

By the end of the twentieth century and during the first years of the twenty-first century, overwork due to uninterrupted connectivity raised great concerns regarding employees with senior management and managerial positions. There are even labour laws that exclude these workers from the right to a limited working day, to rest-breaks, to daily rest, to weekly paid rest, and to the night works additional payment, as it is the case of the Consolidation of the Labour Law in Brazil (Article 62).

In the current scenario, this description is no longer typical only for employees in senior management and management positions. It has spread to middle-level workers, who are now also connected in an uninterrupted fashion. There are some employers who already claim to pay a higher salary to employees who are online twenty-four hours in order to avoid the payment of additional overtime hours. However, we must be aware that a limited hour working day is a health issue in society and not a mere economic problem that concerns only the worker.

In the year 2013, in Germany, Volkswagen and BMW agreed with their workers to limit the use of mobile devices to exchange work messages outside the normal working hours. In the year 2014, in France, the employers' federations of engineering, information technology, consulting and market research firms agreed with the main trade unions on the right to disconnect distance communication tools and in 2017 the country added that agreement into their labour legislation.[11]

2. FINAL CONSIDERATIONS

The need to promote digital education and the right to disconnect summarizes the contradictions experienced in the current labour environment in the face of new technologies. There is great concern about unemployment, but we are also worried about overwork. It is said that the new technologies are *stealing* people's work, but simultaneously people are being enslaved by technology. It is convenient to have quick

[10] *See* Jon Messenger et al., Eurofound and the ILO, Working anytime, anywhere: The effects on the world of work (Publications Office of the European Union and Int. Labour Office, 2017), https://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_544138.pdf

[11] *See* Raquel Martins, *Devemos ter o "direito a desligar" do trabalho? Governo abre debate* [*Should we have the "right to disconnect" from work? The government opens a debate*] Público (Jan. 6, 2017), https://www.publico.pt/2017/01/06/jornal/devemos-ter-o-direito-a-desligar-do-trabalho-governo-abre-debate-32496252 (Port.).

access to information, but we fear not being constantly up to date and losing our place in the job market. We grew up hearing that work dignifies a person, but we feel our dignity being violated by the invasive work that excessive technology can lead to.[12]

In its centenary, the ILO cannot be indifferent to this focal point of labour humanization and the social justice: promoting training and legal protection for workers so that they can keep up with technological innovations and simultaneously have health and welfare.

Technological innovations have brought new ways of working, but these do not dispense with legal regulations. The internal labour law of states and international labour law, with the highest standards set by the ILO, should continue to protect people and promote humanization in labour relations.

Just as information technology infrastructure needs to be regularly updated to maximize performance of the system, the ILO must also renew its efforts in order to best meet the expectations of its tripartite composition - employees, employers and government - and to fulfill its mission of development of social justice.

[12] Jorge Luiz Souto Maior, *Do direito à desconexão do trabalho* [*About the Right to Disconnect from Work*], Revista do Tribunal Regional do Trabalho da 15ª Região, July- Dec. 2003, at 296 (Port.).

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