S^{THE}OCIAL CONTRACT

THE SOCIAL CONTRACT

The University of Western Ontario's Political Science Undergraduate Academic Journal

Editor-in-Chief
David Belous

The Social Contract
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PREFACE

On behalf of the Department of Political Science, I would like to congratulate you on publishing the second annual issue of The Social Contract. Undertaking a project of this magnitude requires the involvement and commitment of many people, and it is obvious from the quality of the papers published in this volume that your hard work has paid off. Founded in 2005 by Daniel Lynde, the responsibility for this year's edition fell to several Political Science students, including David Belous (Editor-in-Chief), Daniel Lynde (Editor-Emeritus) and Laura Wiesen (Editor-in-Chief Elect 2007-08). Support and advice was also provided by several graduate students in the Department - Barbara Holcman, Ajay Sharma and Hélène Lawler - and by Nigmendra Narain, an award-winning professor in Political Science.

This year, over 130 papers covering seven different fields were received, twice the number of submissions that arrived in 2005-06. As you will undoubtedly notice in looking at the broad range of topics included in this issue, the contributors have left few stones unturned. As teachers and researchers in Political Science, we are very gratified to read the work of our students. It serves as a constant reminder that our efforts to stimulate and generate discussion and critical thinking in our seminars and lectures about key political issues have not been in vain. It also serves as a reminder that we have much to learn from our students and that their voice on so many important subjects matter.

In a very short period of time, The Social Contract has made its presence felt, not just as an outlet for undergraduate political science papers, but as a medium through which our students can identify and explain the significance of political issues to a diverse and attentive audience. It is my hope that students in our Department will continue to support this wonderful initiative and that it will serve as a model for others to follow.

Please accept my heartfelt congratulations for a job well done. My colleagues and I look forward to absorbing the many ideas contained in these pages and in subsequent issues.

Best wishes,
Donald Abelson
Professor and Chair,
Department of Political Science

INTRODUCTION

It has been another exciting year for *The Social Contract*. Following the enthusiastic acceptance of the journal's debut in 2005-2006, the University Students' Council (USC) accredited the journal, which means that it is recognized by the USC and will receive funding annually in order to publish this student run, student published journal.

I have worked closely with Editor-in-Chief David Belous and Editor-Elect Laura Wiesen to ensure the high level of excellence of last year's edition was built on for this year's current publication. Along with David and Laura's hard-work, there are many other individuals that helped make this year's edition possible. Professor Nigmendra Narain has helped provide advice to the current editors and organization of the journal. I would like to specially recognize Professor John McDougall's contribution to the journal this year. As well, a thank you to all the editors, reviewers, grad students and professors, and the various faculty bodies for funding.

It has been an honour to help establish *The Social Contract* and watch it grow over the past two years. Although I am graduating from Western in June, I hope that the journal will continue to grow and more students will become involved with this academic organization. I have every confidence in Laura's leadership for next year's edition.

Cheers,

D.J. Lynde
Founder and Editor Emeritus,
The Social Contract, 2006-2007
Honors Double-Major, History & Political Science, Year IV

FROM THE EDITOR'S DESK

Welcome to *The Social Contract*, Western's Undergraduate Political Science Academic Journal. For many of you, this will be your first time browsing through our pages and reading the A-level papers which have been included. They not only offer you a chance to read some interesting, provocative and informative pieces, but also to gain a perspective into the Political Science community at Western. For those of you who are sitting down with us for a second time, I thank you for your continued readership and loyalty. I can guarantee that this year's publication will not disappoint.

The first time I heard of *The Social Contract*, I was sitting in Professor Simpson's 231, International Relations class. DJ Lynde walked into the room and gave a heartfelt presentation as to what his vision was for this journal and the organization which came with it. Immediately I became involved in a cause which I felt was needed in our community. By doing so I had the opportunity to meet many of my peers, whose friendships I will treasure my entire life.

Now I am sending a call out to all the students in Political Science at Western, King's, Huron and Brescia, to become involved and engaged in their community. What better way to do so than by becoming actively involved with next year's publication of *The Social Contract*? Along with the work that goes into putting together a top-grade publication like ours; being involved in *The Social Contract* offers you the opportunity to network with professors and students, over coffee, lunch, meetings and socials.

When publishing an academic undergraduate journal it is crucial to have the support of the faculty. For the past two years, *The Social Contract* has been fortunate to have Nigmendra Narain as our faculty advisor. In this role he has helped us by acting as a sounding board, an advisor and a friend. DJ, Laura and I thank him for all that he has done for our journal and for the dedication he has shown to all his students.

Indeed, the support which we have received from the faculty and graduates students has been inspiring. In particular I would like

to recognize Barbara Holcman, Ajay Sharma and Hélène Lawler, for the tremendous roles they played by sitting on our Emeritus Editorial Board. We thank them for generously volunteering their time and expertise during our selection process.

I would also like to take this opportunity to commend our entire Editorial Board for their hard work and dedication. Without their industrious efforts, this year's publication would be non-existent. As my tenure as Editor-in-Chief comes to an end, I am confident in the capabilities of my successor Laura Wiesen. Laura has been an integral part of the Social Contract since its inception and I look forward to working with her next year on brining the journal to the peak of its potential.

David Belous
Editor-in-Chief
The Social Contract, 2006-2007
Honors Major, Political Science, Year III

LETTER FROM THE EDITOR-ELECT, 2007-08

Getting involved in *The Social Contract* has been one of the most rewarding experiences I have had. Over the past three years, I have realized that the chief craft of our practice, here in the Faculty of Social Science, is writing. The journal is a vital addition to this school's extracurricular activities because it gives students who excel in this craft an opportunity to publish their work. This year, our team was filled with dedicated, bright and dynamic students, and maintaining this aspect is one of my goals as editor-in-chief next year. The expansion of our volunteer base and increasing the awareness of this journal are two initiatives which must be realized. I would like to commend both D.J. Lynde and David Belous for their vision, leadership and innovation. In addition, this journal would not be possible without the help of faculty members such as Professor Nigmendra Narain, Professor John McDougall and Professor Biswas Mellamphy. Their guidance is necessary for our success. Thank you! I look forward to another year of interaction with our team, all of the challenges this leadership position holds, and reading the third set of submissions.

Best,
Laura Wiesen
American Politics Section Editor, Editor-Elect,
The Social Contract 2006-2007
Honors Double Major, History & Political Science, Year III

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ACKNOWLEDGEMENTS

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UNDERGRADUATE POLITICAL SCIENCE ASSOCIATION (UPSA)

Active engagement of youth in political life is key to a healthy democratic society, but the avenues for meaningful student contributions to Canada's political dialogue are relatively few and far between. It is for this reason that the Undergraduate Political Science Association (UPSA) is proud to continue its support of The Social Contract, an important initiative that showcases the work of some of the brightest young minds at the University of Western Ontario.

The UPSA is an organization that welcomes students of all political views, academic backgrounds, and interests in the fields of politics and government. In the past, the club has served as a liaison between the Department of Political Science and the students, but a new mandate hopes to push the club in a more creative and productive direction. With several new projects geared towards actively engaging political science students at Western, we hope to broaden the awareness of politics and its importance at Western and throughout the London community. Our success greatly depends on the active, creative and resourceful members who make up this club and encourages all interested political science students to help expand the programming of this club.

Congratulations are in order to all contributors and members of the editorial team; your hard work and dedication to this important project are sincerely appreciated. We look forward to reading this edition of The Social Contract.

Chester Cheang and Michela McClelland
Co-Presidents
Undergraduate Political Science Association, 2006-2007

CANADIAN POLITICS

"In a world darkened by ethnic conflicts that tear nations apart, Canada stands as a model of how people of different cultures can live and work together in peace, prosperity, and mutual respect."
President Bill Clinton

WESTERN CONSERVATIVES

The UWO Tory Club is one of the four official political party campus clubs at Western. Throughout the year, members are given the opportunity to meet with key political figures in both the federal and provincial levels of government. So far this year we have had the chance to host informal meet and greets with both Prime Minister Stephen Harper and John Tory while continuing to attract big names in politics across the country. The club maintains a close relationship with both levels of government, and is active in lobbying student concerns in an effort to broaden the party's youth base. The club also lends support to local candidates during elections by volunteering its time, while also keeping a busy social schedule throughout the year. Some staple events include the Ontario Model Parliament, the UWO Model Parliament, an annual London Club fundraiser that last year featured Honourable Members of Parliament from both the federal and provincial levels, as well as a range of other social functions where fellow Conservatives can meet and banter. The five dollar membership fee includes entrance into the Ontario Progressive Conservative party where students are able to elect candidates to represent their riding in general elections. We encourage students to become active in the political process in a time when youth continue to distance themselves from debate, weakening our voice on many key issues. So come on out and help stand up for Canada!

Tyler Simpson
President
Western Tories, 2006-2007

WESTERN LIBERALS

Joining a political party is one of the best ways to extend your education outside of the lecture hall. The Western Liberals represent the Liberal Party of Canada and Ontario Liberal Party on campus, help out local Liberal candidates during elections, host guest speakers, and participate in many events such as Model Parliament.

As one of the largest Liberal student clubs in Ontario, the Western Liberals are not only a force on campus but also at party functions across the province and country. We send delegates to all major events and conferences, giving members a great opportunity to travel and meet new people.

Becoming a Western Liberal is a great way to make a difference. Members of the Liberal Party have a critical role in determining new policies and approaches, and selecting who will be our leaders and representatives. Past members have gone on to work in London, in Toronto at Queen's Park, in Ottawa on Parliament Hill and internationally for the United Nations.

It is important that liberal-minded young people come together to play a role in decisions that will greatly affect us. From climate change to health care, Young Liberals, especially at Western, are involved in finding solutions for our generation.

For more information about the Western Liberals visit our website at www.uwoliberals.ca or email us at info@uwoliberals.ca.

Cheers,
Kevin Spafford
President
Western Liberals, 2006-2007

WESTERN NEW DEMOCRATS

Since April of last year, I have witnessed an enormous amount talent, enthusiasm, and new ideas converging and building momentum. Young New Democrats across the country are working together to create a future that is just, equitable, and democratic. This growing movement is particularly active right here at Western. I have been very privileged to work with some of the brightest minds in the country as we forge a new vision for the democratic left.

Over the past year, a compelling case for social democracy has taken root among Canada's intellectual, political, and cultural leaders. Grassroots activism has driven home the message that neoliberal capitalism isn't working. The Western New Democrats have been leaders in this area. From Quebec City, to Ottawa, to Toronto, to our own campus, we have been bringing politics to regular people and seeking out new ideas. We have taken on pressing issues such as the McGuinty tuition hikes, climate change, draconian laws passed in the name of "national security," and Stephen Harper's assault on gender equality.

As Jack Layton elucidated during his latest visit to Western, students can make a concrete difference not only in their local communities, but on the provincial and national stage as well. The time has come to work toward a better alternative to neoliberal exploitation, and the Western New Democrats have answered the call. I invite you to join our growing movement for social justice, peace, and equality.

Solidarity,
Devin Johnston
President
Western New Democrats, 2006-2007

THE INHERENT DANGERS OF THE ANTI-TERRORISM ACT UNDER THE CHARTER OF RIGHTS AND FREEDOMS
By Andrea Linden

"The challenge to democracy is to resist the tendency towards...the 'totalitarianism of hazard prevention'. By taking effective action to resist modernity's 'side effects' we generate other side effects that amount to risks to the political process itself. Either we fail to respond meaningfully to risks or, in the process of responding, we threaten fundamental democratic principles" - David Schneiderman (2001) [1]

In the aftermath of the September 11th attacks on the United States, the United Nations Security Council set out Resolution 1373 requiring that all member states act to prevent, suppress and criminalize the financing of terrorism, supply of weapons, and recruitment of terrorist groups, as well as to deny safe haven to those who commit these crimes.[2] In light of these obligations, Canadian Parliament proposed Bill C-36, the *Anti-terrorism Act*, which received Royal Assent on December 18, 2001[3], after considerable legislative and public scrutiny, with a vote of 190 in favor and 47 against.[4] This legislation defines terrorism, creates new offences under the *Criminal*

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[1] Quoting sociologist Ulrich Beck.
[2] Richard G. Mosley, "Preventing Terrorism Bill C-36: The Anti-terrorism Act, 2001," in *Terrorism, Law and Democracy: How is Canada Changing Following September 11?*, ed. Daubney et al, (Montreal: Editions Themis, 2002), 145-172.
[3] David Jenkins, "In Support of Canada's Anti-terrorism Act: A Comparison of Canadian, British and American Anti-terrorism Law," *Saskatchewan Law Review* 66 (2003), 419-454.
[4] Unknown Author, "Indepth: Canadian Security," in *CBC News Online*, June 14, 2006, www.cbc.ca/news/background/cdnsecurity/ (accessed June 28, 2006)

Code, makes amendments to the *Canadian Evidence Act, National Defence Act* and *Official Secrets Act*[5] and drastically increases the powers of law enforcement through "Investigative Hearings" and "Preventative Arrests".

As a new and highly controversial piece of legislation, numerous aspects of the *Anti-terrorism Act* have been met with significant dissonance; many of which continue to be a cause of concern for civil libertarians, defence attorneys, minority groups and the public. Many argue that the provisions of the *Anti-terrorism Act* are unprecedented departures from traditional Canadian principles; however, one of the most substantial arguments claimed in favour of the *ATA* remains its alleged consistency with the *Charter of Rights and Freedoms*. In an attempt to respect Canadian values, development of Bill C-36 involved the integration of the Human Rights Law Section of the Department of Justice, members of the Federal Prosecution Service and the Public Security and Antiterrorism Committee of the Cabinet.[6] According to the Department of Justice, this process worked towards finding an "appropriate balance between the need to respect human rights and the need for effective measures to ensure Canadians and the global community are better protected."[7] Upon its proposal, Justice Minister Anne McLellan described Bill C-36 as "the most rigorously scrutinized piece of legislation" of her political career, insisting that it contained numerous safeguards to ensure that "nothing in the *Act* unreasonably infringes on civil liberties and *Charter* rights."[8] For example, rather than including *membership* in a terrorist organization as a criminal offence—as is

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[5] Renamed the *Security of Information Act*
[6] Mosley.
[7] *Ibid.*
[8] Kent Roach, "Dangers of a Charter-Proof and Crime-Based Response to Terrorism," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 131-150.

punishable by up to ten years imprisonment in Great Britain[9]—Bill C-36 proposed to respect individuals *Right to Association.*[10]

Although Justice officials may insist that the *Anti-terrorism Act* complies with the *Charter*, this does not remove the danger of labelling this legislation as "*Charter*-proof". *Charter* proofing—using preambles that attempt to frame and influence *Charter* analysis—is a process that is becoming an increasingly standardized operating procedure for the federal government[11], and is highly favourable over selecting the override option of *Charter* section 33, the Notwithstanding Clause[12]. The problem with "*Charter*-proofing" is that the term implies that a piece of legislation is completely respectful of all *Charter*-guaranteed rights and freedoms and free of any moral or ethical concerns. In reality, *Charter*-proofing merely provides a decreased likeliness of the legislation being struck down by the courts as its wording precludes an interpretation that may be considered to infringe a *Charter* right. As Kent Roach argues, this is merely taking advantage of the willingness of the courts to accept limits on *Charter* rights.[13] The fact that the *Anti-terrorism Act* is labelled as *Charter*-proof has only obscured the fact that it still violates individual rights.

The definition of terrorism set out in the *ATA* is of primary concern to those opposing this legislation. Under section 83.01 added to the *Criminal Code*, "terrorist activity" is defined, for the first time in Canadian legislation, as

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[9] Errol P. Mendes, "Between Crime and War: Terrorism, Democracy and the Constitution" in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 239-270.
[10] Audrey Macline, "Borderline Security" in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 383-404.
[11] Roach, 2001.
[12] Mendes. Which provides the government with the power to supersede any and all *Charter* rights.
[13] Kent Roach, *September 11: Consequences for Canada* (Canada: McGill-Queen's University Press, 2003).

a) Any act or omission that is committed in or outside Canada and that, if committed in Canada, is one of 12 listed UN terrorist offences
b) An act or omission, in or outside Canada, committed
   i) in whole or in part for political, religious or ideological purpose, objective or cause;
   ii) with the intention of intimidating the public with regard to its security or compelling a person/government/organization to do or refrain from doing any act; *and*
   iii) that intentionally causes death, serious bodily harm or property damage or endangers life or interference with an essential service, facility or system[14]

Although this definition is actually a narrowed version of that originally proposed in Bill C-36, critics maintain that, while constitutional, it remains highly problematic. Public opinion surveys similarly indicate that this definition remains a cause of concern for people of all ethnicities.[15] Many fear that the definition adopted is still far too broad and bound to blur the lines between 'terrorists' and the rest of society, thus providing justification for the extensive overuse of the powers enabled by the Act against innocent individuals and groups. What remains the most problematic aspect of the definition is the wide-reaching extensions and vagueness outlined in subsections:

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[14] Other than a result of advocacy, protests, dissent or stoppage of work that is not intended to result in the conduct of harm
[15] Department of Justice Canada, *Focus Group Report: Minority Views on the Canadian Anti-terrorism Act (Formerly Bill C-36), A Qualitative Study* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2003); Millward Brown Goldfarb, *Public Views on the Anti-terrorism Act (Formerly Bill C-36), A Qualitative Study* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2004); Justice Canada & Public Safety and Emergency Preparedness Canada, *Summary Report: Public Consultation with Ethnocultural and Religious Communities on the Impact of the Anti-terrorism Act* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2004)

(c) whether or not providing or offering to provide a skill or expertise for the benefit of, at the direction of or in association with a terrorist group
(d) remaining in any country for the benefit of, at the discretion of or in association with a terrorist group

These conditions provide for an establishment of guilt based solely on association, regardless of an individual's location in the world, or their actions and intentions.

The greatest cause for concern regarding the definition of terrorism is that this legislation permits individuals and groups to be publicly branded as "terrorists". Under section 83.01, a "terrorist group" is a) an entity that has one of its purposes or activities facilitating or carrying out any terrorist activity or b) an entity listed by the Governor in Council as such. A primary cause for concern over this provision involves the apparent inclusion of a reverse onus of proof: rather than requiring proof of an individual's or group's guilt *prior* to listing, those listed must apply to the Solicitor General of Canada, who is granted the power to decide if there are reasonable grounds to justify de-listing the entity.[16] Furthermore, if no response is given by the Solicitor General, he or she is deemed to have refused to recommend de-listing. As this provision also includes a requirement that the property of listed individuals is effectively frozen[17], this process is highly detrimental to the livelihood of those listed, and exceptionally stigmatizing to those who may be falsely identified as a terrorist.

Under the *Anti-terrorism Act*, where a judge determines if there are reasonable grounds to believe that a terrorist offence will occur and that an individual has information pertaining to the offence, section 83.28 of the *Criminal Code* provides for judicial order

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[16] Mosley.
[17] Don Stuart, "The Anti-terrorism Bill (B C-36): An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System," in *Terrorism, Law and Democracy: How is Canada Changing Following September 11?*, ed. Daubney et al, (Montreal: Editions Themis, 2002), 173-192.

to compel testimony from this witness.[18] In order to initiate this process of "Investigative Hearings", consent must be granted by the Attorney General[19]; however, charges need not be laid against *any* suspects.[20] Upon disobeying an order to appear for an investigational hearing, a warrant for the arrest, mandatory testimony and production of documents from the witness is issued.[21] Under this provision, a witness may not refuse to give testimony on the basis that it is self-incriminating.[22] Although this provision undoubtedly appears to go against the *Charter*, it is accompanied by a stipulation of "use and derivative use immunity."[23] This provides that witness testimonies may only be used if the witness is subsequently charged with perjury or it is proven that the evidence used in a subsequent charge would have been independently obtained without the compelled testimony.[24] An additional means of *Charter*-proofing section 83.28 lies in providing the right to retain and instruct counsel at any stage of the hearing[25]; however, such counsel may only instruct the client as to his or her legal obligation to give testimony or *lack* of right to refusal. A reason for further concern lies in the wording of subsection 83.28(4), which suggests that the power to order testimony is not limited to those suspected of participating in a terrorist offence, but any person who "may have information concerning the offence or the whereabouts of those suspected or perpetrating the offence... [including] friends, relatives or acquaintances...many of whom will be completely innocent of any involvement with terrorist activity."[26] Finally, as is exemplified

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[18] Mosley.
[19] Jenkins.
[20] Mosley.
[21] Roach, 2003.
[22] Mosley.
[23] Jenkins.
[24] Roach, 2001.
[25] *Ibid.*
[26] Martha Shaffer, "Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?" in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 195-204.

by *Reyat v. British Columbia*[27], the power to compel testimony in investigative hearings is not limited to information pertaining to possible future offences, but also past terrorist activities.[28] Regardless of any safeguards that may have been integrated into the drafting of section 83.28 and the improbability that courts will overturn this provision, investigative hearings directly infringe upon the *Right to Silence* and *Against Self-incrimination*.

The *Anti-terrorism Act* "Recognizance with Conditions" provision confers the power of "Preventative Arrests" to police. As section 83.3 outlines, upon the consent of the Attorney General, a peace officer may arrest and detain persons suspected of preparing to commit a terrorist activity where there are insufficient grounds for arrest and charge for specific offences. The individual must appear before a provincial court judge within 24 hours or, if none are available, "as soon as possible". If there remain grounds for detaining the individual, the court may adjourn for up to 48 hours, after which the individual is to be released upon signing an ordered 'peace bond' containing specific terms of the recognizance that must be complied with for up to 12 months.[29] Failure to enter into recognizance provides reason for imprisonment for up to one year; breach of the recognizance terms is punishable by up to two years in prison.

The "Preventative Arrests" provision is highly criticized within both the public and legal spheres. While section 495 of the *Criminal Code* permits the warrantless arrest of an individual on the basis that the officer believes he or she is "about to commit an indictable offence", the *Anti-terrorism Act* extends the scope of arrest to those crimes that are not necessarily imminent.[30] Many argue that

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[27] Where Mrs. Reyat was compelled to provide information relating to the trials of two men charged for the Air India attack in 1985
[28] Canadian Legal Information Institute, *In the Matter of an Application Under s. 83.28 for the Criminal Code: Synopsis of Reasons for Judgment*, Docket BL0318, July 21, 2003.
[29] Mosley.
[30] Gary T. Trotter, "The Anti-terrorism Bill and Preventative Restraints on Liberty" in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J.

detaining those who have not been charged with any offence for up to 72 hours prior to a bail hearing is merely a means of providing police with additional time to develop a case against the individual so that a charge may be laid.[31] Others contend that, if the sole purpose of Preventative Arrests is, in fact, to have the accused enter into a peace agreement, this is an exceptionally useless power, as the effectiveness of such in preventing terrorist offences is highly unlikely.[32] It appears that only in the event that a suspected terrorist is caught breaching the specific conditions of his or her recognizance and subsequently imprisoned, that this provision will have any effect in preventing terrorist activities.

A final cause for concern regarding the provisions set out by the *Anti-terrorism Act* is that of "Security Certificates". Based on information gained from the Canadian Security Intelligence Service, the Minister of Immigration, the Solicitor General and the Minister of Justice are free to prohibit the disclosure of any information or conceal evidence in any proceedings for the purpose of protecting international relations or national defence and security.[33] This provision unmistakably infringes the *Right to Fair Trial* and the *Right to Disclosure of State Evidence*. However, courts are unlikely to overturn this legislation as the Federal Government continues to argue in favour of "not compromising the ability of Canada to receive intelligence from foreign sources."[34] Thus, in addition to being held in detention for up to 72 hours without charge, listed as a terrorist entity regardless of sufficient proof, and unable to refuse

Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 239-250.

[31] *Ibid*; Thomas Gabor, *The Views of Canadian Scholars on the Impact of the Anti-terrorism Act* (Ottawa: University of Ottawa, 2004)

[32] Gabor; Shaffer; Stuart.

[33] David Schneidermann, "Terrorism and the Risk Society," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 63-72.

[34] Department of Justice Canada, Annual Report Concerning Investigative Hearings and Recognizance with Conditions, December 24, 2003- December 23, 2004 (Ottawa, 2005)

giving testimony, suspected "terrorists" are also prohibited from knowing what information and evidence is being used against them.

As the Supreme Court of Canada instructed in *R. v. Oakes*, limits to the fundamental rights set out in the *Charter* must be prescribed by law, rather than arbitrary; substantial and pressing, as determined by a democratic and free society; and proportional. The latter condition is met if the objective behind limiting a right meets three criteria: a) the means to achieve the objective are rationally connected to the objective itself, b) the means of achieving the objective only minimally impair the *Charter* right, and c) there is proportionality between the effects and the benefits of limiting the rights of individuals.[35] It is under the second and third requirements that the constitutionality of the *Anti-terrorism Act* may be brought into question.

As Irwin Cotler states, "the appropriate oversight framework is germane to the integrity and efficacy of anti-terrorist legislation".[36] Under such framework, amendments to Bill C-36 included the requirements for annual reviews on the use of preventative arrests, investigative hearings and recognizance with conditions to be submitted by the Attorney General and Solicitor General.[37] According to these reports[38] neither provision has been employed by law enforcement officials since the Act was put in place in 2001. There are numerous reports of arrest and detention of individuals 'suggested' to be involved with terrorist activities, such as the August 2003 arrest of 19 men.[39] However, these arrests are not

[35] Mary C. Hurley, Charter Equality Rights Interpretation of Section 15 in Supreme Court of Canada Decisions (Ottawa: Library of Parliament, Law and Government Division, 1995, revised 2005)

[36] Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy," in The Security of Freedom: Essays on Canada's Anti-terrorism Bill, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 111-130.

[37] *Ibid.*

[38] 2002, 2003, 2004.

[39] Enakshi Dua, Narda Razack and Jody Nyasha Warner, "Race, Racism and Empire: Reflections on Canada," Social Justice 32, no. 4 (2005), 1-11.

counted in the *Anti-terrorism Act* reports as Canadian authorities were operating under post-9/11 *Immigration Act* regulations, which have a far lower standard of proof than that of the *Criminal Code*.[40] Similarly, the recent arrests of 17 men and youths associated with terrorist plots in Toronto did not involve the use of preventative arrests or investigative hearings. Instead, the police waited until enough evidence was amassed—an alleged year and a half from the initial indication of this terrorist group.[41] Despite an apparent lack of operationalization, both provisions continue to be described as "necessary preventative measures that allow us to remain vigilant to an ongoing threat to the security of our democracy and fundamental human rights" by the Minister of Justice and Attorney General.[42]

While oversight provisions are necessary, annual reviews of Investigative Hearings and Preventative Arrests are not adequate for determining whether the *Anti-terrorism Act* meets the *Charter* demands of proportionality. In order to do so, it is necessary to focus on both the direct and indirect effects of this legislation. Oversight mechanisms provide neither a means of determining if these provisions have any influence in actually deterring terrorism nor the extent of influence the Act has on minority groups and society as a whole. According to Shaffer and others, establishing whether the *Anti-terrorism Act* is, or will be, effective in preventing terrorist activity requires substantial analysis of both the effectiveness of the Act's provisions and whether or not these provisions substantially improve upon existing criminal law.[43] While the *Anti-terrorism Act* is unquestionably successful in denouncing terrorism within Canada by proclaiming that these

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[40] Howard Aldemand, "Canadian Borders and Immigration post-9/11," The International Migration Review 36, no. 1 (2002), 15-29; Scott Hornby, (2006, May 29). "National security organizations open up on racial profiling, 'secret police'," Edmonton Journal, 29 May 2006, p. A.10, final edition.
[41] Michael Friscolanti, Jonathon, Gillis and Charlie Gatehouse, "Homegrown Terror It's Not Over," MacLean's 119, no. 25 (2006), 18-26.
[42] Denise Rudnicki, Third Annual Report to Parliament on the Anti-terrorism Act (Ottawa: Department of Justice Canada, 2005)
[43] Shaffer.

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activities shall be met with harsher punishment than previously subjected by the *Criminal Code*, there is little reason to believe that this alone will result in a reduction in terrorist activities. Given the nature of terrorism and the fact that these individual are willing to *die* for their causes, it is highly unlikely that facing a term of 10, 14 years or life imprisonment will have much consequence. Even more ludicrous is the belief that a signed peace order will stop such individuals from committing these atrocities. In the experience of numerous countries riddled with terrorism, even draconian anti-terrorism measures do not have the effect of preventing terrorist attacks. Instead, it is necessary to "deal with the conditions that produce people who are willing to perpetrate terrorist acts in the first place, so long as those conditions exist, people will find a way to commit terrorist actions, regardless of harsh punishments or more invasive investigative techniques."[44]

The greatest concern over the implementation and operationalization of the *Anti-terrorism Act* provisions is that of discrimination against minority groups often associated with terrorism. As Oren Gross states, "crises inevitably lead to heightened individual and group consciousness."[45] Although this mentality is not limited to the sphere of emergency powers, counter-terrorism efforts are directed against a clear enemy and produce an atmosphere of "us" vs. "them"; the greater the threat to "us" the greater the scope of power bestowed upon the government to suppress "them". Such emergency measures have the effect of dramatically intensifying in-group identification, stereotyping and discrimination. As defined by a 1989 judgment of the Supreme Court of Canada, discrimination is

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[44] *Ibid.*
[45] Oren Gross, "Cutting Down Trees: Law Making Under the Shadow of Great Calamities," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 39-62.

a distinction, intentional or not, based on motives related to the personal characteristics of an individual or group, that imposes burdens, obligations or disadvantages not imposed on others, or prevents or restricts access to the possibilities, benefits and advantages offered to other members of society.[46]

There are an estimated one million Muslims in Canada[47]; Islam is Canada's fastest growing religion and is now the second most prominent Canadian faith after Christianity.[48] Although the long beards and headscarves of many Muslims make them easy targets, countless individuals of Middle-Eastern appearance are similarly targeted.[49] The *ATA* projects targeting of this minority group in two ways: increased security profiling, especially at the border and in airports, and the ability of the Canadian Security Intelligence Service and Royal Canadian Mounted Police to collect information without the knowledge of the individual.[50] The latter most significantly affects those who are highly active within the Muslim community and those individuals with unsecured immigration status.[51]

The use of investigative hearings *may* provide information that could possibly lead to the earlier detection of people involved in terrorist activities and the power granted to police through preventative arrests *may* provide an increased ability to incapacitate these people prior to putting their plans into action. However, these unused provisions come at the great expense of civil liberties as a

whole. Most importantly, discriminatory use of these provisions carries the potential to exacerbate already existing racial profiling. While flatly denied by government agencies,[52] racial profiling is already a substantial problem within criminal law.[53] There are numerous reports of people of Middle-Eastern appearance being pulled aside at airports and the border and held for secondary questioning, for no reason other than they were 'suspicious looking.'[54] As was rearticulated by the Supreme Court in *Law v. Canada*, a discriminatory distinction drawn on the basis of prohibited ground is a direct violation of section 15 of the *Charter*.[55] Targeting individuals for heightened security on the basis of their race or ethnicity alone clearly falls under this category. Racial profiling is a harm to human dignity; it has the power to "stigmatize all members of a group by promoting the view that they are somehow less worthy of respect and consideration because they all possess the undesirable trait in question."[56] The greatest cause for concern is the primary effect that such discrimination has in creating and propagating a climate of fear. As the National Anti-racism Council of Canada affirmed, "the *ATA* is nurturing a generalized climate of exaggerated fear and racialized, faith-based xenophobia, not just in the language of the *Act*, but also in how it is operationalized."[57] As the non-utilization of the preventative arrest and investigatory hearings provisions indicate, these powers are unnecessary for the prevention of terrorist activity in Canada. In light of the integration of a "Sunset Clause[58]" as an additional oversight mechanism,[59] one

[46] Helly.
[47] Statistics Canada, *Population by Religion, by Province or Territory (2001 Census)* January 25, 2005, ww40.statcan/101/cst01/demo30a.html
[48] Rasha Mourtada, "A Climate of Fear," *Canadian Business* 77, no. 7 (2004), 24-26.
[49] T. Y. Ismael and John Measor, "Racism and the North American media following 11 September: The Canadian Setting," *Arab Studies* Quarterly 25, no. 1/2 (2003), 101-114; Helley; Justice Canada & Public Safety and Emergency Preparedness Canada.
[50] Helly; Hornby.
[51] Helly.

[52] Hornby.
[53] Shaffer.
[54] Sujit Choudrhy, "Projecting Equality in the Face of Terror: Ethnic and Racial Profiling in s. 15 of the Charter," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. Ronald J. Daniels, Patrick Maclem and Kent Roach, (Toronto: University of Toronto Press, 2001), 367-382.
[55] *Ibid.*
[56] *Ibid.*
[57] Justice Canada & Public Safety and Emergency Preparedness Canada.
[58] Section 83.32 applies to Preventative Arrests and Investigative Hearings such that the provisions expire at the end of the 15th sitting day of Parliament after December

can only hope that Parliament will not contest the expiry of these provisions.

There is no shortage of evidence demonstrating the adverse treatment of Muslims in Canada following September 11th. The Toronto Police Service Hate Crime Unit recorded 57 acts of violence towards Muslims in 2001, compared to one in 2000.[60] The 2002 CAIR-CAN survey indicated that one third of Muslim respondents felt "disliked by fellow Canadians, and were concerned for their own safety and that of their families."[61] More than two thirds feel "uncomfortable about the way white Canadians look at them"; half report that they encounter racism on a daily basis.[62] These effects are not only felt by those of Muslim ethnicity. Thirty-three percent of Ontarians and 45 percent of Quebecers agree that "the September 11th attacks made them more mistrustful of Arabs and Muslims coming from the Middle East."[63] In 2002, the Association for Canadian Studies found 43 percent of respondents felt that Canada accepted too many immigrants from Arab Countries.[64]

Proponents of the *Anti-terrorism Act* warn that one must be suspicious of these sorts of reports and work to differentiate between the outcomes of the *ATA* and the effects of September 11th. These advocates state that most stereotyping, discrimination and hate crimes against Muslims are a direct effect of the attacks themselves and are separable from the influences of the *ATA*. While it may be true that the *Anti-terrorism Act* did not *cause* the post-9/11 backlash against minority groups, it is impossible to differentiate between these effects as the two are inseparable. The *ATA* is Canada's response to 9/11 and sets the standard for how Canada perceives and treats terrorists. More importantly, by not absolutely safe-guarding

against minority groups being subjected to racial profiling and discrimination, the *ATA* sets the example that it is acceptable to treat those of Muslim, Sikh, Hindu or other Middle-Eastern faiths as inferior to all other Canadians. This attitude unequivocally clashes with the fundamental values of the *Charter of Rights and Freedoms*; any propagation of such by our government is not only unethical and immoral, but completely unconstitutional. The *Charter of Rights and Freedoms* is an essential and fundamental element of Canadian law and a backbone of our multicultural society—one that must be upheld regardless of influences from other nations. Although the underlying intentions of the *Anti-terrorism Act* are wholly constructive, it is of critical importance that the call for stronger preventative measures does not quash the need to uphold those fundamental and invaluable principles of our democracy.

31, 2006. They may be extended by passage of a resolution by both Houses of Parliament for up to another five years, when they are subject to another renewal.
[59] Mosley.
[60] Helly.
[61] *Ibid.*
[62] Hornby.
[63] Helly.
[64] *Ibid.*

DOES IT *REALLY* MAKE A DIFFERENCE?
THE LEGALITY OF PRIVATE HEALTH CARE IN ALBERTA
AN INVESTIGATION INTO THE EXISTENCE OF A RIGHT TO HEALTH CARE,
THE FEDERAL-PROVINCIAL DIVISION OF POWER, FEDERAL
SPENDING POWER, AND THE CANADA HEALTH ACT
By Andrew Douris

It is remarkable that the Canadian health care system, which from Confederation until a better part of the twentieth century had defined *private* in every respect, has come to be known as a system whose protectionist "policy on private sector [health care] rivals only that of North Korea and Cuba."[1] Unfortunately for Alberta and Ralph Klein, it is the latter period that they find themselves in trying to justify the legality of private health care in Canada. In order to properly assess Alberta's right to establish a two-tier health care system, with a private sector operating within the boundaries of the current public system, there are four complex areas of Canadian constitutional doctrine that need to be addressed.

To begin with, it must be discovered whether or not the *Canadian Charter of Rights and Freedoms* contains a right to health care under section seven which declares that, "everyone has the right to life, liberty and security of the person and the right not to be

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[1] Colleen M. Flood and Tom Archibald, "The Illegality of Private Health Care in Canada," *Canadian Medical Association Journal* 164, no.6 (2001), 825. Until the 1940's, when Saskatchewan first began a publicly funded health care system, Canadian citizens were responsible for all costs acquired from the use of medical services. Furthermore, it was not until the 1960's that the federal government became involved. Thus, the Canadian health care system was once private in every respect.

deprived thereof."[2] The reason for this is because the existence of such a right would certainly pose serious complications to the establishment of a private health sector in Alberta. The division of powers articulated through the *Constitution Act 1867* must also be analyzed as the history of the judiciary's interpretation of the constitution has shown that the distribution of legislative responsibility in the Canadian federal system is not quite as neat as it may initially appear. The question that needs to be answered is in which level of government, the provincial or the federal, does the responsibility for health care lie. Furthermore, the ability of the provinces and the federal government to raise money to fund the responsibilities which lie under their jurisdiction must also be looked at along with the federal government's spending power which has allowed them to "cross" constitutional borders. Finally, the current legislation pertaining to the organization and financing of health care in Canada (The Canada Health Act), requires examination. It needs to be discovered if the Canada Health Act prohibits Alberta from establishing a private health care system and if so, whether or not the enforcement mechanisms in place are significant enough to ensure cooperation.

Throughout this discussion it will be argued that although Alberta is able to legally establish a private health care system because of the nonexistent right to health care in Canada and their constitutional jurisdiction over health care, financial inequalities and the legitimacy of the federal government's spending power has enabled Ottawa to establish the Canada Health Act resulting in a very strong deterrent to doing so.

The first and possibly most important factor creating the legal basis for Alberta to establish a private health care system is the absence of a right to health care in the *Canadian Charter of Rights and Freedoms*. The significance of this cannot be minimized and is best shown by co-coordinating the argument presented by one of the leading scholars in support of such a right with the possibility of a private health sector in Alberta if this right existed. Martha Jackman,

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[2] *Canadian Charter of Rights and Freedom* [1982].

among others, argues that section seven of the Charter requires the Canadian government, both provincial and federal, to provide for its citizens a purely publicly funded health care system.[3] The reasoning is that the addition of a private sector would take financial resources away from the public sector as well as health care professionals, resulting in a deficient public health care system that would fail to protect the Charter right to life, liberty and security of the Canadians who could not afford the "superior" private health care.[4] In the words of Jackman, "a person who then lacks access to adequate income, food, shelter, or medical care...cannot be said to enjoy a right to life and liberty in any real sense.[5] If this interpretation of section seven offered by Jackman was in fact correct it would follow that the establishment of a private health care system in Alberta would be illegal as it would be contrary to the Canadian constitution. However, this interpretation of section seven is not only incorrect but is also inconsistent with previous rulings by the Canadian judicial system.

The interpretation given by Jackman provides the basis for the necessary distinction between Charter rights as positive rights and as negative rights, with the latter being the interpretation consistent with the rulings of the courts.[6] A Charter right interpreted in an incorrect positive way involves action on behalf of the government to facilitate the achievement of the right in question. In the case of health care and section seven, such an interpretation would require the government to establish a health care system that would ensure that life, liberty, and security are being enjoyed by all individuals. But, to apply the same reasoning used by Jackman, the

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[3] Martha Jackman, "The Protection of Welfare Rights Under the Charter," *Ottawa Law Review* 20 (1988), 264.

[4] Jackman, 265.

[5] *Ibid.*

[6] The Canadian Bar Association Task Force on Health Care, *What's Law Got to Do With It?* (Ottawa, Ontario: The Canadian Bar Association, 1994), 24. Hereinafter noted in the text as (Task Force). The differentiation between negative and positive rights that will be discussed is suggested and described in great detail by the Task Force.

government would be required to provide transportation for all Canadian citizens on Election Day since section four of the Charter gives Canadians, "the right to vote in the election of members to the House of Commons."[7] Under such an interpretation the government would also be required to establish places of worships for all religions and to create political groups where citizens can express themselves since Canadians have Charter rights that allow, "freedom of conscience and religion," and, "freedom of association."[8] The list continues and it is obvious that to expect such action on behalf of the government given financial limitations is absurd. The correct interpretation of Charter rights, a negative one, does not require such action on behalf of the government to ensure that these rights are met but requires exactly the opposite – inaction. The guarantee of Charter rights is limited in the sense that the government cannot *prevent* Canadian citizens from realizing these rights.[9] In the words of a Supreme Court Justice, the Charter "is intended to *constrain* governmental action inconsistent with those rights and freedoms; it is *not* itself an authorization for government *action*."[10] What this means is that it is not the responsibility of the government to establish a health care system in order to ensure that the right to life, liberty and security is being met. But, it *is* their responsibility to ensure that the legislation they pass does not hinder or interfere with citizens who wish to achieve the right to life, liberty and security on their own.[11]

Such an interpretation of Charter rights by the courts can most clearly be seen in the *Morgentaler* case where section 251 of the criminal code was repealed because it interfered with the life, liberty and security of Canadian citizens.[12] As noted by B.F. Windwick, section 251 of the criminal code required women who sought

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[7] *Canadian Charter of Rights and Freedom* [1982].

[8] *Canadian Charter of Rights and Freedom* [1982] Section 2 (a) and Section 2 (d).

[9] The Canadian Bar Association Task Force on Health Care, 21.

[10] *Hunter v. Southam*, [1984] 2 S.C.R. 156. (emphasis author's own).

[11] Peter W. Hogg, *Constitutional Law in Canada* (Toronto, Ontario: Carswell Thompson Professional Publishing, 1994), 674.

[12] R v. *Morgentaler* (1988), 44 D.L.R.

abortion to go through a lengthy process and meet extensive criteria before they were allowed to have an abortion.[13] Interpreting the Charter right to life, security, and liberty in a negative sense most clearly represents the violation in this case. The right was *not* being violated because the service had to be provided, but because the government's action (legislation) prevented women from getting access to a particular health service when desired. As the judge ruled, "the state cannot be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy represents a danger to her life or health. There must be state intervention for s.7 to be violated."[14] The correct interpretation of section seven as a negative right reveals that it is not the responsibility of the Alberta government or the federal government to provide health care for its citizens since a positive right to public health care does not exist within the Charter. The government must however refrain themselves from interfering with Canadian citizens who wish to receive health care. Thus, the foundation for the legality of a private health sector in Alberta has been set since such a program would not be inconsistent with Canada's constitution.

As earlier mentioned, at the time of Confederation the idea of government involvement in health care was not addressed by the parties concerned since health care and other social matters, "were thought to be a private matter for the individual, family, or church."[15] It is for this reason that the *Constitution Act 1867*, does not *specifically* say which level of government is responsible for health care in the Canadian federal system. The absence of such enumeration to the provinces may lead some to assume that the responsibility should then be included within the peace, order, and good governance clause (POGG) as a residual federal power. However, a closer investigation into the relevant areas reveals that provincial jurisdiction over health care has been adapted by the

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[13] Brent F. Windwick, "Health-Care and Section 7 of the Canadian Charter of Rights and Freedoms," *Health Law Review* 3, no. 1 (1994), 20-21.

[14] *R. v. Morgentaler* (1988), 44 D.L.R. at 385. As noted by Windwick.

[15] Keith G. Banting, *The Welfare State and Canadian Federalism* (Montreal, Quebec: McGill/Queen's University Press, 1987) 47.

courts through other sections of the act. Sections 91 and 92 of the *Constitution Act* outline the responsibilities of the federal and provincial governments and it is section 92(7), 92(13) and 92(17) that have given the provinces, Alberta included, constitutional jurisdiction over health care.[16]

Section 92(7) immediately gives the provinces a very strong claim to regulate health care as it assigns to them the exclusive responsibility of making laws with relation to, "the Establishment, Maintenance, and Management of Hospitals...in and for the Province."[17] Although this may appear to end the debate over health jurisdiction, there seems to still be an opportunity for the federal government to establish an insurance plan that would assist Canadians in paying for the health care they receive as it would not interfere with section 92(7). But, before the federal government could attempt to do so the Supreme Court made a ruling relating to the jurisdiction of health insurance during an attempt by the federal government to establish an unemployment insurance program during the depression. Ontario argued that such a program was beyond the scope of federal jurisdiction since the provinces had been given power over, "Property and Civil Rights in the Province," under section 92(13) and over, "all Matters of a merely local or private Nature in the Province," under section 92(16). Justice J. Rinfret agreed with the provinces and stated on behalf of the Supreme Court majority that:

> Insurance of all sorts, including insurance against employment and health insurances, have always been recognized as being exclusively provincial matters under the head of 'Property and Civil Rights' or matter of a merely local or private nature in the province. Any legislation contrary to this is therefore invalid.[18]

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[16] Banting, 48; The Canadian Bar Association Task Force on Health Care, 15.
[17] *Constitution Act, 1867* s. 91(7).
[18] *Canada (AG) v. Ontario (A.G.)*, [1936] S.C.R. at 451. See also (Banting 1987, 49); Sujit Choudry, "Bill 11, the Canada Health Act and the Social Union: The Need for Institutions," in *Health Care Reform & the Law in Canada*, ed., edited by

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The significance of this ruling is absolutely essential to understanding the legal basis for the establishment of a private health sector in Alberta. It sets the precedent that any health care or health insurance offered to citizens of Alberta or for that matter, of any other province, is completely under the discretion of the provincial government(s). Fifty years from this ruling the opinion of the courts had failed to change. In 1982, another case that questioned the jurisdiction over health care resulted in the judge saying; "the view that the general jurisdiction over health matters is provincial has prevailed and should no longer be seriously questioned."[19] It logically follows that when these two court decision are accompanied by the absence of a right to health care in Canada, and thus, an absence of a right to a health insurance system, the Alberta government is able to legally establish any form of health care that they and their constituents desire free of interference from the federal government.

With the previous arguments in mind it should appear rather strange when one observes the current organization of health care in Canada and sees that it involves Alberta fighting for its legal right to establish the two-tier health care system that it desires. The explanation for this can be explained by the differentiation in the ability to raise money between the provinces and Ottawa assigned by the *Constitution Act 1867*, and the federal spending power that has been interpreted from the same document. In order to properly understand the latter an immediate discussion of the former is necessary.

The *Constitution Act 1867*, initiated a federal system that immediately resulted in the provinces being financially subordinate to the federal government; a trend that has continued throughout Canadian history. Through the division of powers Ottawa was given the ability to raise money through any mode and any method

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A. Caulfield and Barbara von Tigerstrom (Winnipeg, Alberta: University of Alberta Press, 2002, 74.
[19] *R. v. Schneider* [1982] 2 S.C.R. at 137. See also (Hogg 1998, 444).

of taxation.[20] This included direct and indirect taxes while the provincial governments were limited to raising revenue strictly through direct taxation.[21] While direct taxes have now become the greater source of revenue, in the late 1800s and early 1900s, indirect taxes were generating eighty percent of all governmental income.[22] While this initially did not pose a problem since Canada had yet to develop into a welfare state, the depression and the end of World War II accompanied by the federal government's goal of creating a publicly funded health system exposed this inequality.[23] It was the provinces that had jurisdiction over health care, but by 1945 a publicly funded health care system had yet to be established by any province other than Saskatchewan because of the financial burden.[24] The development of a national publicly funded health care system thus demanded the financial resources of the federal government and the constitutional jurisdiction of the provinces. It is precisely in this way that the federal government first became involved with health care.

The publicly funded health care programs that have since existed in Canada have been achieved through the use of cost-shared programs that have involved conditional and block grants on behalf of the federal governments with criteria that must be met in order for the provinces to receive the funding. The first such act was the *Hospital Insurance and Diagnostic Services Act* (HIDS) of 1957, and by 1961, every province had signed on to receive financing through this arrangement. The conditions of this program were rather stringent and required provinces to make their health care systems universal,

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[20] *Constitution Act, 1867*, s. 91(3).
[21] *Constitution Act, 1867*, s. 92(2). An example of a direct tax is one applied to a person or corporation's income while an indirect tax would be a tariff or a sales tax. It was not until 1962 that all provinces had initiated personal income tax. Furthermore, natural resources such as oil in Alberta had yet to be discovered and thus, the financial benefit from such resources did not yet exist.
[22] Hogg, 116.
[23] Anne Crichton and David Hsu, *Canada's Health Care System: It's Funding and Organization* (Ottawa, Ontario: Canadian Hospital Association Press, 1990), 31.
[24] *Ibid.,* 31.

portable and publicly administered in order to receive the federal government's fifty percent cost contribution.[25] In order to improve upon what was established with HIDS, the Diefenbaker government replaced the act with the *Medical Care Act* of 1966 and added the condition of comprehensiveness while keeping the same fifty-fifty cost distribution. The problem that developed with both of these acts is that the federal government's costs were driven by the expenditure of the provinces and therefore there was no ceiling on federal contributions.[26] The fifty-fifty cost shared programs had become no longer feasible.

In order to minimize their costs the federal government repealed the *Medical Care Act* in 1977 and combined the federal contributions to provinces for health care and education in one block grant called "Established Programs Financing" (EPF). Rather than federal costs being linked to provincial expenditure, EPF consisted of a fixed contribution dependent on each provinces gross national product and population. The federal government no longer needed to monitor the manner in which health care money was spent since there was no incentive to as their costs were no longer linked to provincial spending.[27] As a result, a private-sector that included extra-billing (physicians billing both the provincial government and the patient) and user charges (a cost required for the use of the health insurance) developed in provinces such as Alberta. The federal government finally realized what was happening and in 1984, the Canada Health Act was established with very strict conditions to be met in order for the provincial governments to

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[25] Alison Drummond, *Carrots and Sticks: Federal-Provincial Fiscal Relations and Enforcement of the Canada Health Act* (Toronto: Ontario Legislative Library, 1995), 2. Universality is the quality of being accessed by all Canadians; portability to be valid within other provinces and countries; publicly administered is free of a private sector.
[26] Ibid., 4.
[27] Crichton, 34.

receive the EPF financing.[28] The Canada Health Act was supposed to end the private sector that had developed and reinforce a publicly administered system.

Without the entire conditions of the Canada Health Act (CHA) immediately being elaborated on, it is sufficient to know that it prevents a private health sector from being established and it is because of this that Alberta Premier Ralph Klein has declared that, "the Canada Health Act cuts to the heart of the constitution by infringing on the provincial jurisdiction over health care."[29] Given that Alberta desires a public sector *and* a private sector, the conflict between Alberta and the federal government appears.[30] It is initially tempting to take Klein's argument as being valid as it seems that the federal government is regulating an area of provincial jurisdiction: Alberta requires federal financial contributions to establish their public sector however, in order to receive the transfers they must follow the CHA criteria that prohibits private health care. Despite the initial appeal of this argument, it is nonetheless *invalid* and can be defended by an appeal to Canada's constitution, constitutional scholars and the courts.

The federal government has been able to legally establish a role in shaping the health care system of Canada through the use of its spending power. As critics on the legality of federal spending power have pointed out, the term "spending power" is nowhere in Canada's constitution.[31] But, as shown by the courts designation of health care to the provinces, such elaboration is not always

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[28] In 1995 the EPF was replaced with the Canada Health and Social Transfer (CHST) which is a block grant that combined EPF with the Canada Assistance Plan and is the current financial arrangement.
[29] Adrienne Tonner, "Alberta May Go to the Court to Fight Fee," *Edmonton Journal,* 17 October 1995.
[30] Those who are willing to pay extra for services provided by the government would be able to have the initial cost paid for by the public system with the extra cost paid to the physician performing the service. This is what a "two-tier" health care system consists of.
[31] Andrew Petter, "Federalism and the Myth of Federal Spending Power," Canadian Bar Review 68, (1989), 449.

necessary. The federal spending power arises from a combination of section 91(3), 91(1A), and 106 of the *Constitution Act 1867*.[32] As was earlier mentioned, section 91(3) gives the federal government the power to raise revenue by any method and any mode of taxation. When this is combined with section 91(1A) which gives the federal government jurisdiction over "the Public Debt and Property," and section 106 which gives them the power to "appropriate" federal revenue, the legal basis for the federal government to spend their money, crossing constitutional borders is established. The combination of these sections was best described by constitutional scholar Peter Hogg when he said, "it gives [the federal government] the power to spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and they may attach to any grant any condition they choose, including conditions it could not directly legislate."[33] It is important to recognize that when the federal government uses its spending power to establish cost-shared programs they are only creating financial arrangements to appropriate money to the provinces and there is no law that requires the provinces to join. The provinces are and have been free to opt-out; however, if they do so they forego the substantial financial benefits. For example, had Alberta not agreed to the Canada Health Act it would have "cost" the province $15 billion dollars just between the years of 2001 and 2005.[34] Admittedly, a very fine line is being drawn between financing and regulation of provincial responsibilities. However, in 1991 the Supreme Court made it absolutely clear what the law was relating to federal-provincial cost-sharing arrangements. The court ruled that:

> While an act may impact upon constitutional interest outside the jurisdiction of Parliament, such impact is not enough to find that a statute encroaches upon the jurisdiction of the other level of government...The courts

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[32] Hogg, 156; Banting, 52.
[33] Hogg, 156.
[34] "Federal Transfers to Alberta," *Department of Finance Canada* http://www.fin.gc.ca/facts/tfsh2_e.html (accessed 24 March 2005).

should not supervise the federal governments exercise of its spending power in order to protect the autonomy of the provinces...money granted to fund a matter within provincial jurisdiction does not amount to regulation of that matter.[35]

As it appears, the federal government's "carrots" have enticed Alberta and the other provinces enough to accept cost-sharing arrangements such as the Canada Health Act. Furthermore, it is the federal government's spending power that has legitimized the attachment of conditions that have resulted in a publicly administered health care system in Canada.

The Canada Health Act has proven to have enforcement mechanisms that are significant enough to prevent the creation of a private health sector as was shown by Alberta's attempt to do so in 1994.[36] The criteria established in the act has similar conditions to previous shared-cost health programs that must be met in order for provinces to receive funding - public administration (s.8), comprehensiveness (s.9), universality (s.10), portability (s.11), and accessibility (s.12).[37] More importantly, the act addressed the issue of extra billing and user fees that had developed under the *Medical Care Act* by explicitly banning them through sections 18 and 19. No additional payments could be made by patients to physicians and no citizens could be required to pay a fee to use a provincial insurance program. But, in 1994, Alberta introduced a "facility fee" that required its citizens to pay a small cost each time they used their health insurance. This was an attempt to avoid the requirements of the CHA through the use of rhetoric. However, when this fee was implemented the enforcement mechanisms of the CHA were

[35] *Reference Re Canada Assistance Plan* (B.C.), [1991] 2 S.C.R. at 564 and 567.
[36] Heather B. Devlin, "Federal-Provincial Relations in Canadian Health Care Policy: The Case of the Alberta-Ottawa Conflict" (Master's Thesis, University of Western Ontario, 2001), 45-57. This thesis paper provided excellent background knowledge relating to Alberta's attempt to operate a private sector within the boundaries of the Canada Health Act.
[37] *The Canada Health Act, 1984.*

initiated. Section 20 of the CHA required the federal government to subtract the earnings made through the use of user fees from the total amount of transfers that Alberta would get for health care during the period the fees existed. So, although Alberta made $3.6 million dollars from the use of "facility fees" from 1994 to 1996, $3.6 million dollars was subtracted from the money they received from the federal government.[38] The existence of the fee thus made no sense as it only inconvenienced Albertans while failing to achieve its purpose of generating revenue and was therefore scrapped in 1996. Had it remained, an additional enforcement mechanism of the CHA was also at the disposal of the federal government. Section 15 allows the federal government to not only withhold health transfers but, to withhold *all* federal-provincial cash transfers. Given that federal cash transfers to Alberta were more than $4 billion dollars in 2005, the CHA certainly has provided a very strong deterrent to the establishment of a private health sector in Alberta.[39]

The discussion that has taken place demonstrates that when trying to determine Alberta's right to establish a two-tier health care system, there are multiple areas that need to be investigated before coming to a conclusion. As it appears, Albertans can legally establish whatever system they choose; the failure of Canada's constitution to contain a right to health care and provincial jurisdiction over health care has enabled them to do so. But, financial inequalities between the provincial and federal and governments have led to cost-shared health care programs legitimized by the federal government's spending power. If Alberta ever intends on altering their health care system while still receiving financing from the federal government, the Canada Health Act ensures that the new system will be free of a private sector.

[38] Sujit Choudry, "Bill 11, the Canada Health Act and the Social Union: The Need for Institutions," in Health Care Reform & the Law in Canada, ed., ed. A. Caulfield and Barbara von Tigerstrom, (Winnipeg, Alberta: University of Alberta Press, 2002), 38.
[39] "Federal Transfers to Alberta," Department of Finance Canada http://www.fin.gc.ca/facts/tfsh2_e.html (accessed 24 March 2005).

POLICY FAILURE: A PERSISTENT FEATURE OF CANADIAN ENVIRONMENTAL POLICY.
THE CASE OF THE ATLANTIC FISHERIES
By Katrina Pollock

Canada enjoys a considerable wealth of natural resources, a fact intimately linked to the country's economy. From the Hudson Bay Company's historic trade in beaver pelts to the current export of massive quantities of softwood lumber, for better or for worse, the economic health of Canada relies utterly on these resources. Despite such a long history in resource development, it seems that the limited nature of these commodities has only recently been realized and understood. Government policy to deal with this fact is generally either outdated, ineffective or still entirely nonexistent. Since the creation of Environment Canada in 1971 under the Trudeau government, environmental policy in Canada can claim very few significant successes and is instead characterized by persistent failure. This essay will show that environmental policy failure led to the collapse of the East Coast fishery in the early 1990s and has perpetuated the depletion of stocks by failing to adequately address the issue. It will do so by examining policy and political knowledge of the fishing industry before the collapse and responses to the crisis afterwards, while also attempting to suggest possibilities for a more positive response and for effective management of the fisheries.

The very nature of oceans makes their management more of a challenge than the management of forests or animal species. What goes on under the surface of the water has, for the most part, been a mystery to human beings, particularly prior to the 1960s and 1970s when marine research began to take off. Before this, the damage caused by centuries of over fishing off of Canada's east coast went

unnoticed mainly because nobody could actually see it. When a forest is clear cut or a herd of caribou is hunted to extinction, the effects are quite apparent to anyone willing to look. Clear cutting of forests leaves open, empty patches of bare land in their place. Deep-sea trawling is the equivalent of clear cutting the ocean floor as it involves dragging heavy nets and equipment along the bottom of the ocean to catch fish, but only a marine researcher would ever have an opportunity to witness this destruction. As a result, information and conservation efforts for marine habitats and species have been slower to gather support. In Beazley and Boardman's book on environmental politics, they assert that "there has always been a persistent, but false, belief that marine populations and ecosystems are 'resilient' and that human impacts in the oceans are negligible."[1] Again, this is due to the reality that marine ecosystems are more difficult to access and therefore less likely to attract the support of public attention, meaning that environmental policy addressing marine issues has been even slower to develop than that of land or air quality.

Beginning in the 1960s, the environment and specifically, water and air pollution, became a topic of interest in North America. Rachel Carson's famous book "Silent Spring" was published in 1962 and helped to launch an environmental revolution of sorts. In Canada, the amount of media attention and public concern helped to create the Department of the Environment in 1971 under the government of Prime Minister Pierre Trudeau. Included in the Department was the Fisheries Service, which dealt with issues involving inland and coastal fisheries as well as waterways, seacoast and shipping issues.[2] While these departments were certainly a step in the direction of environmental protection and conservation, the reality of Canadian politics is and was that the federal government can only play a limited role in pursuing environmental policy. In

[1] Martin Willison, "Endangered Marine Species and Marine Protected Areas in Canada" in *Politics of the Wild: Canada and Endangered Species*, ed. Beazley and Boardman (Canada: Oxford University Press, 2001) 94.
[2] G. Bruce Doern and Thomas Conway, *The Greening of Canada: Federal Institutions and Decisions* (Toronto: University of Toronto Press, 1994), 24.

1971, Canada was operating under the British North America Act which gave limited powers to the federal government in terms of the environment. Even today after Canada adopted the Canada Act in 1982;

> The provinces have the primary responsibility for most aspects of environmental affairs. Thus, Environment Canada was limited in terms of the politics and programs it could formulate and implement. In most areas, Environment Canada had to develop cooperative relations with the provinces which, in the early 1970s, was a difficult task...[3]

Lack of political muscle and public funding continues to plague Environment Canada, although it did enjoy a brief period of substantial influence in the late 1970s. However, at that time, depletion of the Atlantic fish stocks was not recognized as a significant environmental issue and was not placed on the department's list of issues and objectives. Although the Department of Fisheries included in their mandate plans to, "restore deteriorated habitats and their living aquatic resources", as well as, "develop biological indices of water quality adequate for the enforcement of pollution control" among other mandates, the overriding principle of the department was to provide the highest possible yield to fishermen. They were also focused initially almost solely on the issue of water quality rather than species protection.[4] It was not until the 1990's when Prime Minister Brian Mulroney's government introduced the Green Plan that the fisheries were even vaguely alluded to as a 'priority area' under the Plan's third objective: the "protection of our special spaces and species."[5] This enormously general mandate however, gave no guarantee that the Atlantic fishery would be included as both a "special space" and containing

[3] O.P. Diwvedi, Patrick Kyba, Peter J. Stoett, and Rebecca Tiessen, *Sustainable Development and Canada* (Ottawa: Broadview Press, Ltd., 2001), 51.
[4] Doern and Conway, 24.
[5] Diwvedi, Kyba, Stoett, Tiessen, 65.

"special species", although it certainly represented a looming crisis that in just two years would prompt the closure of the cod fishery with devastating effects for the Atlantic Canadian economy.

The largest recorded catch of "northern cod" was around 800 000 tones in 1968.[6] After this, the catches steadily declined in volume until July 1992 when the Minister of Fisheries and Oceans announced that the northern cod stocks were close to extinction and that the cod fishery would be closed indefinitely. Just two years later, in 1994, this was extended to nearly the entire east coast fishery with the Grand Banks closure. At that time, the Department of Fisheries faced an enormous amount of criticism for their failure to have effectively managed the cod stock and prevented its depletion. The Department had its own branch of scientists and researchers who realized and reported the scope of the problem in the North Atlantic stocks; the stumbling block was in transforming this evidence into policy initiatives. In an analysis of the Canadian cod fishery, Stig Gezelius noted that,

> Prior to the 1992 moratorium, the Canadian Atlantic Fisheries Scientific Advisory Committee (CAFSAC) had a major role in transforming scientific evidence into policy advice.... and its political independence was questioned. Industry interests were closely integrated in the advisory process prior to the moratorium. Industry consultations were carried out in advisory committees at regional and inter-regional levels.[7]

With this in mind, it is not surprising that protection policies were not implemented. The fisheries generated revenue on which Atlantic Canada's economy was completely dependent. In all, close to 145 000 jobs and $2.4 billion[8] are wrapped up in the Atlantic

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[6] Gezelius, "Environmental Sustainability and Political Survival: A Comparative Analysis of the Cod Fisheries of Canada and Norway," *Environmental Politics* 4, vol. ii (2002), 67.

[7] Gezelius, 68.

[8] Diwvedi, Kyba, Stoett, and Tiessen, 26.

fisheries, representing an enormous percentage of Atlantic Canada's population and revenue. As such, those industry leaders who were consulted in advisory committees would have naturally opposed any strict regulation, such as small catch quotas or shortened catch seasons, because this would have translated into economic loss to the industry.

After the fisheries were closed, it was widely recognized that the Department of Fisheries was flawed at an organizational level. Industry consultants should not have had the power to prevent environmental initiative the way they did prior to 1992, and research scientists should have had more input and power at the policy creation level. The CAFSAC and Atlantic Groundfish Advisory Committee (AGAC) were both closed down and replaced by the Fisheries Resource Conservation Council. This new council was supposed to bridge the gap between policy makers and research scientists and, more importantly, the members of the Council were elected independently of any organizations or industry divisions.[9] But the issue that was not addressed or acknowledged was the government's lack of willingness to effect conservation policies when they had evidence from both fishermen and scientists that the cod stock was in decline. The fact of politics was, and is, that no government wants to be associated with policies that will damage their region's economic stability. The provincial governments of Atlantic Canada recognized that the fisheries were in crisis but also knew that enforcing stricter catch quotas, banning or restricting certain fishing technology or shortening seasons would make them highly unpopular in the region. In part it was due to political need for short term popularity that no significant measures were taken to aid the fish stocks and prevent crisis.

Though one would expect both the public and the government to have learned a better approach to marine resource management from the early '90s fishery collapse, a similar crisis of the Atlantic salmon stock has been in development for some time now. Because salmon spend time in both fresh water and ocean

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[9] Gezelius, 67.

water, the stock is susceptible to pollutants and toxins which are more concentrated in freshwater bodies such as small rivers and lakes. Controversy surrounding the safety of salmon for consumption due to these pollutants has recently been in the public attention. However, the attention may soon turn to the fact that wild salmon stocks are disappearing entirely. In Canada, the southern Nova Scotian population is either extinct or so negligible that they cannot be fished at all. In Maine, only about one hundred wild salmon were thought to have spawned in Maine's rivers in 2000.[10] Wild salmon stocks have been allowed to decline to the point of virtual extinction despite efforts made to protect the species. In the United States, salmon were kept off of the endangered species list until 2000, despite evidence of rapidly declining stocks and dangerously low numbers of spawning fish, due to technicalities of the term "wild". In his article detailing the situation of Atlantic salmon, David Jenkins notes that in the United States,

> ...Both state and federal officials recognize that the long-term survival of salmon is doubtful. Over the last century, state efforts to restore Atlantic salmon populations to New England rivers have failed ... and the Endangered Species Act, by requiring species and habitat restoration to be cast in terms of the best science of the day, polarizes scientific discourse for political ends.[11]

Although Jenkins writes from an American standpoint, the situation in Canada is almost identical. As of 2001, wild Atlantic salmon had not been placed on the Canadian Endangered Species list, in part due to the existence of farmed salmon which are bred and raised for market consumption. The sport fishing and commercial fishing communities lobby for salmon's removal from the Endangered Species list using the argument of farmed salmon populations, as its placement is bad for business. Their success in keeping it off the list

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[10] Jenkins, "Atlantic Salmon, Endangered Species, and the Failure of Environmental Policies," *Comparative Studies in Society and History* 45, no. 4 (2003), 844.
[11] Jenkins, 845.

for so long only shows that much of the old influence of the fishing industry on environmental policy implementation is still alive and well.

While local policies have not been strong enough to have considerable effect, Canada has been anxious to show the international community that we are serious about protecting 'our' stocks. With the Law of the Sea act in 1984, Canada's territory was extended to include a 200 nautical mile exclusive economic zone (EEZ)[12], effectively giving Canada rights to fish stocks on the Grand Banks that have attracted European and American boats as well. In 1995, a dispute over 'straddling stocks'[13] of Turbot arose. It came to the attention of the Canadian Coast Guard that a Spanish trawler was grossly over fishing the stocks that technically were in international waters, and thus outside of Canadian authority. The dispute ended when the Coast Guard fired a shot over the bow of the Spanish trawler and then seized it and cut the nets of another trawler.[14] So soon after the height of the fishery crisis, the Canadian authorities were no doubt hyper sensitive to both public opinion of their handling of the situation, as well as gaining international understanding and recognition of the serious nature of the situation in Canada.

Since the fisheries crisis in the 1990s, efforts have been made to correct the problems of implementing effective environmental policy for the area. As discussed above there were departmental reorganizations that were meant to lessen industry influence on policy makers. New standards for the total allowable catch quotas and shorter fishing seasons were also implemented to try and give fish stocks a chance to regenerate with less pressure from the fishing boats. All of these policies were important, but do not necessarily go far enough. Also problematic is that policies have not kept up with

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[12] *Sustainable Strategies for Oceans: A Co-Management Guide* (Canada: National Round Table on the Environment and the Economy, 1998), xii.
[13] Straddling stocks mean that the habitat of these fish included the open sea as well as within the EEZ.
[14] Diwvedi, Kyba, Stoett, and Tiessen, 208.

technology developments in fishing. Even with shorter seasons, fishers have been able to maintain or increase their catch using technologies such as radars, fish finding sonar, Global Positioning Systems (GPS) and LORAN.[15] Improved nets and deep sea trawling have also increased catch sizes, as well as marine degradation. The regulatory approaches to dealing with the fish stocks, from quotas to seasonal restrictions, have not proved nearly effective enough to restore the stocks.

Since the early 90s, considerable thought has been put into alternatives strategies for maintaining the fish stocks. Jane Roberts agreed that, "whilst environmental limits are fundamental to environmental policy making, they are, by themselves, an insufficient basis for policies which are workable and fair."[16] The most important and difficult part of this statement is "workable and fair." It has already been outlined how important the fisheries were and are to the economy and how many Atlantic Canadians' livelihoods are dependent on it; to completely shut down the fisheries would be devastating to the region. Instead, innovative and thoughtful policies that can both serve the interests of community and allow the stocks to regenerate are needed. Several arguments have been made for a private ownership of fish stocks, which many believe would eliminate the 'tragedy of the commons' problem that faces the stocks now, whereby over-fishing and exploitation of stocks are seen as being the result of public ownership and lack of private accountability. Private ownership, through electronic tagging could transfer fish stocks into marine 'herds' or 'sea ranches'[17] much like a cattle or horse ranch. While the idea may seem foreign or improbable to us, it is not an unrealistic or without merit and may very well be the way of the future in sustainable fisheries.

The environmental policies surrounding the collapse of the fish stocks have been examined and their role in leading to this

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[15] Michael De Alessi, "Technology, Marine Conservation, and Fisheries Management," in *The Half-Life of Policy Rationales,* ed. Foldvary and Klein (New York: New York University Press, 2003), 23.
[16] Jane Roberts, *Environmental Policy* (London: Routledge, 2004), 73.
[17] Michael De Alessi, 23-25.

collapse has been identified. Perhaps one of the most significant factors in the Atlantic fisheries crisis was the relationship between the fishing industry and the policy implementers, which blocked effective conservation policies from being put into place due to concern over the impact this would cause on the fishing industry, and the lack of willingness by the provincial governments to implement unpopular, but necessary, conservation policies. Unfortunately, this was an extremely short sighted path to take as the ensuing moratorium caused significantly more economic damage than stricter limitations would have involved. Policies following the moratorium have been restricted to regulatory guidelines, which has not proved as effective as authorities and environmentalists would like. As a result, alternative strategies such as private ownership of certain fish schools or 'sea ranching' practices may help the fishing community effectively manage our marine resources in the future. Whatever the approach taken, it is important that something new, innovative and sustainable for both the economic health of the Atlantic community and for the environmental health of the Atlantic ecosystem, is developed and implemented soon, before more fish stocks follow the devastating path of the Atlantic cod and wild salmon stocks.

HOW MUCH DOES CANADA MATTER INTERNATIONALLY?
By Kristopher Slater

Many Canadians pride themselves on being citizens of a great nation. We pride ourselves on our international reputation, our heritage, and the image that has been constructed of what it means to be a Canadian. We value freedom, democracy, and the strength of our international reputation. However, unbeknownst to most that hold this pride, all they are holding is a finely constructed image. This image is consistently propagated by successive governments from both the Liberals and Conservatives, and it is one that is consistently straying further from any semblance of truth. The image that Canada is the helpful fixer, honest broker, and middle power peacekeeper of the global world has become little more than political rhetoric that is used to maintain the myths that many Canadians hold. These myths are not only of themselves, but also of their government. The unfortunate reality is that Canada is no longer a good international citizen. In fact, we have lost such a great amount of our international currency and respect that we must begin to wonder, as the rest of the world does, how much we actually matter internationally.

In the past decade much has been written lamenting that Canada has become little more than a spectre of its former self. An academic cottage industry has sprung up around this debate, with writers offering both analyses and prescriptions on how Canada is failing not only itself, but the global community. All offer criticisms of why we have reached this disparity and how this can best be rectified. There is great agreement that Canada has been in decline since the late 1960's, and while there have been high points, this

decline has been without abate. According to noted Canadian scholar Michael Ignatieff, "we continue to coast on the old Pearsonian reputation of being the good guy, but less and less backed up by the commitments that we need to sustain it."[18] We are failing ourselves in the three D's of defence, diplomacy, and development aid, and yet many Canadians hold onto the image of the blue helmeted diplomatic good guy in the world. We still believe that Canada, through its internationalist rhetoric, is a good international citizen.

This paper seeks to examine the role Canada is taking as an international citizen and dispel the myths that many hang onto. It is without denial that Canada was once a very important state within the international system, and at one time we were in a position of great prominence. In the last forty years we have let this go. Now we are trapped in a struggle between our values, interests, rhetoric, and actions. We are at a crossroads with where we wish to stand internationally, and it is uncertain if we can even say that we still matter among nations. Canada is facing harsh realities with its international image, and can no longer bank on its former standing. Canada is no longer a good international citizen; it has forfeited much of what it once had.

There was indeed a time when the internationalist Canada that many perceive today still existed. The 'Golden Age' of Canadian internationalism began in 1945, at the end of the Second World War and lasted almost four decades. It was during this time that Canada emerged as a great internationalist and came into its own as a country. Andrew Cohen, in *While Canada Slept*, has chronicled this period through the eyes of three of the most prominent individuals to work for Canada during this era: Hume Wrong, Norman Robertson, and Lester Pearson[19]. In the post war period, the isolationist idealism that had dominated the inter-war period was

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[18] A. Cohen, *While Canada Slept: How We Lost Our Place In the World* (Toronto: McClelland and Stewart, 2003), 26.
[19] Andrew Cohen offers a very in depth analysis of this period in chapter 6 "From the Golden Age to the Bronze Age" of *While Canada Slept*, 2003.

replaced with internationalism and a newfound multilateralist sentiment.[20] Those working for the department of external affairs at this time saw a means to bring together Canada's security interests with their idealism for a better global order.[21] Internationalism was a means for Canada to forge a close relationship between its values and interests, and this was clearly expressed in its foreign policy during this period. As a result, Canada emerged as a dominant force internationally, and had the means to support its ambitions in both military strength and capital. In comparison to that era and our current position, Andrew Cohen writes:

> If Wrong, Robertson, and Pearson were to pay twenty-first century Canada a visit, their impression would be an illusion. We have created a Potemkin Canada. The truth is Canada is in decline in the world today. It is not doing what it once did, or as much as it once did, or enjoying the success it once did. By three principal measures- the power of its military, the generosity of its foreign aid, the quality of its foreign service - it is less effective than a generation ago.[22]

Most scholars identify this decline as being heralded by Lester Pearson's resignation as prime minister in 1967, what prominent Canadian historian Pierre Berton has referred to as Canada's "last good year."[23] The year 1968 ushered in what many have seen as the beginnings of Canada's progressive decline internationally.

It seems almost incredulous to think that Canada would be so willing to turn its back on the strong internationalist presence it had built for itself in the years between 1945 and 1968[24]. It was

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[20] T. Keating, *Canada and World Order: The Multilateralist Tradition in Canadian Foreign Policy* (New York: Oxford University Press, 2002).
[21] *Ibid.*
[22] Cohen, 22.
[23] P. Berton, *1967: The Last Good Year* (Toronto: Doubleday Canada, 2004), 358.
[24] There is debate as to whether Canada's decline may have been signaled with the defeat of Louis St.Laurant's government by John Diefenbaker and the Conservatives

during this time that Canada was at its height. We were well respected militarily, having the third largest armed fighting force[25], and we were fast establishing ourselves diplomatically, as we had built the most respected external affairs office in the world. In 1953, *The Economist* recognized the contributions Canada was making internationally, saying: "If it is permissible to generalize about the diplomatic service of any country, it is probably true to say that the representatives of Canada exercise an influence and enjoy a prestige out of all reasonable proportion to the size of their country or the power they yield."[26] Canada was forward thinking and ambitious during this time. We were unafraid to be involved, and received many accolades for our willingness to offer direction and lead. The 1956 Suez Crisis is possibly the most prominent example of this goal orientation. Not only did it give birth to modern day peacekeeping, but it firmly established Canada's international prominence. Lester Pearson was awarded the Nobel Peace Prize and Canada's role as a leader in multilateralism, diplomacy, and international affairs was firmly established.

The golden age that Canada had been living in prior to 1968 has been quickly fading, as the drive and willingness to be innovative internationally has slowly withered within successive governments. "[This] decline is not the product of one party, one politician, one period. It has been going on for decades- slowly, often imperceptivity, sometimes accelerated, sometimes arrested, under both the Liberals and Conservatives."[27] The perception of Canada has changed within the greater world, as we have sacrificed the currency that we had built up by being so engaged. According to Welsh,

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in 1957. For the purpose of this discussion the year 1968 and the end of Lester Pearson's Liberal government will be used as the starting point of Canada's decline.
[25] Cohen; J. Welsh, *At Home in the World: Canada's Global Vision for the 21st Century* (Toronto: Harper Perennial, 2005).
[26] Cohen, 130.
[27] *Ibid*, 23.

Canada's identity vis-à-vis the outside world is a topic that cries out for discussion. There is both the perception and the reality of Canadian decline on the international stage. We are resting more and more uncomfortably on our international reputation as the helpful middle power. Measured in terms such as the size of our armed forces and of development assistance budgets, Canada has less and less meat to put on the international table.[28]

This decline began with the erosion of the foreign service, and continued with successive budget cutbacks, and complacency that large armies were no longer needed in a bipolar world. In the middle of the 1990's it looked as though Canada was becoming isolationist as it sought to defeat the deficit. "The impact of budget cutbacks, the emphasis on promoting trade, internal reorganization, patronage appointments, and neglect,"[29] all in part have had a role to play in how Canada has lost its direction and continues to lack footing internationally. The result is Canada is not the international citizen it once was.

The scope of these diverse arguments parsed with a look to our past highlights a very important theme that has come to dominate Canadian foreign policy. The dichotomy between our values and interests when it comes to foreign policy and our goals internationally has come to dominate our actions since 1968. We have been both unwilling and unable to rationalize our priorities and this has only gotten worse. Much unlike the heyday of foreign policy that gave rise to the likes of Wrong, Robertson, and Pearson, among others, who had drive and a real sense of where they wanted Canada to be, "there is a pervasive sense of disconnect as well as fragility about Canada's role in the world."[30] This fragility has manifested itself in the increasing lack of direction and goals that Canada

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[28] Welsh, 2005, 156.
[29] Cohen, 30-31.
[30] A. F. Cooper and D. Rowlands, "A State of Disconnects- The Fracturing of Canadian Foreign Policy," in *Canada Among Nations 2005: Split Images*, ed. A. F. Cooper and D. Rowlands (Montreal: McGill-Queens University Press, 2005), 3.

consistently displays. We have become trapped within a dynamic where the values we hold about who we are within the world, and the ideals we want to hold up and export, have become exclusive from our national interests. Instead of being coterminous, they have become mutually exclusive. This has resulted in a policy that tries to be everything to everyone, but does little of anything.[31] Canada has embarked on a policy that is not only inconsistent but also fails to realize any succinct direction. This has manifested itself in an almost schizophrenic approach to international relations.[32] In the past forty years we have become more economically tied to the United States, and this has had a great effect on our foreign policy interests; however, we look south while trying to look both east and west. Noted scholar Jennifer Welsh has captured this dilemma well in her writings, explaining that we cannot have everything at all times. She sees a great problem with how policy makers in Ottawa have taken a reactive approach to dealing with the United States and concludes that this has translated into inconsistency internationally, as we have begun to place all of our focus on our economic relationship across the 49th parallel. In her latest offering, *At Home in the World: Canada's Global Vision for the 21st Century*, she places two central themes into her discussion of how she views the issues facing Canada in taking on the values versus interests dilemma. Her discussion focuses on Canada wanting to be America's best friend, while trying to reconcile itself as a middle power. Welsh has viewed these two desires as being the "myths that Canadians hold about themselves and their place in the world."[33] However, they are "increasingly unattainable in the post- September 11 world as they are impeding our ability to craft a compelling vision for the twenty-first century. Until we see ourselves more clearly, and honestly assess our strengths and weaknesses, we cannot hope to assume our

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[31] A. Noël, J. P. Therien, and S. Dallaire, "Divided Over Internationalism: The Canadian Public and Development Assistance," *Canadian Public Policy* 30, no. I (2004), 29-46.

[32] Welsh, 2005.

[33] Welsh, 2005, 24.

continental and global responsibilities."[34] We cannot hope to align ourselves with the United States and expect to have the same effect in the world. We must make hard choices.[35]

Many Canadians hold the values of fairness, human security, multilateralism, freedom, human rights, and democracy very high, and are firm in their belief that it is these values that we exemplify around the world. These ideals are abstract concepts, and are not concrete in their implementation. At present Canada seems unwilling to choose which it would rather pursue: its historic values, or its economic interests.

During the four year period between 1996 and 2000, it appeared that Canada had become very good at exporting a values-based foreign policy around the world. The period of Lloyd Axworthy's tenure as Mister of Foreign Affairs can be seen as a brief glimmer where it appeared that Canada had settled on a direction. Axworthy, during his time as minister, put forth a very values-oriented foreign policy, centering on a human security agenda which focused on 'soft power' diplomacy. During this five year period, Canada was very active with "high profile campaigns to ban landmines, to establish an International Criminal Court, and to revitalize the UN Security Council."[36] These "reflected traditional Canadian preoccupations,"[37] and for the period it looked as though Canada had found the former footing it had under Pearson. This does not necessarily represent the exception to the rule that it seems. Axworthy did a lot to strengthen international institutions, but at the same time his government was undermining his work.

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[34] *Ibid.*

[35] D. Stairs, "The Making of Hard Choices in Canadian Foreign Policy," in *Canada Among Nations 2004: Setting Priorities Straight*, ed. D. Carmet, F. Osler Hampson, and N. Hilmer (Montreal: McGill-Queens University Press, 2005)

[36] G. Donaghy, "All God's Children: Lloyd Axworthy, Human Security And Canadian Foreign Policy, 1996-2000," *Canadian Foreign Policy* 10, no. 2 (2003), 39.

[37] *Ibid.*

In the 1990's as the government became less generous in social services, it became less generous with the world poor... [as it] reduced the civil service, it reduced the foreign service, and the military too. As it refused to invest itself at home, it refused to invest itself abroad.[38]

Others have viewed this period in a much more cynical light. Kim Richard Nossel, a respected scholar at Queens University, was perhaps the most critical, referring to Axworthy's foreign policy as "foreign policy on the cheap,"[39] as Canada did little to invest in hard assets or in the initiatives Axworthy was trying to accomplish. Roy Rempel has also been very critical of the apparent successes that Axworthy and Canada have accomplished internationally in the past decade.

Canada has pursued several diplomatic initiatives over the past decade including: a Comprehensive Test Ban Treaty for nuclear weapons, the anti-personal landmines treaty, the formation of the International Criminal Court and the Kyoto treaty... However, in each one of these areas serious questions exist with respect to the value the proponents have claimed, they have either been largely ineffective or have actually set back international co-operation.[40]

This is not to detract from Canada's successes during this time, as they have indeed served to strengthen international law and global norms. However, the example of 1996 to 2000 highlights the inability of Canada to chart a solid, lasting course on foreign policy direction, as none of Axworthy's work has left a prevailing legacy within

[38] Cohen, 24.
[39] Donaghy, 309.
[40] R, Rempel, *Dreamland: How Canada's Pretend Foreign Policy Has Undermined Sovereignty* (Montreal: McGill-Queens University Press, 2006), 36-37. Rempel bases his argument around the lack of support that these international agreements have received from the United States, claiming that they have served in some cases to harm our relations with America, and that they have also been pursued long after it was apparent that the original goals were unachievable.

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Ottawa. Andrew Cohen aptly notes that "today, Canada has abandoned its military, slashed its foreign aid, and diluted its diplomacy. It has tended to favour commerce over conscience in its foreign policy abandoning the moral high ground it once held in human rights and democracy."[41] Roy Rempel has also viewed Canada's foreign policy failing in a similar light. He sees the inability of Canada to create a succinct and decisive foreign policy as our biggest failing. While Jennifer Welsh, and to a lesser extent Andrew Cohen, argue for a more values-based approach, Rempel and others look for a much more interests-based direction. Rempel responds to the idea of a values-oriented foreign policy saying that "in a values driven international policy it becomes extremely difficult to make hard choices based on interests as everything becomes a priority, which means in reality there are no priorities."[42] He disagrees that Canada should be a model citizen internationally, as it is a "poor man's ideological policy."[43] While this represents an adverse argument, it highlights that Canada needs to rectify its dilemma. We cannot sustain this lack of direction as we continue to debate whether our traditional values should take precedence in our international affairs, or if we should be guided by interests. "The result [of this] is a Canada more responsive than inventive on the international stage, given to a kind of lofty ad hockery, inclined to embrace the next fashionable idea, be it soft power or human security, as long as it doesn't cost too much."[44]

More scholars are adding their voices to the debate whether Canada should focus exclusively on its relationship with the United States and a foreign policy "largely driven by the imperatives of trade and economic development,"[45] or place focus back on our historical roots of grand internationalism and our values. As Welsh notes, "we've lost sight of what we are trying to accomplish both on

[41] Cohen, 160.
[42] Rempel, 36.
[43] *Ibid*, 34.
[44] Cohen, 160,
[45] *Ibid.*

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the North American continent and in the wider world."[46] And also, "as Canada has become a lesser country at home it has become a lesser country abroad."[47] No longer can Canada lead internationally, as it has fallen in disarray, both in terms of hard and soft power. This debate has done nothing to improve our status as a good international citizen.

It is interesting to note how few voices are coming from average Canadians. This is perhaps the most unfortunate aspect of how far Canada has fallen. The great majority of Canadians have little idea of how poorly Canada is doing internationally. This clearly shows that Ottawa is not only deluding itself, but its citizens as well. One does not have to look far to find examples of this. There is a great disparity between what the government is saying it is doing and what it actually does internationally. This is not new, as it has been happening since the 1960's. As Canada has progressively lost influence internationally, it has pursued a much more active "declaratory policy."[48] It is almost as if the government is tying to use words to cover its unwillingness to make hard choices. Canada has been consistently saying that we are doing much more, when in fact what we are doing is much less. This is a direct result of our inability and unwillingness to chart a succinct course of where we want to be internationally.

> During the 1990's the Canadian government dramatically reduced its foreign aid effort, ending up becoming one of the least generous donor countries of the OECD. However, during this time Canada maintained a progressive and innovative rhetoric on its development assistance without recognizing the widening gap between what it said it was doing and its actual contributions.[49]

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[46] Welsh, 2005, 159.
[47] Cohen, 123.
[48] Rempel.
[49] Noel et. al, 43.

The Canadian government has received much criticism for this lack of action to meet its rhetoric. In terms of official development assistance, countries continue to decry how grossly we are under-funding our promises despite proclamations by various governments portraying Canada as a friend to poor nations.[50] It was Lester Pearson who set the goal in 1970 at the United Nations for the economically developed countries to give 0.7 per cent of their gross national product in economic development aid. Yet Canada, at the most, has only managed to give 0.53 per cent which it did in 1975.[51] The government continues to propagate an image that Canada is on track. "While the prime minister promises to increase aid, it is now at its lowest level in thirty-seven years [...] it fell to .22 per cent in 2001, placing Canada third last of the twenty-two donor countries of the Organization for Economic Co-Operation and Development."[52] Unfortunately, the actions of successive governments have done little to match their words. In all the main areas of internationalism Canada is failing, while trying to convince its citizens of a finely-constructed illusion.

> We have devalued our assets and diminished our reputation for effectiveness. Declaratory policy endures but Canadian pronouncements are now often ignored because there is nothing behind the words. Canada's vulnerability has increased, not because of an independent stance on critical issues, but because we no longer have the capacity to be effective or make a difference.[53]

A reading of the 2005 International Policy Statement offers an insightful vision of where the government sees itself. In the statement, the government outlines its policies for the future,

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[50] S. K. Holloway, *Canadian Foreign Policy: Defining the National Interest* (Peterborough: Broadview Press, 2006)
[51] Noel et. al.
[52] Cohen, 29.
[53] T.S. Axworthy, "An Independent Canada in a Shared North America: Must We Be in Love or Will an Arranged Marriage Do?." *International Journal* 59, no. 4 (2004), 768.

recognizing that "recent years witnessed a relative decline in the attention Canada paid to its international instruments, as priority was given to getting our domestic house in order."[54] The statement also acknowledges that Canada's diplomatic network, foreign and trade policy capacity, defence capabilities, and commitment to development suffered as a result.[55] While this statement is now out of date with the passing of the Paul Martin Liberal government, it is telling that the government is willing to admit its own failings. However, nowhere in the document is there an outline of how the government intends to rectify its course, as it fails to offer hard policy change. Instead, it opts for 'priorities' that it wishes to address in light of its own failures. As well it continues the rhetorical approach highlighting its current international commitments and parsing these with its historical success. The statement is not a change. It only serves to gloss over the reality that Canada is without orientation.

We are no longer generous, and have almost retrenched ourselves so much into quasi-isolationism that "it is hardly surprising that Ottawa seems to be doing more with less, and in more places too, so that the real impact of its programming conveys a sense of thinning out."[56]

It is not surprising that a 2003 cover story of the Canadian edition of *Time* magazine asked if anyone would notice if Canada disappeared. We no longer contribute like we once did and we cannot create policy that makes anyone take notice. There remains a strong consensus among the public for active involvement in foreign affairs and economic internationalism[57], but we are unable to articulate this.

[54] Foreign Affairs and International Trade Canada, *Canada's International Policy Statement: A role of Pride and Influence in the World* (Ottawa: Queen's Printer, 2005)
[55] *Ibid.*
[56] Stairs, 28.
[57] Noel et al.

"The Canadian willingness to pursue a truly altruistic values based foreign policy has been largely rhetorical"[58] and Canada is in trouble. Alain Noël *et al* note that "important divergences remain regarding the country's relationship with the United States, development assistance, and security issues."[59] Our inability to reconcile our abstract values that we hold as what makes us Canadian, with our national interests, and our floundering rhetoric that is not backed up by action, has weakened us to the point that we no longer matter. Internationally we are still active, but this activity is thinly distributed. We are a token joiner. We still try to participate everywhere, without much impact anywhere.

> Canada is not a "global power" so much as it is a "global dabbler." What Canadians need to understand is that if this country wants to have real influence on a particular problem in a way that actually furthers the national interest, then much greater focus in areas where we can make a difference will be required. The process of choosing where to focus must, in turn, be grounded on a clear understanding of just where the national interest in fact is.[60]

Defining the national interest should be what is at the forefront of the agenda for Canada. There is an idea that Canadian initiatives are created by subjective desires of bureaucrats and politicians, not the objective needs of the national interest.[61] We can no longer continue to bank on the myths that we have been so actively holding up to the mirror, as this is not what is really there. Our misguided actions only do us a greater disservice. These actions are harming all aspects of defence, diplomacy, development aid, and multilateralism, the things that all Canadians traditionally hold in high regard.

[58] Rempel, 37.
[59] Noel et al, 30.
[60] Rempel, 53.
[61] A. F. Cooper and G, Hayes, *Worthwhile Initiatives?: Canada's Mission Oriented Diplomacy* (Toronto: Irwin Publishing Ltd., 2000)

In national defence, we have continued to dismantle the military, as the interplay of values and interests over the years has lessened our expenditure and our contributions to our armed forces. This is yet another area where our words and actions do not match.[62] Canada spends 1.2 per cent of its gross domestic product on defence, ranking us 7th of the 19 NATO countries[63] and 128th in the world.[64] The result is an insignificance which has amounted to our inability to meaningfully contribute internationally, limiting our influence. In peacekeeping, where traditionally we have led as "a top ten contributor, Canada now ranks 50th out of 95 countries currently contributing military personnel to UN missions."[65]

The same is being seen in our contributions to development aid. At the end of the Cold War, throughout the 1990's, the government's effort to eliminate the deficit significantly weakened our involvement in development assistance. Between 1991 and 1999, official development aid dropped by 33 per cent.[66]

In diplomacy, Canada maintains a seat at many different tables, with many different organizations, but the seat it holds is now more of a formality than one of active participation. Canada no longer has the hard currency of international relations, which is increasingly being seen in terms of military strength, and definitive actions, not of reaction oriented policy, and waffling. According to Thomas S. Axworthy, "prestige is the currency of international relations. One gains prestige by being known as an effective player

[62] Cooper and Rowlands.
[63] Polaris Institute, *It's Never Enough: Canada's Alarming Rise in Military Spending*, October 25, 2005, http://www.polarisinstitute.org/files/Never%20enough.pdf (accessed November 13, 2006).
[64] United States Central Intelligence Agency, *The World Fact Book 2006*, https://www.cia.gov/cia/publications/factbook/rankorder/2034rank.html (accessed November 13, 2006)
[65] Polaris Institute, *Boots on the Ground: Canadian Military Operations in Afghanistan and UN Peacekeeping Missions* May 17, 2006, http://www.ceasefire.ca/atf/cf/{0A14BA6C-BE4F-445B-8C13-51BED95A5CF3}/bootsonground.pdf (accessed November 7, 2006).
[66] Noel et al.

in diplomacy, development, or defence. Canada has diminished its capacity in every one of these."[67] In doing so it has also diminished itself both at home and abroad.

There are many different interpretations for why Canada has gone this way and fallen so far from where it once stood. Pejorative interpretations view that Canada has relinquished its former guiding role for a miserly footing lacking both substance and direction. Others see Canada as being in transition within the changing global landscape, viewing Canada's confusion as a time of great opportunity to recapture its former status. Regardless of the interpretation, it cannot be disputed that Canada is at a crossroads and needs to decide on a direction before it becomes too late to do more than it is already doing. Hindsight is twenty-twenty, but the past no longer defines us, as we have done little over the past forty years to substantiate our illusions. Many "critics call Canada an immature country, unwilling to make hard choices,"[68] and say we "cannot recreate the post-war era."[69]

> [We also] cannot return to the bi-polar world of fewer states and smaller councils and sharper discussions, in which [Canada] was once ideally placed and uniquely suited to be an honest broker and helpful fixer.[70]

Canada must chart a new path and overcome the unwillingness to stand on our own feet and be an innovative player internationally. In essence we were caught looking when we should have been acting. The world moved forward and Canada stood by, relaxing in its former glory. As Jennifer Welsh succinctly notes, "at this point in our national history, we need to be asking ourselves some tough questions about the world beyond our frontiers. What do we want to do on the international stage? What do we want to stand for? What kind of world do we want to build? Are we willing to put our money

[67] Axworthy, 770.
[68] Cohen, 33.
[69] *Ibid.*, 169.
[70] *Ibid.*

where our mouth is?"[71] Currently Canada has done little to rectify this situation. We remain at a crossroads with our values and interests, unable to define ourselves internationally, both multilaterally and economically, in terms of our global trade and development. Our rhetoric still remains at odds with our actions as foreign aid remains uneven and insignificant. As well, our commitments to the environment and defence fall far short of our pronouncements, as we are working against climate change, and under the Harper minority government our military has shifted from peacekeeping to combat operations in Afghanistan. Our ability to meet the target UN Millennium Goals remains highly questionable. Canadian foreign policy is a curmudgeon that falls far short of the values we claim to hold. Many Canadians are unaware of how far away the image that we have is from reality, but the haze we have created and allow to persist is far from abating. The academic debate will continue and suggestions will be offered, but we stand idly by waiting for another golden age that will not happen. Not until we find a way to solve our dilemmas, and encourage innovation and direction, will Canada let go of its past and become a good international citizen once more.

[71] Welsh, 2005.

AMERICAN POLITICS

"I just want to say this. I want to say it gently but I want to say it firmly: There is a tendency for the world to say to America, "the big problems of the world are yours, you go and sort them out," and then to worry when America wants to sort them out."
Prime Minister Tony Blair

STENBERG V. CARHART (2000)
THE CONTINUING EVOLUTION OF ABORTION LAW IN THE UNITED STATES
By Kimberley Elliot

In the last few decades, abortion has been one of the most divisive and emotionally charged issues in American politics.[1] Adversaries of abortion believe that life begins at the moment of conception, and accordingly, abortion is akin to murdering an innocent child.[2] Conversely, advocates of abortion believe that a woman's right to make this decision is a basic protection under the American Constitution. In the most recent Supreme Court case concerning abortion law in America, *Stenberg v. Carhart (2000)* ruled that a Nebraska state law criminalizing the performance of "partial birth abortions" violates the Federal Constitution.[3] This 5-4 decision expanded upon the legal principles determined in two prior Supreme Court decisions, *Roe v. Wade (1973),* and *Planned Parenthood of Southeastern Pa. v. Casey (1992).* The decisions in these court precedents, together with a very weak majority in *Stenberg,* lead the U.S. into a state of questionable and ambiguous definitions of what methods of abortion are constitutional under Federal and State laws.

Although the American Constitution does not explicitly protect the woman's right to an abortion, the Supreme Court has recognized that this right of personal privacy has its roots in the First, Fourth, Ninth, and Fourteenth Amendments.[4] Through the Court's reliance on the preceding Amendments and through the acceptance of years of Supreme Court precedent, primarily *Roe and Casey,* the right of "personal privacy" was viewed broad enough to

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[1] Mary Holland Benin, "Determinants of Opposition to Abortion: An Analysis of the Hard and Soft Scales," *Sociological Perspectives* 28.2 (April 1985): 199.
[2] *Stenberg v. Carhart* 530 U.S. 914 (2000): 920.
[3] *Ibid.,* 914.
[4] Janeen Berkowitz, "Stenberg v. Carhart: Women Retain Their Right to Choose," *The Journal of Criminal Law and Criminology* 91.2 (Winter 2001): 338.

encompass a woman's decision whether or not to terminate her pregnancy.[5] However, in *Roe*, the Court concluded that the woman's right to make an abortion decision was not unqualified and that there were important State interests in its regulation.[6] The opinion delivered by Mr. Justice Blackmun relied on a trimester approach to regulation by the State, stating that for the first trimester, the abortion decision must be left to the woman and her physician.[7] For the second trimester, the State could regulate and even prohibit abortion "except where it is necessary ...for the preservation of life or health of the mother."[8]

The opinion of the Court in *Casey* reaffirmed *Roe*, and defined *Roe's* essential holding as being made up of three parts: firstly, a recognition of the right of the woman to choose to have an abortion before viability; secondly the power of the State to restrict abortions after viability if there is an exception for the mother's life or health; and thirdly, that the State has an interest from the outset of pregnancy to protect the health of the mother and the life of the fetus.[9] The Court held that States could regulate abortions prior to viability provided that the laws did not impose an undue burden on the woman seeking the abortion.[10] Although the central holding of *Roe* was upheld, the Supreme Court essentially rejected the Trimester framework, in favour of the concept of viability of the fetus. The opinion of the Court in *Casey,* that the State could restrict or prohibit abortion post-viability, lead directly to the legislation passed by the Nebraska legislature dealing with partial birth abortion.

In *Stenberg v. Carhart*, Justice Breyer delivered the opinion of the Court and affirmed that any State abortion statute must be

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[5] *Ibid.*, 339.
[6] *Ibid.*, 163.
[7] Stanley Kutler, *The Supreme Court and the Constitution: Readings in American Constitutional History* ed. 3. (New York: W.W. Norton & Company, 1984): 648.
[8] Kutler: 648-650.
[9] *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey* 505 U.S. 833 (1992): 846.
[10] *Ibid.*, 878-879.

deemed unconstitutional if the result places an undue burden upon a woman's right to make an abortion decision.[11] The Nebraska State law at hand, more specifically Section 28-326 and Section 28-328, banning "partial birth abortion" reads as follows:

> No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.[12]

The law classifies violation of the statute a "Class III felony" carrying a prison term of up to 20 years, and a fine of up to $25,000.[13] In addition, an automatic revocation of the doctor's medical license would take immediate effect if a partial birth abortion were performed in the State of Nebraska.[14] Dr. Leroy Carhart, a medical doctor in Nebraska, challenged the constitutionality of this statute and subsequently, in 1997, he brought a lawsuit to the Federal District Court, which eventually was brought before the Supreme Court.[15]

In the opinion of the Court, Justice Breyer provides a detailed description of the different methods of abortion to set out a preliminary understanding of all of the available abortion procedures. Approximately ninety percent of all abortions performed in the United States take place during the first trimester of pregnancy.[16] The first standard method of abortion is identified as "vacuum aspiration", and involves insertion of a vacuum tube into the uterus to evacuate the contents.[17] The second standard method of abortion is referred to as Dilation and Evacuation (D&E), and

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[11] *Stenberg v. Carhart* 530 U.S. 914 (2000): 945-946.
[12] Berkowitz: 345.
[13] *Ibid.*, 922.
[14] *Ibid.*, 922.
[15] Berkowitz: 348.
[16] *Stenberg v. Carhart* 530 U.S. 914 (2000): 923.
[17] *Ibid.*, 923-924.

entails a dilation of the cervix accompanied by instrumental disarticulation of the fetus to facilitate evacuation from the uterus.[18] Approximately ten percent of abortions performed in the United States are conducted in this manner.[19] There is a variation of the D&E procedure that is commonly referred to as the Dilation and Extraction, or D&X. This method begins with the induced dilation of the cervix, followed by "partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus."[20] This is the method used by Dr. Carhart, and as he testified, minimizes the trauma to the woman's uterus, cervix and other vital organs.[21]

The question before the Court was whether or not Nebraska's statute criminalizing partial birth abortions, violates the Federal Constitution as interpreted in *Casey* and *Roe*. The Opinion of the Court, delivered by Justice Breyer and affirmed by Justice O'Connor, Justice Souter, Justice Stevens, and Justice Ginsburg, concluded that the Nebraska statute did in fact violate the Federal Constitution for two distinct reasons: first, the law lacks any exception "for the preservation of the...health of the mother", and second, it imposes an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself.[22]

In *Stenberg*, Nebraska put forth several arguments asserting that the D&X procedure is "little-used" and only by a "handful of doctors," however in response, the Court affirmed that "even if the D&X procedure is infrequently used, the health exception question is whether protecting women's health requires an exception for those infrequent occasions."[23] Accordingly, a rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone; thus, the State could not prohibit a person from obtaining

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[18] *Ibid.*, 924.
[19] *Ibid.*, 924.
[20] *Ibid.*, 928.
[21] Berkowitz: 352.
[22] *Stenberg v. Carhart* 530 U.S. 914 (2000): 930.
[23] Berkowitz: 359.

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the treatment 'simply by pointing out that most people do not need it.'[24] In short, the Court responded to each argument put forth by the State, concluding that they were all insufficient to demonstrate that Nebraska's law needed no health exception. To that end, the Nebraska statute imposed an undue burden upon a woman's right to make an abortion decision and is, therefore unconstitutional.[25]

Since *Stenberg, Casey* and *Roe,* a number of developments have transpired surrounding this issue, causing political and social repercussions to Americans. On November 5, 2003, President George W. Bush implemented the "Partial-Birth Abortion Ban Act". Pro-life supporters were delighted by this federal legislation; however, pro-choice proponents were in complete opposition to the Act. Three different federal courts of appeals ruled that the federal law conflicts with *Stenberg* and is unenforceable. The Supreme Court announced in February 2006 that it would review one of the lower-court decisions that blocked the enforcement of this Act.[26] The Partial-Birth Abortion Ban Act represents the first direct national restriction on any method of abortion since the Supreme Court legalized abortion in 1973.[27] The Act declares that partial-birth abortions are an unnecessary procedure that causes tremendous harm to the mother:

> Partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited. Partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of the women and in some circumstances, their lives.[28]

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[24] *Ibid.,* 359.
[25] *Ibid:* 362.
[26] National Right to Life. "U.S. Supreme Court Agrees to Review Federal Partial-Birth Abortion Ban Act," *National Right to Life,* October 2006, http://www.nrlc.org/press_releases_new/Release022106.html.
[27] "U.S. Supreme Court Agrees to Review Federal Partial-Birth Abortion Ban Act".
[28] "U.S. Supreme Court Agrees to Review Federal Partial-Birth Abortion Ban Act".

Although the current status of this debate is in the process of evolving, several social, political, and communal repercussions emerge as a result of the decision made in *Stenberg*.

A significant social repercussion of permitting the use of partial birth abortions in the United States, as determined in *Stenberg*, is the proliferation of the repeat abortion patient. Approximately, forty-five percent of all abortions are repeat abortions, which place the woman at risk from suffering from physical and psychological problems.[29] In a study conducted by Judith Leach, the examiner found that "repeat abortion patients are more often dissatisfied with themselves, more often perceive themselves as victims of bad luck, and more frequently express negative feelings toward the current abortion than women who are obtaining abortions for the first time.[30] This creates extreme distress for women within a community and leaves them with significant emotional and physical scars. Since almost half of all abortions performed in the United States are repeat abortions, it is likely that most of these women use abortion as a birth control method. This in turn, places a burden on the federal government and the American taxpayer, who partially fund these procedures. Although the social repercussions of *Stenberg* are significant, the political impacts are of even more importance.

One of the most significant political repercussions of the decision reached in *Stenberg*, is the federal legislation and the impact that the current composition of the Supreme Court will have in determining the law concerning abortion rights. Since *Stenberg*, Chief Justice Rehnquist died and Justice O'Connor retired, with the latter having been one of the justices who supported the opinion of the Court in *Stenberg*. President George W. Bush appointed two new conservative-thinking justices, Chief Justice Roberts and Justice Alito

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[29] Judith Leach, "The Repeat Abortion Patient," *Family Planning Perspectives* 9 (Jan-Feb., 1987): 37.
[30] *Ibid.*, 37.

to replace the two former justices.[31] Among currently sitting Supreme Court justices, five voted in favor of *Roe*, however, Justice Kennedy, who voted with the majority in *Roe*, voted in the *Stenberg* case to allow Nebraska to ban the partial birth abortion method.[32] Moreover, two sitting justices, Justice Scalia and Justice Thomas have voted to overturn *Roe*, and the remaining two justices have not voted on the matter. With this new composition of the Court, the precedents established in *Roe*, *Casey* and *Stenberg* may not be followed. The Court's decision in the next significant abortion case, *Gonzales v. Carhart*, could potentially be the redefining case in overturning *Roe* and prohibit all abortions in the United States.[33]

The Supreme Court precedent together with legislative history, provided support for the Court's decision in *Stenberg*. However, with its narrow holding, the Court did not resolve the discrepancy in the methods of abortions that are considered constitutional under Federal and State laws, and specifically, Americans still do not know whether a prohibition of the D&X method of abortion is constitutional. [34] As long as *Roe v. Wade* remains the law of the land, pro-lifers will continue to push forward with the anti- abortion movement. With the momentum from the anti-abortion movement, together with the appointments to a new, more conservative Supreme Court, we could see a dramatic reversal in abortion law which will in turn, significantly impact women's constitutional right to choose in the United States.

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[31] Carole Joffe, "Roe v. Wade at 30: What Are the Prospects for Abortion Provision," *Perspectives on Sexual and Reproductive Health* 35 (Jan-Feb., 2003): 29.
[32] *Joffe.*, 29.
[33] *Joffe.*, 29.
[34] Berkowitz: 382.

THE LEGACY OF THURGOOD MARSHALL
By Sue Szasz

Thurgood Marshall was America's leading radical. He led a civil rights revolution in the 20th century that forever changed the landscape of American society. On August 30, 1967 Justice Marshall became the first African-American to be appointed to the Supreme Court.[1] President Johnson was quoted as saying of this appointment, that it was "the right thing to do, the right time to do it, the right man and the right place."[2] In his twenty-four terms on the Supreme Court, Justice Marshall played a crucial role in enforcing the constitutional protections that distinguish American democracy.[3] Marshall believed that the Constitution was inherently defective in its acceptance of slavery and gave much credit to those who "refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,'" and who worked to better them.[4] "The true miracle of the Constitution was not the birth of the Constitution, but its life."[5] He was an adamant supporter of challenging discrimination based on race or sex, and feverishly opposed the death penalty. Justice Marshall established a record for supporting the rights of the voiceless American, his political career stands as a true value of what one man can accomplish, and he single handedly altered the laws, which govern America today. Marshall, himself, symbolized the end

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[1] Michael D.Davis and Hunter R. Clark, *Thurgood Marshall Warrior at the Bar, Rebel on the Bench,* (New York, N.Y.: Carol Pub. Group, 1992) 275.
[2] *Ibid.,* 13.
[3] Roger Goldman and David Gallen, *Thurgood Marshall Justice For All,* (New York: Carroll & Graf, 1992) 13.
[4] Elizabeth Krug, *Great Lives Thurgood Marshall Champion of Civil Rights,* (New York: Fawcett Columbine, 1993) 139.
[5] *Ibid.,* 139.

of the reign of white supremacy in American history; he shined as the legal champion for a new beginning.[6]

Chief Justice Rehnquist once said, "Almost everyone who sits on the Supreme Court is remembered for some contribution to American constitutional law. But Marshall [was] unique because of his major contributions *before* becoming a member of the Court."[7] Marshall grew up in a discriminatory world, where segregation was common and the black man's inferiority was proclaimed. [8] He had firsthand knowledge of this world, in which laws failed to fulfill their promised protections. He nevertheless had the capacity to believe in a better world, during more than twenty years as director-counsel of the NAACP Legal Defense and Educational Fund, he believed in a system of laws to provide what the political system would not: a definition of equality that assured black Americans the full rights of citizenship.[9] The predicate for the achievement of *Brown* was to imagine something better than the present, to defy an insistent reality with imagination.[10] Thus, Marshall became the guiding force and symbol of *Brown*. He devised the legal strategy and headed the team that brought the school desegregation issue before the Supreme Court; he argued the case himself in a straightforward manner, when asked by Justice Felix Frankfurter during the argument what he meant by "equal," Marshall replied, "equal means getting the same thing, at the same time, and in the same place." [11] *Brown* changed the world. The naming of Marshall to

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[6] *Ibid.*, 122.
Marshall saw the Constitution as a living tree, which grew and changed with time, he was not a believer of judicial restraint
[7] Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (New York: Oxford University Press, 1997) 3.
[8] Roger Goldman and David Gallen, *Thurgood Marshall Justice For All,* 168.
[9] Charles J. Ogletree, Jr. *All Deliberate Speed Reflections on the First Half-Century Brown v. Board of Education* (New York; London: W.W. Norton & Co., 2004) 143.
[10] Roger Goldman and David Gallen, *Thurgood Marshall Justice For All,* 168.
[11] Elizabeth Krug, *Great Lives Thurgood Marshall Champion of Civil Rights,* 91. His distinctess was not simply that he was the first African-American to sit on the

the Court showed just how much the world had changed. "He created the world that made his own personal triumph possible" he would now share the power to decide, his becoming a Justice became a part of what *Brown* meant.[12]

He brought a unique perspective to the Court. To speed up desegregation, the Court ruled that black children could be bused to white schools and white children to black schools. In a busing case, *Swan v. The Charlotte-Mecklenburg Board of Education,* Marshall championed for integration, and the Court approved his idea and ruled in favor of correcting residential imbalances in school enrolment. [13] For much of his Supreme Court career, as the Court's majority increasingly drew back from affirmative action and other remedies for discrimination that he believed were still necessary to combat the nation's legacy of racism, Justice Marshall used dissenting opinions to express his disappointment.[14] In the 1978,

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Court, but that he had spent much of his professional life working with the oppressed. Marshall also knew the other side of the tracks, he called it home, and he saw himself as an activist on its behalf. This verdict destroyed the laws used to support the "separate but equal" doctrine. It became the first of a series of civil rights victories in the 1950s and early 1960s.
[12] Roger Goldman and David Gallen, *Thurgood Marshall Justice For Al,* 168.
[13] Elizabeth Krug, *Great Lives Thurgood Marshall Champion of Civil Rights,* 91.134.
[14]Note: Marshall never faltered to push for what *Brown* represented: rectifying racial injustice. He used dissenting opinions to fight for individual's freedoms. Its important to note that yesterday's dissent can become tomorrow's majority opinion. To me the strength of having a democratic government is to have the ability to respect dissenting opinions, they are important for developing law. Marshall dissented in City of Richmond v. Croson, a 1989 ruling in which the Court declared unconstitutional a municipal ordinance setting aside 30 percent of public contracting dollars for companies owned by blacks or members of other minorities. The Court majority called the program a form of state-sponsored racism that was no less offensive to the Constitution than a policy officially favoring whites. In his dissenting opinion, Justice Marshall said that in reaching that conclusion "a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice." He added: "I, however, do not believe this nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice

Bakke case, the Court found it unconstitutional for a state-run medical school to reserve 16 of 100 places in the entering class for black and other minority students, Justice Marshall filed a separate sixteen-page opinion tracing the black experience in America, showing how quotas were a necessary remedy for past injustice, "bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to insure that America will forever remain a divided society." [15] He left an indelible mark on the Court in race matters, and his legal strategy fueled the victories of the civil rights movement.[16] "He defeated segregation where it counts: in court." [17]

When Marshall joined the Supreme Court in 1967, the Constitution had not been read to limit the use of the death penalty. Marshall was a zealous opponent of the death penalty. His opposition to the practice grew out of his early experience in the South and from his work with court-martial victims in the Korean War.[18] The Eighth Amendment to the Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[19] Marshall believed that the purpose of the Amendment was to prevent punishment from becoming synonymous with vengeance. He regarded the death penalty as: cruel, excessive and unusual.[20] He saw it as "excessive" because it did not deter the crimes it was intended to punish, "Hell if [it] was deterrent, there would never have been a second execution after the first," he thought it "cruel" since it did not deter criminal

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not only to those victims of past and present racial discrimination in this nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity."
(http://www.arlingtoncemetery.net/tmarsh.htm)
[15] *Ibid.,* 138.
[16] Roger Goldman and David Gallen, *Thurgood Marshall Justice For Al,* 140.
[17] *Ibid.,* 141.
[18] Michael Mello, *Against the Death Penalty, The Relentless Dissents of Justices Brennan and Marshal* (Boston: Northeastern University Press, 1996) 75.
[19] Michael D.Davis and Hunter R. Clark, *Thurgood Marshall Warrior at the Bar, Rebel on the Bench,* 318.
[20] *Ibid.,* 318.

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conduct, the motivation behind its imposition showed a desire to wreck vengeance and retribution, and "unusual" because it was imposed arbitrarily.[21] A man convicted in Nebraska might be sent to prison, while a man convicted of the same crime, might be sentenced to death in Alabama.[22] Marshall viewed the death penalty as the "ultimate form of discrimination," a closer examination will identify that the distorting effects of racial discrimination and poverty continue to be visible in applying the death penalty. If a victim were white the death penalty is four times more likely than if the victim were of a different race.[23] A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro.[24]

The case of *Furman v. Georgia,* gave Marshall the opportunity to convince the other justices that the death penalty was unconstitutional. Starting with the 1972 *Furman* decision, the Court has insisted that the death penalty be administered in a manner that would diminish its arbitrary nature. Thanks in part to Marshall; the 5-4 *Furman* decision made all death penalty statutes unconstitutional and the death penalty was suspended (temporarily). Following the decision, a common theme for new state death penalty statutes developed a set of rules, which intended to channel the jury's discretion by limiting the factors that could be considered in choosing a death sentence. Also juries were to be informed of available sentencing alternatives and instructed to take mitigating and aggravating circumstances into consideration.[25] Marshall continued to emphasize the irreversible nature of the death penalty, fearing the innocent would be wrongly convicted, thus claiming,

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[21] Michael Mello, *Against the Death Penalty, The Relentless Dissents of Justices Brennan and Marsha,* 75.
[22] Michael D.Davis and Hunter R. Clark, *Thurgood Marshall Warrior at the Bar, Rebel on the Bench,* 319.
[23] Laura E. Randa, *Society's Final Solution A History and Discussion of the Death Penalty* (Lanham, Md.: University Press of America, 1997) 208.
[24] Michael D.Davis and Hunter R. Clark, *Thurgood Marshall Warrior at the Bar, Rebel on the Bench,* 325.
[25] Laura E. Randa, *Society's Final Solution A History and Discussion of the Death Penal,* 206.

"life and death should not be the business of the fallible. It should be left to powers higher than ourselves. [26]

Justice Marshall's African-American background gave him a unique perspective on feminine equality, much as it did on race.[27] He grew up in a home with a long tradition of working women, his mother was a schoolteacher and his grandmother owned a grocery store.[28] His attitudes were also shaped by forceful women like Lillie Jackson, who helped organize a boycott of white owned businesses that refused to hire black clerks.[29] Thus, Marshall was persistent in his efforts to persuade the majority away from its old discriminatory views. In 1972, Marshall was joined by four other justices to form a majority in *Frontiero v. Richardson*, which marketed a landmark victory for women's rights. The majority concluded the air force was according "dissimilar treatment for men and women who are... similarly situated." [30] This decision took women out of their cage and

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[26] *Ibid.*, 76.
It is an inescapable fact that innocent people are too often convicted of crimes. Sometimes only many years later, in the course of appeal, or when new evidence emerges which clearly demonstrates that the wrong person was prosecuted and convicted of a crime. Errors happen, because of poor representation during trial, racial prejudice, prosecutorial misconduct, or simply due to erroneous evidence. This is why Marshall sought to influence the values of citizens; he believed that if the people understood they would conclude that the death penalty was "shocking, unjust and unacceptable." (Laura E. Randa)
[27] Michael D. Davis and Hunter R. Clark, *Thurgood Marshall Warrior at the Bar, Rebel on the Bench*, 338.
[28] Arlington National Cemetery Website, *Thurgood Marshall Associate Justice United States Supreme Court*, 25 Jan. 1993.
www.arlingtoncemetery.net/tmarsh.htm
[29] Michael D. Davis and Hunter R. Clark, *Thurgood Marshall Warrior at the Bar, Rebel on the Bench*, 339.
Lillie Jackson was President of the Baltimore NAACP in the 1930's.
Sharron Frontiero was a lieutenant in the Air Force; her husband was a full time student. She brought suit against the government when she was denied an increased housing allowance and medical and dental benefits for her husband as a dependent. While, male air force officers were granted the benefits under similar circumstances. In their decision, the majority went on to recognize the long and unfortunate history of sex discrimination in the U.S.
[30] *Ibid.*, 340.

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paved the way for the most controversial women's right issue to come before the Court, abortion.[31]

"Jane Roe" sought an abortion in her home state of Texas so she could terminate an unwanted pregnancy, but under the state's laws abortions were illegal unless the life of the mother was at risk. The issue in the case was whether a woman had a constitutional right to abort an unwanted fetus.[32] At the heart of the debate where two questions: first, is a fetus a person and, if so, what are its rights? Second, under what circumstances, if any, should abortions be allowed? [33] The Court was unable to arrive at a definitive answer to either of the questions. For the purpose of establishing the legal rights and an acceptable balance of interest the 7 –2 majority, that included Marshall, decided to divide pregnancy into three trimesters. During the first trimester the right to abortion was absolute, in the second, the state could regulate abortion to protect a woman's health, and in the third stage, the state interest in the life of the fetus becomes compelling, but a woman could still choose an abortion to protect her life.[34] Marshall went even further, while *Roe* did establish a woman's constitutional right to choose, he fought for governmental funding of abortions. In *Beal v. Doe*, the Court upheld a decision to provide funds only for therapeutic abortions, ones that were certified by a physician to be necessary to protect the life of the mother.[35] Marshall dissented and held strong in his belief that the government's regulations had a disproportionate impact on the poor population of America. Women of means could pay for abortions,

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[31] *Ibid.*, 340.
[32] *Ibid.*, 341.
[33] *Ibid.*, 341.
[34] *Ibid.*, 341.
A poll taken in 1990 showed that 77 percent of American favored abortions (Davis and Clark)
[35] *Ibid.*, 341.
Marshall looked beyond the impact on women to the effect the *Beal* decision would have on the children of the poor, born into a world that did not want them. He wrote " I am appalled at the ethical bankruptcy of those who preach a "a right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children" (Davis and Clark)

but the majorities ruling disadvantaged the poor. Marshall was an architect of the legal strategy that ended the era of official sex discrimination in the United States and extended women's constitutional rights.

"In the Segregated South, when hope dimmed, oppressed blacks used to whisper his name."[36] Justice Marshall brought to the Court a sense of how the world worked, and how it worked against those at the bottom.

> He knew what police stations were like, what rural Southern life was like, what trial courts were like, what death sentences were like, and what being black in America was like and he knew what it felt like to be at risk as a human being.[37]

What he knew best of all is that law could make a difference; he knew it could trample individuals, but he was forever faithful of what it could do to protect them.[38] In reflecting on the history of his rulings on the Court, even his dissents, one will see, Marshall was not just speaking for black Americans but for all Americans. Marshall planned, fought and won many battles abolishing the legal basis for American apartheid.[39] He was one of this century's most influential figures of American civil rights, having defeated segregation, expanded women's rights, championed

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[36] Roger Goldman and David Gallen, *Thurgood Marshall Justice For Al,* 140.
[37] *Ibid.,* 169.
[38] *Ibid.,* 169.
His rise to the Supreme Court reaffirms the American ideal that it counts what you are and not who you are, or who your ancestors were.
Without Marshall's appointment to the Court what he accomplished would otherwise remain unfulfilled. He did what no one else did, the unimaginable, he stood up for what he believed in and he fought when he knew he could win, without his fight, laws dealing with segregation, women's rights and the death penalty would have been much slower in welcoming change. Although he was never a Chief Justice, his vote still counted the same, his voice spoke strong, his dissents mattered, he made an impact, and he altered the course of history. His appointment to the Court brought a legacy of hope, which otherwise may not have been welcomed. He was in the right place at the right time, this is undeniable.
[39] *Ibid.,* 14.

individual liberties and opposed the death penalty. Marshall through his life was a watchdog, making sure that the nation lived up to the Constitution. His mastery of the legal system made him arguably history's greatest enforcer of freedom and liberty as espoused by the U.S. Constitution.[40] No black American has ever held a higher government office, and none will until a black person is elected president. Justice Thurgood Marshall, will forever be remembered as a voice with an unwavering message: the Constitution's protections must not be denied to anyone, never forget the weak.[41] The impact of his political career is undeniable; he was the *only* man for the job.

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[40] *Ibid.,* 14.
[41] *Ibid.,* 14.
Marshall's special legacy is the ability " to see ourselves as others see us, and to see them too."
President Bush announced that Marshall had "rendered extraordinary and distinguished service to his country. His career is an inspiring example for all Americans." After Marshall's retirement, Bush appointed another African-American, Judge Clarence Thomas to fill the vacancy in the Court in 1991. Thomas's record on the Court would be very different from that of Marshall, since Thomas had openly attacked Marshall's views on the Constitution. (Krug)

COMPARATIVE POLITICS

"He who seeks salvation of the soul, of his own and others, should not seek it along the avenue of politics, for the quite different tasks of politics can only be solved by violence."- **Max Weber**

CULTURAL RELATIVISM
CAN UNIVERSALITY BE ACHIEVED?
By Danielle Lee

Introduction

In an ideal world the concept of universality would be met on issues such as human rights. Universality will be defined in this essay as a consensus of all parties on an agreement. Despite being a universally applicable document, the Universal Declaration of Human Rights (UDHR) has yet to be implemented by all countries. Many consider universality a concept that can only exist in theory. This cannot be true because in all cultures there are minimum standards in how to treat a human being. A big part of the reason why universality has not become a reality is the misunderstanding between Islam and the Western World. Furthermore, Islam has not reformed its customs to fit with present day standards. This paper will argue that universality can exist, however reconciliation needs to occur within the Muslim faith and within the international community. This essay will begin with a description of how Islam promotes human rights, and then follow with how they can reform their customs in order to fit with the basic concept of human rights. Finally, we will analyze the historical relationship between Islamic States and the Western World and the effect it had on their perceptions.

Islamic Promotion of Human Rights

Islam is a religion that believes in treating people with dignity. This is shown in a variety of ways. One of the ways is through the Islamic Declaration of Human Rights. This declaration states in article 1(g) that "[a]ll citizens are equal before the law"[1] and

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[1] Islamic Council of Europe in London, "Universal Islamic Declaration," ICEL, 12 April 1980, I:G.

article 4 (a) reads "Affirmation, restoration and consolidation of the dignity, integrity and honour of the individual."[2] These two articles show that Islam does believe in the equality and dignity of human beings. Critics will disagree by arguing that many rights (including the rights for women) are limited through the Islamic faith.[3] Despite that, it demonstrates that Muslims have a conception of human rights.

In fact, many Muslims believe that Islam was the first religion to promote the concept of universality and human dignity. This is shown in the Shari'a which dictates customs that bind all Muslims. Begun in Arabia during the 7th century, Shari'a customs are based on interpretations of the Sunna and Qur'an. The Shari'a has not been reformed since then, and the implications of this will be discussed later on in the essay.

The reason why Muslims believe that they were the first to enshrine human rights is because they were the first to address and solve social issues. An example of this is the duty of *zakat* where all Muslims are obligated help the poor.[4] *Zakat* represents the idea of social responsibility, where it is society's duty to solve their social problems. This is significant since no other religion or society has laws that obligate its followers to help the needy. This custom can be seen as creating the first and more importantly, successful attempt in giving social and economic rights to all human beings.

Muslims were the first to give minorities and women rights that protect them from discrimination. Critics will argue that this is not true, since women and minorities were not given the same rights enjoyed by Muslim men.[5] In modern times the rights given to these two groups may be perceived as further widening the inequality gap. But we must remember that in the 7th century women and

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[2] *Ibid.*, 4:A.
[3] *Ibid.*, 4:C.
[4] Donna E. Arzt, "The Application of International Human Rights Law in Islamic States," *Human Rights Quarterly* 12.2 (1990): 218.
[5] Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," *Human Rights Quarterly* 16.2 (1994): 186.

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minorities did not have any rights. So for Muslims to grant these provisions, it is groundbreaking.

Effect of Islamic Traditions on Human Rights

Scholars such as An-Na'im believe that these Islamic customs are more effective in promoting human rights then international doctrines because they are ingrained in the Islamic culture.[6] By bringing these customs into agreement with human rights, legitimacy is created. Thus, a vital part of implementing human rights is to bring cultural practices into accordance.[7] An-Na'im believes that this is not difficult since standards of human dignity are already present. In effect, these rights will become universal. This is an ideal situation, but the reality is that there is a major obstacle facing this task, which is getting people to accept these changes. For Islam, the obstacle is the Shari'a.

Reform of the Shari'a

As mentioned before, Muslims gave more protection to minorities and women compared to other civilizations in the 7th century. However, in modern times it can be concluded that these groups experience discrimination under the Shari'a. The Shari'a is criticized by many scholars since they believe it is outdated. [8] Muslims who believe in maintaining the traditions of the Shari'a consider it to be a part of their religion and that it must be strictly followed.[9] They argue that there cannot be a reinterpretation of the Shari'a because it will go against their god Allah. Furthermore, followers of the Shari'a argue that to apply Western values to Islamic society will not work.[10] An example of this is the western belief that

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[6] Abdullahi A. An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," *Human Rights Quarterly* 9.1 (1987): 4.
[7] *Ibid.*, 18.
[8] Ebrahim Moosa, "The Dilemma of Islamic Rights Schemes," *Journal of Law and Religion* 15.1/2 (2000-2001): 215.
[9] Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 206.
[10] *Ibid.*, 218.

men and women should be equal. Many believe that it cannot be applied to Muslim states because it does not coincide with Islamic society.[11] They argue that Western and Islamic societies are different and demand different values.[12] For example they believe that the provisions women receive in the Shari'a protect them since "women are guaranteed property, inheritance and compensation following divorce."[13] If women were to be equal to men it would mean that Muslim women would lose these guarantees and are therefore worse off.

Though many provisions protect minorities and women, there are many parts of the Shari'a that do the opposite. Religious minorities that live in an Islamic state are treated as second class citizens.[14] There are two classes of minorities, *dhimmis* who are followers of either Judaism or Christianity, and unbelievers that do not follow either. Any "rights" they have are based on the social classes in which they live. For example *dhimmis* are forced to pay poll taxes, while unbelievers are killed unless given *aman* (safe conduct).[15] These practices should be condemned because they fail to treat human beings with the dignity they deserve.

In addition An-Na'im argues that since the Shari'a is based on Sunnah and Qur'an, it is therefore considered a secondary source. In effect, it can be reinterpreted.[16] He also argues that the Shari'a was created during the 7th century and was in reaction to the political environment of that time.[17] It makes sense that the Shari'a needs to be reinterpreted to reflect present- day realities. An-Na'im also gives the example that if Muslims were to go to the original source of the

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[11] Arzt, "The Application of International Human Rights Law in Islamic States," 219.
[12] Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 218.
[13] *Ibid.*
[14] Moosa, "The Dilemma of Islamic Rights Schemes," 202.
[15] An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," 11.
[16] *Ibid.*, 16.
[17] *Ibid.*

Qur'an there are verses that support minority rights as outlined in the UNDHR.[18] He argues that sections of the Qur'an written when Mohammad was in Mecca "prohibited any degree of coercion of non-Muslims."[19] He believes that when the Shari'a was written it could not fulfill this law due to political circumstances. However, judges believed that it was possible to enact it in the future, thus proving that there is a need to reform.

Effects of Colonialism

Political perceptions affect the lack of human rights. This came from the relationships formed between the West and the East throughout history. Many Islamic states were colonized during the 20th century. Colonialism has resulted in these former colonies having a natural distrust of the West.[20] This distrust has resulted in many Islamic states believing that the concept of human rights is another political tool to dominate them.[21] They believe that this is done by imposing Western values and Western culture onto these newly independent states. Furthermore Muslim states believe that to accept international human rights means that they must conform to interests of the Western World.[22] Finally, many believe that for the West to promote human rights is hypocritical and enforces a double standard on them.[23] They argue that many Western States do not have a perfect human rights record, and therefore should not be criticizing other nations about it. An example is the belief that the United States foreign policy has been a "source of human rights violations, rather than as a world leader devoted to their

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[18] An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," 18.
[19] *Ibid.*
[20] Fred Dallmayr, " 'Asian Values' and Global Human Rights," *Philosophy East and West* 52.2 (2002): 184.
[21] *Ibid.*
[22] Tibi , "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 283.
[23] Moosa, "The Dilemma of Islamic Rights Schemes," 205.

elimination."[24] Thus many Islamic countries believe that they do not have to follow international human rights because it is another tool to control them.

It can be concluded that these arguments against accepting universal human rights are based on politicized perceptions. These perceptions are based on the fear that the "evil" West is going to use its power to re-colonize their country.[25] It is because of these fears that Islamic countries do not see the benefits in accepting international human rights. The fact remains that universal human rights do benefit all countries because the basic concepts embedded within these rights are part of every society. Furthermore, these rights transcend beyond political borders because they are guaranteed to all human beings regardless of their age, sex, or race.[26] An-Na'im makes an additional point, arguing that if there was to be no universal standard it would be counterproductive since non-western states "seek to uphold and protect the dignity and integrity of all human beings."[27]

In addition, Tibi believes that the reason why Third World states fail to comply with the human rights doctrine is partly because of "defensive cultural attitudes."[28] He believes that Islamic states have to deal with modern norms and values that conflict with their pre- modern culture. There is resentment to this, and these cultures refuse to deal with this problem. States do not want to change because they feel that by doing this, they are losing their identity. However, these states need to realize that their culture is just evolving with the passage of time.

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[24] Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 283.
[25] Dallmayr, ""Asian Values" and Global Human Rights," 184.
[26] Arzt, "The Application of International Human Rights Law in Islamic States," 205.
[27] An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," 4.
[28] Tibi , "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 287.

Is Individuality Universal?

Tibi has described Islam and Western culture as a clash of civilizations.[29] This is because both cultures are fundamentally different. Western notions such as liberality, individualization, and democracy, were created through its history of secularization (the separation of state and religion).[30] Islamic nations went through a different process. Islam and state politics have historically been intricately tied to one another.[31] Muslims believe that "humans are not created for solitariness and impervious individuality. They are created for community, relationship and dialogue."[32] In turn, Muslims reject the idea of individuality. These differences reflect the conflict in not being able to agree upon a universal moral code.

Looking at the UDHR, it can be seen that this document is a product of Western thought. This is shown through the individualistic nature of UDHR, which does not acknowledge the rights of groups. [33] The reason why Islamic states have failed to implement or rejected the UDHR was not because they reject what these rights stand for. Rather it is because of the individualistic nature of these rights. A concrete example of this is how Saudi Arabia refused to sign the UDHR. This does not mean that Saudi Arabia does not believe in the fundamental values that the UDHR is trying to promote. Rather Saudi Arabia abstained from voting because Article 18 was discriminatory against their religion, since it allows individuals to change their religion and/or beliefs.[34] This is a conflict because it goes against the teaching of the Qur'an where no

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[29] Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 295.
[30] Heiner Bielefedt, " 'Western' versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights," *Political Theory* 28 (2000): 97.
[31] Arzt, "The Application of International Human Rights Law in Islamic States," 205.
[32] *Ibid.*, 206.
[33] Tibi , "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," 295.
[34] An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," 8.

Muslim is allowed to change his or her religion.[35] Thus Saudi Arabia had to abstain from voting because they could not submit to this article.

It must be acknowledged that Islam does contain traditions that do go against the dignity of a human being. Acts such as killing an unbeliever are a violation of human rights and must not be tolerated. However in order for human rights to be universal, all nation-states must be culturally sensitive. Individualism is not a universal concept because it goes against many cultures including Islam. To believe that the Western value of individualism is the correct way of thinking is imperialistic and naïve. There is no authority in the world that can argue that the Western way of thinking is right and the Islamic way of thinking is wrong.[36]

Conclusion

Universality can only happen when effective dialogue has been reached.[37] Part of the reason why this has not happened is because of political perceptions. Political perceptions play a major role in why there is no universal declaration on human rights. Both the Western and Third World states are at fault, because both sides have perceptions which deter them from effective dialogue. Non-Western countries (including Islamic ones) need to address their prejudices. With the resentment and fear these nations have, they cannot trust the Western World, and without trust there can never be successful dialogue. Western states are also at fault. These states need to realize that in order to have universal human rights the input of the whole international community is crucial, not just states that are in power.[38]

Finally, Islamic states need to adjust their traditions to fit within the basic concept of human rights. There has always been a minimum standard as to how to treat another human being

[35] *Ibid.*
[36] Dallmayr, ""Asian Values" and Global Human Rights," 185.
[37] *Ibid.*
[38] *Ibid.*

regardless of their culture. These standards must be met in all cultural practices. Looking at Islamic states, this minimum standard is evident in certain practices like *zakat* and seen within the Islamic declaration on human rights. However, certain customs in the Shari'a fail to meet these standards. This is because the Shari'a has lost its relevance during in modern times and must be reformed.

Thus both Western and Islamic states need to reform their thinking and realize that universality is in their best interests. The only way for this to occur is for them to change their thinking and to take appropriate actions.

PAX AMERICANA GLOBALIZATION:
RIPPING OFF THE RHETORICAL MASK OF AMERICAN GLOBALIZATION TO REVEAL THE UGLY FACE OF GRAMSCIAN HEGEMONY, AND THE GLOBAL ECONOMIC DEPREDATION IT ENTAILS
By Jason Strittmatter

It could be said that it is all Columbus' fault. After all, it was Columbus who, in 1492, expanded European horizons by proving the world was not flat. This was the dawn of globalization; this was the dawn of modern colonialism.[1] Under colonial rhetoric of civilizing and liberating the wretched, populations were exploited and debased politically, socially, and economically by European states. After World War II, unscrupulous globalization continued through neo-colonialism. Like colonialism, neo-colonialism is ruthless and exploitive, using political, military, and economic power to penetrate and gain dominance over other nations, while cloaked in modernization and liberalization rhetoric.[2] However, neo-colonialism allows for all the benefits of exploitation without any of the costs or responsibility of maintaining the colony. Globalization is not a trend, but an active, contriving manipulation on a global scale that uses every means necessary to rationalize its domination. The United States uses the rhetoric of globalization to mask their varied neo-colonial practices; moreover, it conceals the ways the United States is using hard and soft, direct and indirect means of coercion to establish itself as a Gramscian hegemon over an Americanized world.

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[1] Heinz Dietrich, "Five Centuries of the New World Order," *Latin American Perspectives* 19, no. 3 (1992): 49.
[2] Ronald J. Horvath, "A Definition of Colonialism," *Current Anthropology* 13, no. 1 (1972): 45.

Behind the growing web of globalization, the United States has followed the expansionist path their British forefathers blazed, wielding power to consolidate the world into an Americanized global system that will serve its interests.[3] As one of the leading exporters in the world, as shown in their $927.5 billion in exports and $1.727 trillion in imports from 2005,[4] and eleven out of the top twenty multinational corporations,[5] Americans have significant interest and involvement in globalization. The dominance of the US since World War II is no accident; it came through an active campaign involving a multiplicity of state and transnational agencies.[6] The American government, acting as a vehicle for US internationalist elite interests, has moved exploitation abroad to lessen its application at home.[7] Having filled the power vacuum left by colonial exodus, the US assumed a leading role as the benevolent-seeming exploiter of the peripheral states.[8] The Americans have used economic, political, and military aid to coerce nations adopting polices that are beneficial to the US. Through funding and joint-decision-making boards, the American government has co-opted many nongovernmental organizations into being little more than another arm of US hegemony.[9] The American dominance in organizations such as the United Nations Security Council, NATO, and the IMF in the twentieth- and twenty-first-centuries have insured the American worldview became institutionalized as the

[3] Giovanni Arrighi, "Globalization in World-Systems Perspective," in *Critical Globalization Studies*, ed. Richard P. Appelbaum et al. (New York: Routledge, 2005), 42.
[4] The CIA, "The World Factbook: United States," http://www.odci.gov/cia/publications/factbook/geos/us.html.
[5] Scott DeCarlo, "The Forbes Global 2000," http://www.forbes.com/2005/03/30/05f2000land.html.
[6] William I. Robinson, "Globalization, the World System, and 'Democracy Promotion' in U.S. Foreign Policy," *Theory and Society* 25, no. 5 (1996): 631.
[7] David G. Becker, "Postimperialism and Realism in Theories of International Relations," in *Postimperialism and World Politics*, ed. David G. Becker et al. (Westport: Praeger Publishers, 1999), 69.
[8] Robinson, 619.
[9] *Ibid.*, 643.

global worldview.[10] The type of dependency that the US is trying to create is a global vision—one that would fit the expanse of Wallerstein's world-system theory, and the depth of Gramsci's hegemonic theory.[11]

The primary concern for the US has always been unfettered access to periphery raw materials, labour, and markets while creating a political atmosphere receptive to American overtures.[12] Throughout the Cold War, the US supported repressive military and dictatorial regimes to achieve stability and social control for the benefit of its multinational corporations.[13] Anti-Communist interventions were just a cover for brutal economic expansion. As Samuel Huntington stated,

> You may have to sell intervention in the Third World in such a way as to create the misimpression that it is the Soviet Union you are fighting. That is what the United States has done.[14]

However, when authoritarianism began to lose its ability to create an amicable environment for economic predation, the US embraced a policy of liberalization.[15]

The worldview of economic and political liberalization has allowed the US to become a truly Gramscian hegemon—penetrating every layer of society, and gaining legitimation for consensual control.[16] Political liberalization, in the form of polyarchic democracy, still concentrates the power in the hands of the elite ruling class, while placating mass agitators, diffusing upheavals, and

[10] Devesh Kapur, "The IMF: A Cure or a Curse?" *Foreign Policy*, no. 111 (1998): 11.
[11] Cal Clark, "The Taiwan Exception: Implications for Contending Political Economy Paradigms," *International Studies Quarterly* 31, no. 3 (1987): 330.
[12] Robinson, 620.
[13] *Ibid.*, 619.
[14] *Ibid.*, 620.
[15] *Ibid.*, 622-623.
[16] Walden Bello, "The Crisis of the Globalist Project and the New Economics of George W. Bush," in *Critical Globalization Studies*, ed. Richard P. Appelbaum et al. (New York: Routledge, 2005), 106.

preventing dramatic social, economic, and political changes that could endanger American interests. The masses feel the limited participation in voting gives them control, and the institutional mechanisms for resolving conflicts have the effect of limiting legitimate recourses.[17] Consumerism also effectively depoliticises social behaviour and defuses social action by channeling mass aspirations into patterns of individual competition, and consumption—making economic liberalization necessary as well.[18]

Economic liberalization, also called neoliberalism, works to undermine the autonomy of national political systems and civil societies by enmeshing them into a global regime.[19] A world-system in which free-markets dominate on a macroeconomic level would open the societies wide to exploitation while severely limiting the capacity of governments to interfere.[20] Free-markets allow the perpetuation of the division of labour through the extraction of resources, uneven trade deals, and exploitation of labour.[21] Skewed statistics such as Gross National Product (GDP) are used to rationalize the 'tough choices' that neoliberalism requires. The unquenchable thirst for markets of the capitalist global economy fuels globalization, and drives it to invade every corner of Earth, Americanizing societies as it does.[22]

American internationalists arm themselves with every form of benevolent sounding rhetoric to justify their actions.[23] Materialist theorists have proclaimed that global capitalism is inevitable, and have worked hard to make it a self-fulfilling prophecy.[24] This

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[17] Robinson, 623-626.
[18] *Ibid.*, 637.
[19] *Ibid.*, 654.
[20] *Ibid.*, 631.
[21] Clark, 330.
[22] Robinson, 631.
[23] C. G. Jacobsen, "Myths, Politics and the Not-so-New World Order," *Journal of Peace Research* 30, no. 3 (1993): 242.
[24] Howard Winant, "Globalization and Racism: At Home and Abroad," In *Critical Globalization Studies*, ed. Richard P. Appelbaum et al. (New York: Routledge, 2005), 121.

evolutionary approach has allowed Americans to shape their culture and worldview as the only desirable end, and the yardstick against which progress is measured. Traditional cultures are viewed as obstacles to success.[25] American multinational media corporations bombard the world through magazines, film, computers, and television with American worldviews—peddling neoliberal patterns of consumption, identity, and behaviours.[26] Culture and ideology have combined in the consumerism of global capitalism propagated across the globe.[27]

Taiwan's[28] economic success has been used to proclaim the success of liberalization and modernization theory, and to denounce dependency theories.[29] In 1993, when the World Bank published *The East Asian Miracle*, it was a thinly veiled attempt to show Taiwan's, as one of the East Asian Tigers, economic success as directly related to the regime's autonomous adoption of neoliberal market fundamentals.[30] Taiwan example was touted as having met "the three criteria for a developmental state perfectly: a capable bureaucracy, a developmentalist ideology, and autonomy from dominant domestic social classes."[31]

Taiwan's autonomous economic success was a lie; its success was a result of its patron-client relationship with the US. Taiwan was not dependent upon a laissez-faire free market, but was a protectionist state with many state corporations, whose prosperity was contingent on clientelism to cushion the negative effects of

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[25] Clark, 329.
[26] Dietrich, 50.
[27] Stephen W. K. Chiu, and Alvin Y. So, *East Asia and the World Economy.* (Thousand Oaks: Sage Publications, Inc., 1995.), 231.
[28] Though Taiwan was called the Republic of China (ROC) after the Kuomintang took possession in 1949, it will be referred to as Taiwan throughout this paper.
[29] Daniel Smith, "Neoliberal Globalization and Resistance: A Retrospective Look at the East Asian Crisis," in *Critical Globalization Studies*, ed. Richard P. Appelbaum et al. (New York: Routledge, 2005), 295.
[30] Haider A. Khan, *Interpreting East Asian Growth and Innovation: The Future of Miracles*, (New York: Palgrave Macmillan, 2004), 7.
[31] Clark, 342.

capitalism.[32] The lean nature of the government was not for efficiency, but to maintain an elitist, closed system in which the Kuomintang (KMT) did not allow the indigenous islanders a chance to participate.[33] The KMT used successful economic growth to legitimize their rule.[34] American aid, grants, subsidies, and preferential trade propped up the Taiwanese government against internal and external threats, providing an incubator for the state to prosper.[35] Between 1950 and the mid-1960s, Taiwan received over $1.5 billion in American aid, eighty percent of which was in grants.[36] US aid programs were meant to gain political influence, while drawing the country into a dependent position in the world market economy.[37]

To achieve its envied place in the semi-periphery, Taiwan had to subjugate its interests to those of the US. The KMT ignored the immediate interests of its people, including its business class, as they were more concerned with political power and recognition, leading them to offer up whatever human resources the US demanded.[38] American-educated Taiwanese economic technocrats collaborated with American advisers to command the economy.[39] When the United States wanted cheap subcontracting from Taiwan, it coerced KMT deference by threatening to discontinue aid if it did not transform its economy into an export-led economy.[40] Military aid was used to reinforce the repressive governmental forces to curb dissent and preserve control,[41] allowing the Taiwanese government

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[32] Ibid.
[33] Ibid., 345.
[34] Tu Weiming, "Cultural Identity and the Politics of Recognition in Contemporary Taiwan," The China Quarterly, no. 148 (1996): 1122.
[35] Chiu, 17.
[36] Clark, 335.
[37] Robinson, 641.
[38] Clark, 344.
[39] Ibid., 336.
[40] Chiu, 195.
[41] Robinson, 641.

to dominate the labour market and depress workers' wages below market rates to make them competitive on the world market.[42]

Taiwan suffered under subjugation to US interests. The export emphasis in Taiwan created dependence on international markets—exports have totaled over 50 percent of its GDP since 1976.[43] The concentration on industrialization led to a decline in the agricultural sector, creating a dependency on cheap American surplus foodstuffs. Rapid industrialization took a toll on the ecological system. Overuse of pesticides and industrial waste dumping had devastated Taiwan's environment.[44] Even though Taiwan had reaped the benefits of a patron-client relationship with the US, and made gains while appearing responsible for their upward mobility, the decision-making capability and power rested in Washington, New York, and London. The American aid masked dependency in clear sight, what appeared to be a network of support was really a web of dependency and exploitation of human capital.[45]

Rather than human resources, the rich oil resources in Iraq have made it a prime target for American exploitation since 1925. After the British had left Iraq, the economic domination continued through concessions involving a cartel of seven major multinationals, five of which were American owned. These corporations assumed control of Iraqi oil resources in exchange for a diminutive fixed sum per barrel.[46] Even after nationalizing its oil sector in the 1970s, and joining OPEC, Iraqi was still dependent on the world oil market, which was subject to American dictate, and manipulation by its Middle Eastern allies. Saudi Arabia, Kuwait, Qatar, and the United Arab Emirates all conspire with the United States to keep oil price acceptable to the advanced industrialized

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[42] Chiu, 18.
[43] Clark, 335.
[44] Chiu, 19.
[45] Smith, 296.
[46] Abbas Alnasrawi, Iraq's Burdens: Oil, Sanctions, and Underdevelopment (Westport: Greenwood Press, 2002), 1-3.

states, producing above or below OPEC quotas to balance industrial interests against investor interests.[47]

Iraq was coaxed into a dependency on its oil sector to keep oil production high and depress oil cost. Foreign advisers steered Iraq away from developing its agricultural and industrial industries to diversify its economy, and concentrate the infrastructure of the oil sectors. This made Iraq dependent entirely on food and consumer good imports, relying on oil as currency.[48] Positive GDP indicators only reflected the oil industry and hid the underdevelopment of "agriculture, industry, construction, communication, power generation, and employment."[49] The Iraq-Iran War overextended Iraq. Damage to the Iraqi oil sector had reduced revenues, while wartime expenses and social programs drained it reserves, thus creating a need to produce more oil to recoup its financial losses.[50] However, Kuwaiti overproduction was depressing prices, preventing Iraq from doing so. Desperation and oil dependency pushed Iraq to invade Kuwait to do with the sword, what the pen had failed to do.[51]

During the 1991 Gulf War, the US set out to financially cripple Iraq in order to put the country in a state of subjugation. What little social and industrial assets Iraq possessed, such as hospital, power plants, fertilizer plants, water treatment facilities, transportation networks, schools, and industrial plants, were targeted and destroyed to make Iraq dependent on foreign aid and assistance in the reconstruction process, and to limit its capacity to develop a diversified industrialized economy.[52] Afterwards Iraq was limited in capacity to rebuild itself by various agencies of United Nations. While $22.1 billion was needed to restore prewar conditions, $6.8 billion was needed to restore essential services. Yet, the United Nations Security Council (UNSC) only authorized an

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[47] *Ibid.*, 26-29.
[48] *Ibid.*, 41.
[49] *Ibid.*, 48.
[50] *Ibid.*, 166.
[51] *Ibid.*, 31.
[52] *Ibid.*, 67.

input $1.6 billion from oil sales over six months, but deducted $666 million from this to pay for UN operations, leaving only $934 million to help postwar reconstruction.[53]

Economic sanctions have served multiple US interests since their imposition. Saudi Arabia has been rewarded for their loyalty to the US through increased oil output to substitute lost Iraqi output.[54] Sanctions have caused Iraq to lose its voice in OPEC, as influence is directly related to oil output, thereby empowering pro-American voices in the organization.[55] The Sanctions Committee stifled Iraq by blocking and delaying oil sales, importation of humanitarian supplies and foodstuffs, and oil sector equipment resulting in the further miring of Iraq in indebtedness.[56] Sanctions have made Iraq destitute and dependent on what little oil quotas it is allotted to survive. Reparation payments will further delay Iraqi reconstruction to a point where it would be able to resist American overtures. This dependency allows the Americans to set the terms and conditions for its oil exportation.[57] However, this was not enough for the US.

In 2003, the rhetoric of the Bush administration was reminiscent of the "White Man's Burden" as American forces invaded Iraq to save those who did not ask for their help.[58] The Iraqi people did not see liberators, but "humiliation and subjugation to Western oil lust"[59]. Iraq was said to be in need of Western tutelage, to bring freedom, democracy, pluralism, and secularism to its people.[60] Many saw beneath the rhetoric the ugly realpolitik of

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[53] *Ibid.*, 82-83.
[54] *Ibid.*, 129.
[55] *Ibid.*, 133.
[56] *Ibid.*, 101.
[57] *Ibid.*, 167.
[58] Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton:
Princeton University Press, 2004), 31.
[59] Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to bring Democracy to Iraq* (New York: Times Books, 2005), 301.
[60] Winant, 122.

American hegemonic globalization.[61] This ideological war, like the Crusades, had more to do with distracting the home population from their own plight and plundering oil riches than the high-minded goals it proclaimed.[62]

During occupation, the US forces attempted to Americanize Iraq with the imposition of an undemocratic form of American democracy. The Americans wanted to replace the Ba'ath regime with a polyarchic democracy led by exiled elites, sympathetic to American interests. Americans insisted on appointing the democratic representatives, as the people were not trusted to be truly democratic.[63] The Americans limited the amount of Iraqi involvement in their own nationbuilding, dictating the terms of their freedom to them.[64] Ambassador Paul Bremer was more concerned with his "bold plan for free market economic reforms"[65]. This bungled democracy has left American-style government seeming both confusing and undesirable to many Iraqis.[66] However, the Americans assured their dominance by crippling a strong state, taking it over, and reassembling it as a weak state too internally fractured to resist external coercion.[67]

The 2003 regime change was a blatant attempt to gain control over Iraq's oil resources to monopolize for American economic growth, and geopolitical power.[68] The rise of energy-poor China, rather than the rise of terrorism, is likely to have pre-empted the invasion of Iraq and the seizure the oil resources to control access

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[61] Christopher Chase-Dunn, and Barry Gills, "Waves of Globalization and Resistance in the Capitalist World-System: Social Movements and Critical Global Studies," in *Critical Globalization Studies*, ed. Richard P. Appelbaum et al. (New York: Routledge, 2005), 47.

[62] Winant, 127.

[63] Feldman, 115-116.

[64] Diamond, 52.

[65] *Ibid.*, 42.

[66] Feldman, 115.

[67] *Ibid.*, 18.

[68] David Harvey, "From Globalization to the New Imperialism," in *Critical Globalization Studies*, ed. Richard P. Appelbaum et al. (New York: Routledge, 2005), 98.

to them before China gains access to them.[69] The United States is using its military superiority to dominate the oil market. The wars with Iraq have only been the latest attempt to assert control over oil-rich states like Iraq.[70] The American advantage rests now in its military technology, which it uses to conquer areas such as Iraq for high economic and geopolitical returns—vital interests like oil.[71]

The United States has emerged from the post-Cold War period as the leading neo-colonial power, using a wide gamut of direct and indirect agencies, and hard and soft coercion techniques to garner the desired result from its quarry. Both Taiwan and Iraq serve to display the multiple ways the United States, and other core states exploit states in the periphery for resources both material and human. Taiwan illustrates the soft extreme on the dependency spectrum, one that can be somewhat advantageous to the dependent state if it plays by the rules. Iraq illustrates the opposite end of the dependency scale, where adversity to dominant interests ended in hard coercion. In between these two extremes lies a multiplicity of dependency relationships between core and peripheral states. Each one is as diverse as the countries involved and the circumstances that conspire to bring them into existence. Americans apply carrot-and-stick coercion method in their foreign policy both directly and indirectly. Indeed they have become the "invisible hand" of Adam Smith that propels global capitalist expansion. In these two examples, the realpolitik in the quest for American global hegemony is revealed, as the US has shown they will do whatever necessary to secure vital resources and to further their own economic aspirations to create a global Pax Americana, but do so under the guise of a global community that mirrors their own values, and favours their interests. Is this inevitable? It would seem not even the US thinks so anymore as they rush to secure their place in a globalized world where the stars of both the "China Circle"[72] and the European Union

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[69] Bello, 105.

[70] Harvey, 98.

[71] Chase-Dunn, 48.

[72] Arrighi, 40.

are rising. Resistance is not futile, the answer may lie in strong regionalism that will ensure that a globalized world will benefit all politically, socially, and economically.

CONSTITUTIONAL COURTS OF WESTERN EUROPE
By Micheal Gilburt

The fall of Fascism and National Socialism in Western Europe forced many nations to mould their governments into the democratic form. While the establishment of a democratic constitution was an essential element in the realization of a constitutional democracy, it alone would not accomplish this daunting task. The transition would require an institution that defended the constitutional protection of the individual and "federalistic arrangements designed against centralization."[1] Recognizing the need for judicial review, the establishment of constitutional courts became commonplace in many Western European regimes. The examples of Italy's *Corte Constituzionale* and West Germany's Federal Constitutional Court illustrate the importance judicial review played in establishing democratic government. The ability of the Courts to preserve the rule of law, adhere to a code of impartiality, enjoy political insularity and rule with legitimate authority determined the Courts' capacity to maintain constitutional democracy. While each of these principles requires further explanation, their application to the Constitutional Courts of Italy and West Germany illustrates the Courts' ability to safeguard democracy.

An account of the development of Italy and West Germany's post-war constitutions will help to explain why constitutional courts were instituted in Western Europe. The interest of both countries in establishing a constitutional court lay in its ability to ensure the limitation of powers was enforced upon the executive, thus eliminating the possibility of a Fascist or Nazi up-rise. In Italy, the drafting of the democratic Constitution of 1948 contained an

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[1] Taylor Cole, "Three Constitutional Courts: A Comparison." *The American Political Science Review* 53, no.4 (1959): 967

exceptionally "rigid" structure, which could only be amended by "special procedure."[2] The rigidity of the constitution was meant to trump the Albertine Statute of 1848 and the basic constitutional charter of 1861 which "had been open to amendment by any law passed according the normal legislative procedure."[3] This had allowed for the emergence of totalitarian rule by Mussolini, which required the construction of a new constitution to "avoid such an erosion of democracy by constitutional methods."[4] The Constitution of Italy had provided for a method of judicial review through the Court of Cassation; however, its composition and structure failed to achieve constitutional democracy. The Court was composed of magistrates, elderly men who had reached a position of eminence based on good reputation.[5] A traditional mode of thinking had preconditioned the judges towards "applying any law that had been duly enacted" rather than "questioning and determining the validity of legislation."[6] Since the Court of Cassation was an old, established judicial organ with a "very strong, proud tradition and an immense body of accumulated jurisprudence," the Court was "considerably less free to disengage themselves from the past."[7] This style of judicial review was incompatible with the legal norms of the modern constitution, which was "concerned with the ultimate values relating to the future activity of the state and society."[8] As a result, the system of judicial review enacted by the Italian Constitution had proved ineffective. In 1956, Italy responded to this critical threat to constitutional democracy, and entrenched Articles 134-137 into their

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[2] Malcom Evans, "The Italian Constitutional Court." *The International and Comparative Law Quarterly* (1968): 60
[3] Evans, 60
[4] *Ibid.*, 60
[5] Adams, John Clarke and Maura Cappelletti. "Judicial Review of Legislation: European Antecedents and Adaptations." *Harvard Law Review* 79, no.6 (1966): 1215
[6] Adams and Cappelletti, 1215
[7] Merryman, John Henry and Vincenzo Vigoriti. "When Courts Collide: Constitution and Cassation in Italy." *The American Journal of Comparative Law* 15, no.4 (1966): 683
[8] Adams and Cappelletti, 1215

Constitution, which replaced the Court of Cassation with a *Corte Constituzionale*.[9]

In West Germany, unique circumstances led to the establishment of a constitutional court; however, the intention of the judicial body to foster democracy remained uniform. At the London Conference in June of 1948, the Allied powers insisted that Germany create a "federal state with limited power and marked by a separation of powers."[10] In addition, they demanded that the new constitution include "guarantees for individual rights, both procedural and substantive."[11] The effect of those demands was the development of the Bonn Basic Law.[12] While the Basic Law guaranteed extensive individual rights and freedoms to the individual, it did not provide a constitutional court to defend and interpret them. If Germany was to firmly establish a democratic political culture in its governmental architecture, it would require an authoritative judicial body to ensure it was cultivated. In 1949, Germany responded to this deficiency with the creation of the German Federal Constitutional Court. The Court was to stand separate from the Supreme Court, the *Reichsgericht*, which was the last court of appeal in the regular judicial system.[13] Its empowering legislation stipulated that the Constitutional Court would be "autonomous and independent from the Federal Republic" and possess sole authority over the interpretation of the Basic Law.[14]

The historical circumstances surrounding the development of both Italy and West Germany's Constitutional Courts assist in explaining their prevalence in Western European nations. However, to adequately gauge the Courts' ability to foster constitutional democracy, it is necessary to apply them to a set of clearly defined

principles. Each principle must be embodied by a Constitutional Court in order for the judiciary to effectively defend the constitution and ensure a successful and complete transition to democratic governance.

The first defining principle of a constitutional court reflects its ability to preserve the rule of law. The institutionalization of this principle in a democratic constitution helps the state achieve two goals:

> the realization of a clear break with the past and the development of a constitutional culture which teaches state actors that the legal bounds of the system cannot be transgressed for the achievement of partisan political gains.[15]

If a Constitutional Court effectively championed the rule of law, a judge could not only "mediate conflicts between political actors" but also "prevent the arbitrary exercise of government power."[16] Essentially, the Court's ability to fulfill this principle reflected its capacity to maintain the submission of the state to the constitution.

Italy's *Corte Constituzionale* proved to embody the rule of law on a number of fronts. The Court consciously sought to eradicate any Fascist legislation that lingered in the regime, ensuring the success of the country's transition to democracy. Roughly one-third of the first forty decisions of the court involved the defense of civil liberties, which were violated due to legislation enacted during the Fascist period.[17] For example, Article 157 of the Police Law of 1931, which required the repatriation of all citizens to their community of origin by administrative decree, was held to be unconstitutional in 1956.[18] Consequently, the article was abolished, as its Fascist policy was determined by the Court to jeopardize an Article of the Constitution

[9] *Ibid.*, 1215
[10] Taylor Cole, "The West German Constitutional Court: An Evaluation After Six Years." *The Journal of Politics* 20, no.2 (1958): 281
[11] Cole, "The West German," 281
[12] Donald Kommers, "Judicial Review: Its Influence Abroad." *Annals of the American Academy of Political and Social Science* 428(1976): 60.
[13] Krommer, 60
[14] Cole, "The West German," 282

[15] Christopher Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law* 44, no.4 (1996): 606
[16] Larkins, 606
[17] Cole, "The Three Constitutional," 980
[18] *Ibid.*, 980

that guaranteed "the inviolability of personal liberty and freedom of travel."[19] The 'prevention of the arbitrary exercise of government power' had proven to be a major prerogative of the Constitutional Court. This was reflected through Article 76, which provided that,

> the exercise of the legislative function could not be delegated to the Government unless distinctive principles and criteria [had] been determined and only for a limited time and for definite purposes.[20]

The *Corte Constituzionale* was thus obliged by the legislation to judge cases involving the unconstitutional delegation of legislative powers. It is apparent that the embodiment of the rule of law by a constitutional court is critical to the successful manifestation of democracy.

The second principle characteristic of a Constitutional Court hinges on impartiality. Naturally, an impartial judiciary is essential to just governance, since it requires the equal treatment of citizens before the law and the protection of their rights "against the encroachment of others."[21] An impartial judicial system prohibits the manipulation of the law by powerful members of society by providing the individual with an opportunity to seek restitution through the presentation of their case to an independent judge. Essential to the impartiality of a constitutional court is its immunity from control or manipulation that may generate bias towards the government.[22]

The West German Constitutional Court has exemplified an impartial, egalitarian attitude in its judgments. The Court has demonstrated its ability to 'treat all citizens equally before the law and have their rights protected' in numerous ways. In a highly publicized decision on July 29, 1959, the Court held that "a certain provision of the Civil Code had violated Article 3, Sections 2 and 3 of

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[19] *Ibid.,* 980
[20] Cole, "The Three Constitutional," 978
[21] Larkins, 608
[22] *Ibid.,* 608

the Basic Law in that it denied the equal status of man and wife with regard to their children."[23] The Court had found "no biological or functional differences between man and wife which justified the statutory differentiations."[24] This decision was truly reflective of the impartial nature of the institution, as it ruled against the belief that women were inferior. This belief, as past legislation demonstrated, was widely embodied by 'powerful members of society,' however, it had held no bearing on the decisions of the Court. The ruling proved the value of the Constitutional Court to the maintenance of democracy, as its ability to establish a "hierarchy of norms within the Basic Law" would not otherwise be possible with literal interpretation.[25] The demonstration of the impartiality of West Germany's Constitutional Court was most clearly illustrated by its system of constitutional complaint. The Court allowed any individual to present "a law, an act having the force of a law or an administrative decision and order, which violated his constitutional guarantees" to the Constitutional Court.[26] The democratic policy had been embraced by the West German citizenry; after six years of the Courts existence, it had heard more than 3800 constitutional complaints.[27] Impartiality has proven to be crucial to a constitutional court's effective maintenance of democracy.

The third essential principle required of a constitutional court is political insularity. A constitutional court can only realize democracy if it is an entirely autonomous institution. In other words, courts "should not be used as tools to further political aims."[28] The political insularity of the constitutional court is reflected in its appointment process and the presence of tenure. A democratic constitutional court should select judges from a wide spectrum of sources so as to ensure non-partisanship. A tenured judiciary would remove any hesitation by judges to rule in a manner that could

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[23] Cole, "The Three Constitutional," 971
[24] *Ibid.,* 971
[25] *Ibid.,* 971
[26] Cole, "The Three Constitutional," 971
[27] *Ibid.,* 288
[28] Larkins, 609

jeopardize his or her career. Tenure would also provide a check on the power of a judge by limiting the length of his or her seat on the judiciary. Lastly, the mark of political insularity in a constitutional court is the demonstrated ability of judges to reach 'unpopular' decisions without the threat of punishment.[29]

The presence of political insularity in the Constitutional Courts of Italy and Western Germany has shown to have existed in a variety of circumstances. In Italy, the insularity of the *Corte Constituzionale* from partisan rivalries "enabled it to act when other branches of the national regime appeared almost paralyzed."[30] From 1953 to 1983, the average life of an Italian government had been less than one year.[31] No party had been able to acquire a majority in Parliament, since it had been plagued with coalition governments. Due to intense parliamentary conflict and deadlock, legislation "was only possible in the form of decree laws."[32] It was largely up to the *Corte Constituzionale* to govern through the implementation of judicial policy.[33] Furthermore, the appointment process of both Italy and West Germany's Constitutional Courts reflected their insularity. In Italy, the Constitutional Court consisted of fifteen judges. Five were elected by joint sessions of two chambers of parliament, five were elected by the highest judicial courts of the country and five were elected by the President of the Italian Republic. This division of appointment rights worked to manufacture power in the Constitutional Court through its ability to garner a non-partisan composition. In West Germany, the Constitutional Court was divided into two chambers, with eight judges residing in each chamber.[34] Half of the judges were prior members of the lower house, the *Bundestag* and the other half came from the upper house,

[29] *Ibid.,* 609
[30] Mary Volcansek, "Impact of Judicial Policies in the European Community: The Italian Constitutional Court and European Community Law." *The Western Political Quarterly* 42, no.4 (1989): 582
[31] Volcansek, 582
[32] *Ibid.,* 582
[33] *Ibid.,* 582
[34] Cole, "The West German,"286

the *Bundesrat.*[35] A two-thirds majority was necessary for the election of each judge; however, only two judges have not been elected unanimously to date.[36] The egalitarian spread of appointment rights evident in West Germany had resulted in a diverse composition of judges. In 1957, the membership of the Court consisted of "higher public officials, ministers in state government, university professors and one woman."[37] In both cases, the spread of appointment rights established a diverse, non-partisan Court. In the West German regime, judicial tenure reflected insularity. Judges were appointed for "single non-renewable terms of twelve years by the two houses of parliament" and required retirement at sixty-eight.[38] These requirements provide a "strong check on the court and assured that its political complexion would not differ substantially from that of parliament or the nation."[39] With strong evidence of political insularity in both Italy and West Germany, one can acknowledge both the importance of the principle in fostering democracy and the effectiveness of the Constitutional Courts in ensuring its prevalence.

A final principle characteristic of an effective Constitutional Court concerns its legitimacy as an authoritative institution. This reflects the court's ability to pass judgments "against powerful political actors and make them stick."[40] As an independent institution, a constitutional court must embody a distinct role from any other branch of government, while remaining completely "detached from the interests of the political system, the concerns of powerful social groups or the desires of the general public."[41]

The jurisdiction and impartiality of Italy and West Germany's Constitutional Courts have been described to be considerable; however, further application of both Courts to the specificities of the principle will highlight their legitimate authority.

[35] *Ibid.,* 286
[36] *Ibid.,* 286
[37] *Ibid.,* 286
[38] Kommers, 61
[39] *Ibid.,* 61
[40] Larkins, 610
[41] *Ibid.,* 611

In Italy, the powers of the *Corte Constituzionale* are outlined in Article 134 of the Constitution, which gives it sole authority over,

> the constitutionality of laws and acts passed by the State and regions, the determination of conflicts of jurisdiction between the State and regions, the jurisdictional disputes between regions and the impeachment of the President of the Republic.[42]

This provides the Court with constitutionally entrenched authority over 'powerful political actors.' The legitimacy of the *Corte Constituzionale* is illustrated through its admonitory powers; namely the ability of the Court to propose *raccomandazione* or recommendations for legislative action.[43] These recommendations typically "urge the legislature to take action to fulfill the mandate of the constitution."[44] While not binding on Parliament, "the influence and authority of the Court give its recommendations a persuasive force that the legislature has sometimes been willing to heed."[45] In West Germany, the Constitutional Court exerts significant authority over both houses in government. For example, the Federal Government may refuse the *Bundestag* approval for an agreement with a foreign state. In this case, the Constitutional Court would judge whether the agreement was a "treaty requiring approval of the *Bundestag* before its ratification."[46] This illustrates the Court's ability to pass authoritative judgment upon both houses of government, proving it a legitimate player in a constitutional democracy.

  The constitutional court has rendered essential to the establishment of a democratic political culture in the regimes of Western Europe. While the intention of the constitutional court was

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[42] Chan, Stanley H. and David G. Farrely. "Italy's Constitutional Court: Procedural Aspects." *The American Journal of Comparative Law* 6, no.3 (1957): 316
[43] Vincenzo Vigoriti, "Italy: The Constitutional Court." *The American Journal of Comparative Law* 20, no.3(1972): 406
[44] Vigoriti, 407.
[45] *Ibid.*, 407.
[46] Cole, "The West German," 287

to defend the rights, freedoms and limitations of power stipulated in the new constitutions, the ability of the court to ensure the transition to constitutional democracy was largely the reason for its introduction. The historical development of Italy and West Germany's Constitutional Courts and their application to a set of key principles works to reveal two fundamental conclusions. Western European constitutional courts function as a vehicle for the realization of constitutional democracy while accomplishing this task effectively.

POLITICAL THEORY

"The theory of relativity worked out by Mr. Einstein, which is in the domain of natural science, I believe can also be applied to the political field. Both democracy and human rights are relative concepts – and not absolute and general." – **President Jiang Zemin**

FREEDOM, IDENTITY, THE "TO COME" AND THE HALO
By Lauren Warner

Contemporary political discourse on freedom is greatly concerned with the maintenance and exercise of rights. Fundamental rights such as the freedom of conscience, expression and assembly dominate modern political thinking about freedom. It is as if freedom itself could be boxed up into a package of rights, handed out to the citizens, and then, freedom would be upon them. There is a pervasive contention within modern political discourse that if citizens work within this box of rights and exercise their 'freedoms' that they themselves, and, their society, have made freedom an actuality. But the very notion of making freedom an actuality creates a bizarre paradox; when freedom is fully realized, made actual, it has reached an end. When it has reached an end, there is no more freedom left to be had, no room left for possibility. *Actual* freedom is freedom that has cut itself off from possibility, cut itself from the boundless potential that *is* freedom. Thus, freedom can not be 'realized,' but is rather a condition of continuous deconstruction of what is, and openness to what is not, what is not yet and what may never 'be.'

The realm of freedom is the realm of the potential. It cannot be wholly discussed in the terms of what "is" or even what should "be." Thus, the maintenance and exercise of rights is not equivalent to the condition of freedom. This is not to say that civil rights are unimportant or antithetical to freedom, but that there must be openness to something more than the rights that 'are'. There must be openness to the potential, for the individual to be free. While the institution of rights is paramount to the institutions to democracy, they themselves do not *embody* freedom. Indeed, nothing can correctly be said to "embody" freedom, because at the moment "it" crosses into the realm of actuality there must be more outside of what "is." For a condition of freedom, there must be *potential*. There

must be more *to come*. Freedom cannot be wholly boxed up in a package of rights, privileges or advantages; but it is always *outside the box*, so to speak, it is always to come. Thus, the "free" individual, or rather the individual who exists in a condition of freedom, is open to what is outside themselves, open to what is outside their actuality. Only the entity who does not wholly identify with itself, who is open to that which it is not itself, who differs with and from itself, is free. To exist in a condition of freedom, is to exist in a condition of openness to possibility. It is a condition in which the entity does not to identify wholly with what it is, as its very freedom lies in what it is not, what it is not yet, and what it may never be. As soon as the entity asserts itself as solely what it 'is,' (Hispanic, a lawyer, a Marxist and so on) they have defined the end of themselves and therefore reached the end of their freedom. Closed off from their potential, there is no freedom for the entity whose *identity* is *identical* to its *self*. Thus, the free individual is not merely an exerciser of constructed rights, advantages or privileges, but rather the entity "without identity," the individual who is open to the to come. The 'free' individual is not merely the rich businessperson who can buy every commodity they wish, nor is it the activist who participates in every political protest (though the free individual *may* do one or both of these things). Rather, the free individual is hospitable, they are open to the other, open to the possible and open to the 'to come.' It is, thus, only the individuals who identify themselves as always to come who can truly be said to be free.

This essay will argue that freedom cannot be wholly embodied in legal rights, and, that the free individual is the individual who identifies with the possible, the "to come." It will draw heavily upon the work of Jacques Derrida, in addition to some of the work of Giorgio Agamben. It will also seek to deconstruct some contemporary "rights as freedom" theory.

The distinction between the realm of the actual and the realm of the potential is important to the discussion of freedom. The realm of the potential is the realm of the possibilities to come, where the realm of the actuality is the realm of existence. It is the realm of what 'is'. The realm of freedom is the realm of the potential because

it is the realm of boundless possibilities and thus the realm of 'ultimate freedom,' of infinite potential. Much of the discussion of actuality and potentiality draws upon the philosophy of Aristotle.[1] Aristotle's realm of actuality is the realm of existence; it is the realm of *being* and *doing*. Actuality includes all that 'is,' so to speak. I, for example, am wearing a ring. Myself, the ring, and my wearing it are *actual* conditions of being and doing. Even my hope not to loose this ring is an *actual* condition although it is not a tangible form. The realm of potentiality, in contrast, is the realm of what could be or what one could do, but it also includes what may never be and what may never be done. That is, it includes more than just what *will be* in the future, it includes also that which may *never be*. Thus, in relation to the being, potentiality in this sense includes both the potential and the 'im-potential.' As Agamben articulates, " (it is) a potentiality that is not simply from potential to do this or do that thing, but potential to not-do, potential not to pass into actuality."[2] It is this sort of boundless potential for that constitutes freedom; that there is no telos at which freedom will be fully realized, made wholly actual. This is why the realm of the potential is the realm of freedom. "To be free is not simply to have the power to do this, or that thing, nor is it simply to have the power to refuse to do this or that thing. To be free is... to be capable of ones own im-potentiality, to be in relation to ones own privation."[3] It is openness to what one may or may not be, to what one may or may not do. It is important to notice that, for Aristotle, the subject, the "I" is a necessary precondition for both potentiality and im-potentiality. That is, that there must be an actual subject *related to* the potentiality or im-potentiality. This is an important criterion as it is the point of departure for Agamben and Derrida from Aristotle's theory.

Agamben asserts that one must instead "think of the existence of potentiality without any relation to Being in the form of

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1 Giorgio Agamben, *Potentialities* (Stanford, California: Stanford University Press, 1999)
2 Agamben, "Potentialities" 180.
3 Agamben, "Potentialities" 183.

actuality – and think of the existence of potentiality even without any relation to being in the form of the gift of self and of letting be."[4] The implication of this is that one must think of ontology and politics beyond every figure of relation; beyond every perceived limit.[5] Here, Agamben challenges us to think beyond these relations in order to realize the blurring that will occur between the two realms when we do so. The edge of one realm is at least partly inside the other realm and vice versa. At their limits they melt into an indistinguishable space. Thus, there need not be a direct relation between a being in actuality and *their* potentiality because the two realms are already more than related at their seeming limit. This is precisely why the individual can be free without freedom itself being actualized. The individual is free at the very limit (or perhaps non limit) of their being. Here, at this point of indistinction between actuality and potentiality, the individual can discover and rediscover their infinite potentiality, their boundless freedom. Agamben challenges us to consider "… exteriority and non latency as the determination and limit of everything."[6] That is, at the limit, there is more; there is exteriority. And, at the maturity of the form, there is more "to come." Thus, there is no determined place of being, no real limit to the entity's being. Rather, the free being is characterized by its raw capacity of the very potentiality at its limit. The free entity, characterized by potentiality is the entity without identity. It is not absorbed in what it 'is,' but rather is engulfed in a constant redefinition of self, its constant intermingling with potentiality and thus, its constant relation to freedom. This means that there is always more to the free entity than what it "is." Its identity then, in this sense, is always "to come".

For Derrida, the figures of justice, democracy and freedom are related to the realm of the potential in that they are always "to

4 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, California: Stanford University Press, 1998) 47.
5 *Ibid*, 47.
6 Giorgio Agamben, The Coming Community (Minneapolis, Minnesota: University of Minnesota Press, 1993): 15

come." The "to come," does not connote an "ideal possible," or, simply possibilities for the individual being. "It partakes," as Derrida explains, "in what would still fall, at the end of history, into the realm of the possible, of what is virtual or potential, of what is within the power of someone, some "I can," to reach, in theory, and in a form that is not wholly freed from all teleological ends."[7] The "to come," will always fall into the realm of the potential quite simply because when "it" crosses over into actuality it is no longer "to come"; it *is* here. Thus, what is "to come" must exist in the realm of the potential if it is, in fact, *to* come. It is important to assert here that the "to come" is not what *will* come, but all that may or may not come. That is, it is "to come", *perhaps*.

Derrida's "to come" however calls for something more than what is possible or impossible in relation to a being. That is, the relation of the "to come" with the realm of actuality is not necessarily a relation to a *being's* potentiality. Such a relation would limit the "event" to the "to come," that is, the coming of the Other. The to come would then be limited to a performative; limited to that which the "I" or the being may or may not *do*. Rather, Derrida's "to come" stresses the coming of an event that cannot be limited to an event of the "I" performing (or not performing.) The "I" condition of Aristotle's seemingly limitless realm of potentiality, then, "neutralizes the pure eventfulness of the event… (the event) is a question of an unforeseeable coming of the other… of the other in me, an other greater and older than 'I.'"[8] The significance and importance of the "to come," then is not in its raw potentiality *merely*; but rather the importance of the "to come" is, at least in part, the event of its coming. Thus, at least some of its importance is in its actualization. This is why it is not "wholly extractible from all teleological ends." Its coming, in a sense, is its telos; but, at the same

7 Jacques Derrida, "The Last of the Rogue States: The "Democracy to Come," Opening in Two Turns", *The South Atlantic Quarterly*, 103: 2/3 (Online: 2004): 329
8 *Ibid*, 329.

time, the infinite potentiality of the "to come" makes its coming a never ending, end.

This is where Agamben's ideas can add something to the interpretation of Derrida's "to come." The significance of potentiality is its potential actualization, while, simultaneously, the potentiality of actuality's (possible) future, is its freedom and thus, potentiality is of the utmost importance to the realm of actuality. There is then, a certain interdependence of these two realms. In his works *Homo Sacer* and *The Coming Community* Agamben reveals this interdependence. He asserts that if one were to push up along the lines of potentiality and actuality, the two realms, at this point of intersection, are indistinguishable. As he articulates, "Along this line of sparkling alternation… potentiality and act change roles and interpenetrate."[9] It is this aporia of perceived self limit that the "I," the identity, must push up against, to let in a little more potentiality, to make room for the "to come." It is, precisely at this perceived self limit, that the free entity will push up upon blending with their potentiality and thus experiencing freedom. This is why Derrida prescribes an "identity without identity". He calls for a *permeable* identity that is hospitable to the Other, hospitable to the potentiality to come. This 'permeable intersection', where the identity and the Other interpenetrate is, then, of utmost importance. Thus, Agamben discussion of what he terms the Halos, this zone of indistinguishable potentiality and actuality, may have a lot to offer the interpretation of Derrida's "to come".

The significance of the Other, like the to come, cannot be wholly understood in terms of potentiality. There are, necessary conditions of actuality for "its" coming. In relation to identity, the other is not simply *an*other or an other identity that "is" – a "her/him" or a "they/them." Rather, the title "suggests something other than a heading"[10] It suggests a delimitation of the "I," and

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9 Agamben, "The Coming" 20.
10 Jacques Derrida and John D. Caputo, *Deconstruction in a nutshell: a conversation with Jacques Derrida* (Fordham, New York: Fordham University Press, 1997) 116.

"we," and, correspondingly, a delimitation of others headings – the "they" or "them." To except the Other is not, then, simply a matter of letting others of other headings, into ones life. While the openness to the other that Derrida calls for *may include* letting others into ones life or trying things that others "do," those characteristics of *others* are not what could correctly be called, *the Other*. This is rather, a cosmopolitan conception of otherness. The Other suggests something more than this, it suggests a delimitation of self identical identity. Or rather, "a delimitation of 'planning ahead' in favour of an openness to the future that does without the guardrails of a plan, of a 'teleological orientation.'"[11] In this sense then, the other is found within the self, or, within the self's potential. Thus, the cosmopolitan conception of the other is too limiting. Hospitality to the Other cannot end at leading a cosmopolitan life, because in many ways this is just another heading, another identity. Hospitality to the other has nothing that could correctly be called an end, for it is the continuous deconstruction of what is, the infinite re-realization of the self.

This, re-realization of self calls for a sort of "identity without identity." That is, it calls for an identity that is not identical to itself. This, entity without identity does not identify itself as a static and unchanging form. Rather, it identifies with its self in difference. This means, as Derrida explains, "Not to not have an identity, but not to be able to identify itself, to be able to say "me" or "we"; to be able to take the form of a subject only in the non-identity to itself or, if you prefer, only in the difference with itself."[12] In this way, the Other is found within the entity's potential, within its *potential to differ* with its current actuality. That is, "it takes the form of the subject only in the non identity to itself."[13] The entity does not attempt to assert a static, inner form of self. It is capable of identifying *itself*, that is, it is not in a condition of mental instability, but it does not identify *a* self. Thus, the Other is not the antithesis to the subject, and nor is it

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11 *Ibid*, 116.
12 Derrida, Jacques, *The other heading: reflections on today's Europe* (Indianapolis, Indiana: Indiana University Press, 1992): 9.
13 *Ibid*, 9.

something entirely different from the entity "itself." Rather it is all that will flow through the entity if its self, that is, its identity is permeable. Derrida, "thus wants to distinguish from an airtight, impermeable, homogeneous self-identical identity from a porous and heterogeneous identity that differs with itself."[14] This open identity is the hospitable environment for the to come, for the other. And, it is this hospitality to the other, a desire to let more potentiality into the self that is characteristic of the free entity.

Derrida asserts that "(the Other)... is a question of... the other in me, an other greater and older than I."[15] The other, then, is both within the self, and within what the self is not (that is, potentiality). In its coming, it is both interior and exterior to the entity. If this sounds like an impossible paradox, one should explore how this may be possible. It could be understood in terms of what Agamben calls the halos. This is, again, the line at which actuality and potentiality are indistinguishable. This simultaneous 'being' interior and exterior to the entity, could be understood as the point at which the Other, that is, this coming potential and the entity are indistinguishable. It could be understood as the sphere of the halos, blending at the limit of the with potentiality. It is the point of their "interpenetration," it is the point of their blending. As Agamben articulates, "One can think of the halo... as a zone in which possibility and reality, potentiality and actuality become indistinguishable... This imperceptible trembling of the finite... makes its limits indeterminate and allows itself to blend, to make itself whatever."[16] The halo then is the sort of permeable membrane that Derrida's entity without identity possesses. While the "to come" exists in the realm of the potential, in its coming, that is, in the coming of the Other – it meets the identity at the halo to be pulled into actualization, if, the identity is permeable. Thus, the permeability of the entity is essential for the actualization of its

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14 Derrida, "Deconstruction" 114.
15 Derrida, "The Last" 329.
16 Agamben, "The Coming" 56.

potentiality. It is essential for it to push beyond itself and take something from the (limitless) possibilities of the potential. This sort of permeable membrane, then, the essential, non essence-tial, characteristic of the "free being."

This condition of hospitality to the Other, then, is a necessary condition for freedom. The free individual defines itself only in terms of difference from itself. It identifies with its own potentiality, rather than with a static notion of self. The free individual does not limit their self in the assertion of an unchanging inner being. Rather it allows for a permeable self that is hospitable to the Other. This hospitality, this openness keeps the entity from shackling itself to its identity. The entity who has defined itself in absolute terms has itself closed off from every border to the future. They have boxed up their potential and in doing so have enchained themselves in their identity. They have become incapable of melding with a form other than themselves *as they are*. And thus, they have reached the end of their freedom. The self-identical identity will not push upon their limit for they regard their limit as their self definition; and, their self definition as their telos or their raision d'etre. But it is this very capability or desire to push against perceived self-limit that characterizes the free entity. The self-identical entity, at their self-defined telos cannot be free, even if the entity is a citizen of the most 'liberal,' rights conscious nation in the world.

Consider the activist who participates in every accessible political protest and therefore exercises their rights on a regular basis. It is not necessarily true that this individual is free. If this activist identifies him/herself wholly as a political protestor, s/he is not a free individual. Rather this activist has boxed herself up in a self identical identity and cut herself off from freedom. This activist is interested no longer in being anything else but what s/he is. The activist identifies so strong with herself, with her current state of being that s/he is no longer interested in potentiality. In this way, the activist has cut him/herself off from freedom. Thus, while the activist may be an avid exerciser of rights, s/he is not necessarily free. Consider the wealthy business person, who has at their disposal the

means to access whatever they desire. As in the case of the activist, it is not necessarily true that this individual is free. If the individual identifies him/herself as existing solely as a rich businesses person, or automatically rejects what they regard as unfitting within this identity, they too have cut themselves off from potentiality and thus cut themselves off from freedom.

In this way then it is becoming evident that freedom cannot be fully embodied or realized through legal mechanisms or rights as there is much that can constrain the individual before the law even comes into play. Freedom can be understood as a condition of openness to what may come, or, what will come *maybe*. The condition of freedom entails, "not (closing) off in advance a border to the future, to the to-come (a venir) of the *event*, to that which comes, which comes perhaps and perhaps comes from a completely other shore."[17] The self-identical identity is the entity that closes off its borders to potentiality in order to exist as it "is," or how it has defined itself to be. In contrast, the border of the free entity, is open, it is permeable. It can, therefore, intermingle with potentiality at its limit, at its "open border." The free entity is open to more than self-defined teleological ends. It is open to the "to come" and is therefore hospitable to the Other, open to the realm of freedom. The entity does not identify to strongly with itself as the "to come… perhaps comes from a completely other shore."[18] If the entity does identify too strong with itself, its potentiality is closed off by its strong identity or, overlooked for further assertion of what it already is. The idea being that, if one thinks they know what they are looking for, they may miss what actually comes. To say that "this is all I have ever wanted," or that "this is all I have ever wanted to be," is to close off ones boarder to potentiality and live only in the realm of actuality. It is important to notice however, the difference between stating, "that *this is all* I have ever wanted to be," and "I have *always wanted* to do this." The contention is not that people should not have desires and seek out ways to realize these desires, but rather that if

17 Derrida, "The Other" 69.
18 *Ibid*, 69.

one identifies themselves as existing only to fulfill them, they will have nothing left when they are fulfilled. They will have cut themselves off from freedom in an attempt to realize a particular identity. There is then no space left for the potentiality, the possible, the 'to come'. And, without this potentiality there is no freedom. The entity that identifies with itself completely becomes limited or enslaved by its identity. It is in the chains of itself. Freedom, therefore, cannot be fully embodied or realized through legal mechanisms or rights, as the free entity must exist in a condition of openness to potentiality before there can be anything close to the realization of freedom.

Legal scholar Joel Feinberg has published numerous works stressing the importance of liberal rights and freedoms. His work is a good illustration of the articulation of rights as freedom, a pervasive theme in contemporary political discourse on freedom. Feinberg's basic conception of freedom is self autonomy realized through legal rights that enable an individual to be "self governing." That is, the individual is free to do as s/he pleases without interference from the law. This conception of freedom as autonomy is prevalent in modern political discourse. It is this conception that has driven many thinkers to speak of freedom in terms of rights. They claim that for the individual to be free, they must have the right to be free from intervention in realizing their desires, and thus be free to play out those desires. This is the conception of freedom that Feinberg advances. In his words, "I am autonomous if I rule me, and no one else rules I."[19] At first glance this assertion may appear infallible, and indeed, Feinberg seems to have a grasp of the concept of autonomy. But the extent to which this autonomy can be elevated to embody freedom is not clear. It is interesting that, in his discussion he flips from a discussion of freedom to a discussion of autonomy without any attempt to link the two. It is as if autonomy is simply a homonym of freedom. This assumption of the interchangeability of these two terms is prevalent in contemporary rights discourse. The

19 Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton, New Jersey: Princeton University Press, 1980): 21.

two terms, however, are not interchangeable as freedom is in the realm of potentiality and cannot be fully embodied in self autonomy in the realm of actuality.

Feinberg cites "no one else (ruling) I" as the condition of freedom, that is, that the "I" rules over itself. This relationship of self-autonomy however, at least in the sense that Feinberg understands it, reduces not to freedom, but rather to a self tyranny, or if this sounds like an implausible paradox, to a tyranny of the identity.

Feinberg contends that the "free man's... inner core self (must not be) lacking cohesion or direction (and must be) capable of governing."[20] Thus he envisions an identity, an inner core to guide the individual as a necessary precondition for freedom. Two problems immediately exist with this vision. Firstly, identity, any identity, is a construct. That is, there is properly no underlying static form of the individual that exists within them. Secondly, if one allows themselves to be ruled by this constructed identity, they are effectively enchained by an identity and thus not free. The point here is not to down play the importance of rights in the actual world. Indeed, they are important tools for the individual to realize his/her potential. The contention here is that these are rights *merely*. They are not freedom. And, that even the individual with all the legal rights in the world cannot be free if they are chained to some notion of constructed identity.

Interestingly, Feinberg asserts a lack of self-identical identity as a barrier to freedom, as a barrier to self-autonomy. But this characterization of the "unfree" individual is precisely the opposite. He describes the mindset of the "anomie," this unfree individual as a "defective condition."[21] The anomie is able to exercise neither their autonomy over themselves nor their freedom because of a lack of "internal order." (9) He describes the anomie as

20 *Ibid*, 21.
21 *Ibid*, 9.

"a person who (has) no hierarchical structure of wants, and aims and ideals, and no clear conception of where it is within him that he really resides, (this) would be a battlefield of all his constituent elements, tugged this way and that, and fragmented hopelessly...He is a man free of external shackles, but tied in knots by the strands of his own wants."[22]

It is my contention that the condition of having "no clear conception of where it is within (oneself) that (one) really resides," is the common condition of most, if not all people. And, that if one is to contend that they do know where their self resides, this is because of an identity construction rather than the existence of any static form that could correctly be called a self. One can, in fact, have conflicting wants and desires and be unable to categorize them within a single notion of identity without being the victim of a "defective condition," this is, in fact, the free entity. Indeed any "well ordered" identity in the sense that Feinberg understands it is a mere construct of the self; it is merely a constructed identity.

On need not delve into postmodern discourse to support this contention. It can be traced back to David Hume. He asserted of this idea of self construction in his discussion "On Personal Identity," in his famous work *A Treatise on Human Nature*. Hume recognized that the perceptions of individuals are constantly changing, and that there is no underlying sameness that one could assert as ones own identity. He argued that, "mankind... are nothing but a bundle or collection of perceptions which succeed each other with an inconceivable rapidity, and are in perpetual flux and movement."[23] This contention seems to reflect, quite accurately, the human condition of being. Yet, it also seems to describe what Feinberg asserts as an "anomie" or a defective character. The inability to locate a "self" to govern the individual is not a defect, and nor is it to be desired if one is concerned with the maintenance of freedom. Rather

22 *Ibid*, 9.
23 David Hume, *A Treatise on Human Nature* (Oxford, England: Claredon Press, 1973): 252.

than a static unchanging form, the mind consists of conflicting wants, desires and perceptions that, in their perpetual flux, destabilize the identity of the self, revealing it in its constantly changing reality. To assert such a form of a static identity is to oversimplify the condition of a being. Moreover, to limit ones wants, desires and actions in order to make the 'self' fit better into the 'self' creates a bizarre paradox that reveals the tyrannical power of a self identical identity.

Thus, to be "tugged this way and that, and (to be) fragmented,"[24] is not a condition of hopelessness, as Feinberg would have us believe. It is, rather, a condition that embodies *infinite hope* as it lays the groundwork for the permeable identity of *infinite potential*. This condition of fragmentation is a mere fact of life for anyone that does not identify him or herself within the box of a constructed identity. The "man free from external shackles (and) tied in knots by strands of his own identity,"[25] exists in a condition of freedom fair greater than the individual who suppresses their wants in order to maintain "their" identity. The individual who forces themselves to make all their desires "fit" with some preconceived notion of self is the individual enchained by *internal* shackles – a condition incompatible with freedom whatever their legal rights may be.

Derrida describes, "The 'to' of the 'to come' (as wavering) between imperative injunction (call or performative) and the patient perhaps of messianicity (non perfomative exposure to what comes, to what can always not come or has already come)." (336 rogues article) That is, the 'to' wavers between what one *is* and *does* (performs), *actually*, and what they are *open to, potentially*. This 'zone' of wavering could be considered as the zone of indistinguishably between actuality and potentiality that Agamben describes as the halo. If all of this sounds too abstract to relate to, it could be considered in another light. Agamben, in his discussion of the halo, articulates beautifully an account of this wavering between the potentiality of the messianic structure and actuality

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24 Feinberg, 9.
25 *Ibid*, 9.

"A rabbi, a real cabalist, once said that in order to establish the reign of peace it is not necessary to destroy everything nor to begin a completely new world. It is sufficient to displace this cup or this bush or this stone just a little, and thus everything."[26]

Consider freedom and identity, the halo and the to come; it is not necessary for the entity to destroy its identity, to destroy all that it is or desires to be, in order to establish its freedom. It is sufficient to displace *this* self every so slightly, to look beyond the self as it *is* and thus create a space for the "to come," and thus create a halo just beyond the self limit, through which the Other may come. The entity need not abandon their life and start completely anew to be free. It is sufficient to push up against the limit of their actuality, displacing themselves ever so slightly and thus make room for something more, for something else in the very place they thought was their limit. It is this continuous re-realization of the self that characterizes the free entity. Freedom, then, is not bound up in the law or rights, but is rather a condition of openness to one's potentiality, openness to the Other to come.

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26 Agamben, "The Coming". 53.

IDENTITY POLITICS

"Our lives begin to end the day we become silent about things that matter"
– Dr. Martin Luther King, Jr.

WESTERN FIRST NATIONS STUDENT ASSOCIATION

Within the UWO community there are around 160 First Nations students. This number is rather small compared to other Universities across Ontario and Canada. The main reason for such little First Nations participation on campus is due to the lack of understanding in regards to First Nations People. The First Nations Students Association (FNSA) is now working to change this in order to bring more First Nations students to UWO. The FNSA became ratified on campus in March of 2006, giving a voice to First Nations Students within the University Community.

The FNSA was formed in reaction to an ignorant and stereotypical newspaper article printed in the Campus' main paper. This article caused outrage amongst First Nations people across Canada, and even within parts of the United States.

The purpose of this club is to bring First Nations and Non-First Nations people together. All are welcomed to join, as well as to make sure First Nations students at UWO will have a body to voice their concerns at a student level. The FNSA is a political, educational, and cultural club that drives to help make this campus a more educated and tolerant place in regards to First Nations peoples, issues, and cultures.

Point of Fact: Currently, UWO has at least three distinct First Nations groups attending; Aaniishnabe (Ojibway), Haudenosaunee (Iroquois), and Cree, (Iynu). These are just three of many First Nations groups that exist in present day Canada.

Chad Cowie
President
First Nations Students Association, 2006-2007

THE MISS G__ PROJECT

The London chapter of the Miss G__ Project for Equity in Education had a spirited and promising year! We are a group of concerned citizens working together to promote equity *in* education, to combat sexism and homophobia *through* education, and to encourage active citizenship. With the aim of getting an optional Women's and Gender Studies course added into the Ontario Secondary School Curriculum we organized various grassroots events and political undertakings. Our second 'miss educated' postcard campaign to Kathleen Wynne, the Minister of Education, was launched in October. Following Judy Rebick, we were asked to be speakers at Elgin County's annual Violence Against Women Breakfast where we even sold our new Miss G__ Chapters manuals! It's been a fabulous year and we'd like to thank everyone who came to the saucy Miss G__ Dinner Party and helping us raise over 200 dollars!

The provincial Chapter has also been busy! They have been traveling around Southern Ontario for speaking engagements and holding high school workshops. Another success was the December 6th Miss G__ 'sit-in' at the Queen's Park Legislature. The Ministry of Education has been very responsive, and we are confident we will achieve our goal!

For more information about the project and/or to get involved visit http://www.themissgproject.org.

Jenna Owsianik
President
Miss G__Project, 2006-2007

RAPE SHIELD RECONSTRUCTIONS:
EVIDENTIARY PROCEDURES IN CASES OF ALLEGED SEXUAL ASSAULT

By Caitlin Reid

Framing the Agenda:

Historically speaking, the social construction of rape has been overly burdened with myths, misconceptions and stereotypes. A "double victimization" of victims by the legal process is a common, unsettling consequence of such rape myths.[1] First enacted in 1983, the rape shield law aimed to protect women from further victimization, through restricting evidence and interrogation of past sexual reputation or history.[2] However, recent studies and case analysis suggest that rape shield laws are routinely forsaken by both counsel and the judiciary. Furthermore, defence counsels consistently look to circumvent these provisions by introducing victim's counselling or other personal records as evidence. A backlash strategy against rape shield laws that is working.[3] These records serve to undermine the credibility and reliability of a rape victim's testimony: a similar result of previous investigations of sexual history. As Justice L'Heureux-Dube, of the Supreme Court of Canada has concluded, "there is a real risk that the use of medical records may become a means by which counsel indirectly bring

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[1] Elizabeth Comack, "Feminism and Criminology," in *Criminology: A Canadian Perspective*, Ed. R. Linden, 5th ed. (Toronto: Nelson-Thompson, 2004), 178.
[2] Ian McDermid Gomme, "Sexual Assault," in *The Shadow Line*, 3rd ed. (Australia: Nelson-Thompson, 2002), 225.
[3] "Canada: New Rape Shield Needed to Protect Women's Records," *WIN News* 21, no. 3 (1995): 45. www.proquest.com (accessed November 22, 2005)

evidence concerning the complainant ... which they are no longer permitted to do directly."[4]

In reviewing recent legal reform of sexual assault, two predominant tensions emerge. For one, there exists a tension between competing rights: the right of a fair trial, with the right to privacy and protection. This discord is mirrored in the second cleavage between the concerns of the courts, and those of Parliament. This brief will examine the debate surrounding rape shield laws, while also considering some of the possible legal alternatives, and solutions to the tensions outlined above.

Sex, Rape & Sexual Assault: The Legal Construction of Intercourse

The first Canadian laws prohibiting rape were introduced at a time when women were perceived solely as the property of men. In fact, in the 1275 British Statute of Westminster, rape was formalized as a crime against the state, designed to punish those responsible for tainting previously chaste women. This statute proclaimed a husbands right to consortium, by declaring that a wife's consent to the sexual advances of her husband were permanently entrenched within marriage vows.[5] This statute founded several important, discriminatory rudiments of Canadian rape legislation that would remain in force until 1983.

Prior to 1983, defence counsel could freely introduce past sexual history as evidence to challenge a witnesses' credibility. Implicit to these rules were two stereotypical notions regarding female sexuality. Previous promiscuity was linked to a likelihood of dishonesty; while previous consent decreased the credibility of absent consent in the present activity.[6]

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[4] Simon Bronitt & Bernadette McSherry, "The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the 'Rape Shield'?" *Criminal Law Reform* 8, no. 2 (1997): 259-292. www.proquest.com (accessed November 20, 2005)

[5] Gomme, 219.

[6] Comack, 177.

During the 1970s and early 1980s, supporters of the women's movement increasingly demanded legal reforms. In response, in 1983 Parliament introduced Bill-C 53 that repealed the old rape law and established three new categories to the offence of assault: sexual assault, sexual assault with a weapon, and aggravated sexual assault.[7] The philosophy behind this movement was that rape ought to be taken as seriously as any other assault. Also included in this new legislation was a neutral expression of gender that revoked a husband's immunity from sexual assault charges. Finally, the legal policy contained rape shield provisions designed to protect the privacy and integrity of the complainant. Under these rules, only past sexual history with the accused could form the basis of defence interrogation.[8] Critics argued that allowing these discussions remained unjust and unnecessary; however, even these limitations would not go unchallenged for long.

The Judicial-Parliamentary Debate:

In the 1991 Supreme Court ruling on Seaboyer and Gayme, the court held in a 7-2 decision that the rape shield provisions of s.276 - in the Criminal Code - were unconstitutional. "The Supreme Court ruled that, while laudable in its intent, the provision went too far and could deny the accused the right to a fair trial."[9] In response, Parliament passed Bill C-49 in 1992, which set out judicial guidelines governing the admissibility of evidence concerning past sexual conduct. Under this legislation, evidence of past sexual history remains inadmissible where it serves to support an inference of challenging the credibility of consent. However, the amendments also provide judicial direction for when said sexual history may be admitted.[10] Although the amendments to the rape shield laws attempt to strike a balance between competing rights, the reality of "double victimization" remains.

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[7] *Ibid.*, 180.

[8] *Ibid.*, 220; 225.

[9] *Ibid.*, 182.

[10] *Ibid.*, 183.

In 1995, another profound Supreme Court ruling would shape the future of sexual assault legislation. In the O'Connor case, charges were stayed by a trial judge when the Crown failed to release to the defence, therapeutic and medical records of the victims. The consequential Supreme Court ruling set precedent requiring that victim's counselling and other personal records be made available to defence counsel, under certain specified conditions.[11] Again Parliament reacted by initiating limitations on the judicial findings. Bill C-46 restricted, but did not eliminate, defence access to confidential records of complainants.[12] Once more, Parliament attempted to strike a legal balance. Many have argued that in these compromising movements, Parliament has allowed sexual assault laws to become riddled with discrimination and injustice once again. "Rather than try to show that the complainant is 'bad,' this new defence strategy attempts to show that she is 'mad' or, at the very least, untrustworthy and therefore not credible."[13]

What's At Stake?

The question of document disclosure has produced an intense debate among legal scholars, feminists and rights activists alike. In favour of the legislation stands the Canadian Civil Liberties Association, legal rights advocates, the courts, and judicial activists; while opposition stems from the Women's Legal Education and Action Fund (LEAF), the National Committee on the Status of Women, the Canadian Association of Sexual Assault Centres, women's groups, and feminists.

Proponents for record admissibility and disclosure contend that the "principal aim of our adversarial trial process is the search for truth."[14] Where personal and medical records are deemed relevant to an issue at trial, it remains only just that they be made available to the court. Connected to this argument, remains the

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[11] Gomme, 225-26.
[12] Comack 183-84.
[13] Bronitt & McSherry.
[14] *Ibid.*

entrenched right to a fair and prompt trial. In accordance with this attitude, Bill C-49 and C-46 allow for judicial discretion, in determining under what circumstances justice will require such information.

On the other hand, advocates against disclosure argue that the legislation passed by government violates the right to privacy, and will generate profound, negative implications for victims of sexual assault. Although the right to privacy is not itself enshrined in the Canadian Charter, the Supreme Court has reasoned that privacy falls within the rights prescribed in sections 7 and 8, and remains protected by common law tradition. Speaking for the dissent in R v. O'Connor, Justice L'Heureux-Dube held that private counselling records should be viewed as "disclosing a reasonable expectation of privacy which is worthy of protection under s. 7 of the Charter."[15] Furthermore, various international laws also protect the right to privacy.[16]

Evoking the utilitarian rationale against document disclosure remains even more persuasive. "The utilitarian rationale for not granting access to certain types of communication rests on the presumed importance of certain relationships in society. It is argued that if confidential communications are revealed in the courtroom, the relationships within which such confidences are imparted will suffer."[17] Counselling or psychiatric records are designed for therapeutic, not evidentiary purposes, and their misuse could lead to fatal consequences. For instance, therapeutic discussion often explores feelings of guilt or shame, which women commonly experience after assault. It is likely that as evidence, these reports could be misconstrued as conveying consent or complicity.[18] The indirect effect of record admissibility may be to silence sexual assault victims altogether. Many victims will forego counselling rather than

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[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] Comack, 183.

risk disclosure of such highly sensitive and personal information.[19] Moreover, with the current legislation in place, sexually assaulted women may feel they face a decision, whether to seek counselling or initiate criminal proceedings.[20] This type of unjust choice further propels the "double victimization" of sexual assault victims.

Alternatives to the Current "Double Victimization"

Current legislation on rape shield laws and personal record disclosure remains founded on a "case-by-case" privilege. Section 278.5(2) of the Criminal Code outlines the relevant factors to be taken into account; however, this process mainly involves a subjective balance of several competing policy issues. In most cases, judicial discretion on the admissibility will hinge on "the extent to which the record is necessary for the accused to make a full answer and defence."[21] Under the current Canadian discretionary framework, the court may only restrict access to confidential counselling records when it finds reasonable grounds to limit the rights of an accused. This approach discriminates against complainants in sexual assault trials, as the rape myths embedded in the substantive law permit a continuance of "double victimization."[22] After all, the judiciary is not exempt from social misconceptions about rape, and the majority of lawmakers have been and continue to be male.[23]

New South Wales, Australia, who also utilize judicial discretion as a means to determine record disclosure, recently passed a bill that creates a distinct "sexual assault communications privilege," or presumed inadmissibility. Under this legislation, courts may grant discretion to allow this type of evidence, although it will not be the norm. Furthermore, courts are instructed to "take into account the likelihood, the nature, and the extent of harm that would be caused to the protected confider if the evidence were

[19] Bronitt & McSherry.
[20] Comack, 183.
[21] Bronitt & McSherry.
[22] Ibid.
[23] Gomme, 224.

adduced."[24] This presumption of inadmissibility provides a higher degree of victim protection, but partially sacrifices the central Canadian principle of a fair trial.[25]

Another method to manage record disclosure would be to enact a partial blanket protection over all confidential counselling communications. Using this approach, common law may extend this protection through class privilege. Common law has long recognized class privilege between lawyer-client and spousal communication. Why not merely add counsellors to this list of class immunity? Nonetheless, class privilege has never been absolute, therefore the judiciary would still maintain ultimate discretion over disclosure.[26]

A final option for controlling the admissibility of confidential records is to create a complete blanket of statutory protection. For example, "In Australia, under federal law ... documents or communications prepared or obtained in the course of certain epidemiological studies cannot be produced to a court."[27] A similar exclusionary rule could be enacted to solely protect the rights of sexual assault victims. Although the inadmissibility of these documents may jeopardize some defendants right to a fair trial, the inherent jurisdiction of the courts to grant a stay, permanent or temporary, would prevent the few possible miscarriages of justice. "The court would have to be satisfied that the confidential material in dispute was likely to be of substantial relevance or probative value to an issue at trial or to the testimonial competence of the complainant;" a high, but fair threshold for such an important proceeding.[28] Bronitt and McSherry contend that the main advantage to this approach is that it illuminates the tension between competing legal rights, rather than obscuring them behind judicial discretion. In addition, in the case of stayed proceedings, the victim may waive the right to confidentiality, providing a sense of empowerment.

[24] Bronitt & McSherry.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.

However, the concern remains that victims may experience unconscionable social pressure to allow for record disclosure. In accepting any claims of waiver, the court must carefully consider the voluntaries of this decision.[29]

<u>Where Do We Go From Here</u>

The "double victimization" inherent to sexual assault laws is a damaging result of the patriarchal society present today. The amendments of 1983 strongly evidence Parliament's sensitivities to the plight of sexual assault victims. However, the courts continue to rule that the right to justice will not be diverted. Without further legal reform equality under the law cannot be adequately achieved. Although costly, in terms of legislation and possible judicial review, the Canadian government must continue to invest in resolving the tensions described in this brief. Further legal analysis, social studies and opinion polls may help address the issue at hand. In addition to continued commitment, this policy paper strongly concludes that Canada follow the legal trend observed in New South Wales. By recognizing the inherent gender inequality in sexual assault laws, this method of judicial discretion strikes an equitable balance between the rights of victims, society and accused. It must be remembered that unlike any other criminal legislation, rape laws incorporate special rules to safeguard against false accusations.[30] The result is a continued "double victimization" of sexually assaulted women. How can Canada, who prides itself on its equality and compassion, continue to stand for such blatant discrimination?

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[29] *Ibid.*
[30] Gomme, 222.

TOWARDS A MORE REPRESENTATIVE GOVERNMENT:
WOMEN'S UNDERREPRESENTATION IN THE CANADIAN HOUSE OF COMMONS
By Larrisa Bazoian

The issue of political representation has always been the subject of much debate, especially in a multicultural society such as Canada. Representation can be based on many factors, be it language, region, ethnicity, sexual orientation, religion, or especially gender. Political representation is often viewed as a key element to the legitimacy of a democratic government.[1] Though women have made significant political advances since their emancipation, they have not yet achieved full representation. In fact, women comprise over half of the population while at the same time constituting "the most underrepresented segment of Canadian society."[2] Many academics agree that "...the continued under representation of women is due to something of greater consequence than lack of political will."[3] This essay will argue that women face gender biases and systemic barriers which hinder their election to political office. Women's virtual absence from the Canadian House of Commons can be attributed to the persistence of traditional gender-roles, as well as the inherent flaws in both the political party and the electoral systems. Changes to these systems, as well as to our inculcated gender biases can improve the representation of women, and in turn, the legitimacy of our government.

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[1] Marian Sawyer, "Parliamentary Representation of Women: From Discourses of Justice to Strategies of Accountability," *International Political Science Review* 21.4 (2000): 362.
[2] Jane Arscott, "A Job Well Begun...:Representation, Electoral Reform, and Women," *Gender & Politics in Contemporary Canada*, ed. François-Pierre Gingras (Toronto, ON: Oxford University Press, 1995) 68.
[3] *Ibid*, 72.

Traditionally, politics has been considered a man's domain, with a woman's place being in the home. Unfortunately for women, the time required to maintain a political career *and* perform the work associated with the traditional female role as a wife and mother is sometimes unrealistic with only twenty-four hours in a day.[4] Women are often responsible for what has been coined the 'double day of labour', spending the day working outside of the house, and then returning home to children and housework. On the other hand, men traditionally are not expected to put in nearly as many hours on the home front, and thus are freer to spend more time at work or to pursue other actives. As Susan Borque notes,

> While we have made considerable progress in encouraging women to pursue traditional male roles, we have been less effective in encouraging men to pursue traditional female ones. Women continue to shoulder the vast majority of responsibilities in the home, a burden that limits their responsibilities outside it.[5]

The fact that women, more often than men, bear the brunt of family responsibilities has numerous implications for a potential political career. If a woman is elected to the House of Commons, it might require the dislocation of her family, depending on the distance between her constituency and Ottawa.[6] A male Member of Parliament, however, is more likely to spend the week in Ottawa fulfilling his Parliamentary duties, and then return home to his family on weekends. Consequently, women's traditional role in the family often restricts the time and effort they can afford to put into a

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[4] Lisa Young, "Women in the Canadian House of Commons," *In the Presence of Women: Representation in Canadian Governments,* ed. Jane Arscott and Linda Trimble (Toronto, ON: Harcourt Brace & Company Canada, 1997) 86. (Emphasis added)
[5] Susan C. Borque, "Political Leadership for Women: Redefining Power and Reassessing the Political," *Women on Power: Leadership Redefined,* ed. Sue J. Freeman, Susan C. Borque, and Christine M. Shelton (Boston, MA: Northeastern University Press, 2001) 89.
[6] Young, 86.

political career, a limitation which is not generally encountered by men.

Women are often scrutinized by the media should they deviate from their conventional female role. Female politicians are "...assumed to be undergoing a great deal of strain caused by the supposed conflict between their political and family responsibilities."[7] The media is constantly concerned about whether the families of female MPs are suffering because of their mother or wife's political career. Early female MPs Flora MacDonald and Judy LaMarsh both "...report that they were frequently asked by reporters, "Are you a politician or a woman?" as if the two were mutually exclusive."[8] This frame of mind, that a "woman ruler [is] an oxymoron," [9] only further reinforces the long held idea that politics is a man's game. The media also tend to stereotype and label women politicians more than men. As a former MP noted, "If [a female politician] is a widow, she is suspected of having killed her husband. If she is divorced, she is unstable. If she is married, she neglects her husband, and if single, she is abnormal."[10] In reality, women's political careers are not necessarily detrimental their families and the status of their personal lives has little to do with how well they can do the job. However, because of women's traditional role in the family, their political actions are scrutinized by the media in a manner which male politicians are generally exempt from.

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[7] Gertrude Robinson and Armande Saint-Jean, "The Portrayal of Women Politicians in the Media: Political Implications," *Gender& Politics in Contemporary Canada*, ed. François-Pierre Gingras (Toronto, ON: Oxford University Press, 1995) 181.
[8] *Ibid.*
[9] Kathleen B. Jones, *Compassionate Authority: Democracy and the Representation of Women* (London: Routledge, 1993) 103.
[10] Robinson and Saint-Jean, 181.

Another result of the traditional female gender-role in the family is that women tend to enter into politics later in life.[11] Some women may have to wait until after their children are older to begin a political career, or must take time off from political parties more frequently.[12] Women, on average, are five years older than their male counterparts when they join a political party.[13] Because of their late start, women are often a "step behind" men when they attempt to start their political career.[14] Women generally have not had as much experience or as many positions within a party as men of the same age, and thus usually have less contacts to rely on when making a run for high level positions. This often affects their chances of receiving a party nomination and other such party rewards. Thus, both women's adherence to and deviance from the traditional female gender-role has a direct affect on women's chances to enter into politics.

Once a woman has made the decision to enter politics she faces a new challenge: overcoming the barriers within the political party system. Becoming part of a political party is a crucial first step for most politicians seeking office.

> Local party organizations...are important because parties frequently perform political recruitment functions in most liberal democracies, and to the extent that women (or any other group) fail to hold substantial numbers of significant positions in these organizations, it can be anticipated that they will remain severely underrepresented in the pool of candidates having meaningful public office opportunities.[15]

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[11] Harold D. Clarke and Allan Kornberg, "Moving up the Political Escalator: Women Party Officials in the United States and Canada," *The Journal of Politics* 41.2 (1979): 445.
[12] *Ibid.*
[13] *Ibid*, 454.
[14] *Ibid*, 445.
[15] *Ibid*, 443.

Political parties act as gateways between hopeful politicians and seats in the House of Commons. "Legislative candidacies are mediated and structured by the political party, which can serve either as a bridge or a barrier for aspirants to elected office."[16] It has been recognized that "performing strategic tasks within party organizations...[is] a crucial first step for both men and women seeking public office."[17] As can be expected, these tasks are not offered to both genders equally. "The sexual division of labour institutionalized within Canada's major party organizations has excluded many women party activists from important political tasks which may provide the recognition, skills and contacts necessary for political candidacy."[18] Women are generally given more menial tasks, which, through crucial to the operation of the party, do not come with the prestige or provide the experience which is usually required for nomination. Women spend, on average, five times as many hours on party work as their male counterparts,[19] however they are still generally excluded from strategic and leadership roles. The ratio of stalwarts (middle level positions with little chance for promotion) to elites (high level leadership positions) among women is fourteen to one, compared with three to one for men.[20] Thus, women are frequently overlooked when it comes to nominations since the nomination process is biased towards men. According to the report of the Royal Commission on the Status of Women in Canada, "Women who have been successful at the polls confirm that winning the nomination is a more formidable hurdle than winning the election."[21] The few women who are nominated are frequently "sacrificial lambs" since they are nominated in districts where the

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[16] Jill McCalla Vickers and M. Janine Brodie, "Canada," *The Politics of the Second Electorate: Women and Public Participation*, ed. Joni Lovenduski and Jill Hills (London: Routeledge & Kegan Paul Ltd., 1981) 66.

[17] *Ibid*, 65.

[18] *Ibid*, 63.

[19] Clarke and Kornberg, 468.

[20] *Ibid*, 461.

[21] Vickers and Brodie, 66.

party has little chance of winning.[22] This is a crucial impediment to women's election to office. Female party candidates have often lost even before they begin to campaign, since their party generally has a long history of losing in the constituencies in which they are nominated. Parties can also "...expand or contract...political opportunities by withholding or providing the candidate with party resources such as moral support, campaign workers and financing."[23] It is imperative that changes to the party system be made, so women do not have to struggle to obtain a nomination and to ensure that are given a fighting chance at actually being elected to office. These barriers, namely little promotion within the party, lack of nominations, and nominations only in uncompetitive ridings, need to be overcome in the political party system before women will have more than a fleeting hope of comprising half of the House of Commons.

Even if a female candidate gains a party nomination in a riding where her party has a chance of winning, her struggle is far from over. Studies have shown that "...the system for selecting MPs is the single most important predictor of women's recruitment to parliament."[24] Canada's first-past-the-post single-district system provides yet another barrier between women politicians and political office. In this system, a greater number of votes are required to win an election, and parties are more hesitant about nominating female candidates who they are not sure will win, two factors which inhibit the election of female candidates.[25] In a study of twenty-three Western-style democracies, Wilma Rule found that "...the proportional representation system provides the most political

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[22] *Ibid*, 67.

[23] *Ibid*, 69.

[24] Wilma Rule, "Parliaments of, by, and for the People: Except Women?," *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities*, ed. Wilma Rule and Joseph F. Zimmerman (Westport, CT: Greenwood Press, 1994) 16.

[25] *Ibid*, 19.

opportunity for women."[26] Rule also noted that the single-member district system, such as that in Canada, is the least favourable to women's recruitment.[27] In a proportional representation system, "nominees are backed by the party and campaign costs are ordinarily low for the individual candidate."[28] The foremost feature of the proportional representation system which is favourable to the election of women is a larger number of representatives per district (high district magnitude).[29] As the number of representatives in a constituency increases, the percentage of votes required for election decreases. [30] This provides women with a better chance of election than in a single-member district system where a plurality of the votes is required. Even in countries with a proportional representation system where the district magnitude is low, women are better represented than in single-member district systems.[31] According to Rule,

> Absent [changes in electoral policy], we may expect that women in most [single-member district] states will not reach parity with men in their lifetimes, where as the opposite is the prognosis for women in...[proportional representation] and other multimember district countries.[32]

[26] Wilma Rule, "Electoral Systems, Contextual Factors and Women's Opportunity for Election to Parliament in Twenty-Three Democracies," *The Western Political Quarterly* 40.3 (1987): 494.
[27] *Ibid,* 481.
[28] Wilma Rule, "Why Women Don't Run: The Critical Contextual Factors in Women's Legislative Recruitment," *The Western Political Quarterly* 34.1 (1981): 65.
[29] Rule, "Parliaments of, by, and for the People: Except Women?," 18.
[30] Rule, "Electoral Systems, Contextual Factors and Women's Opportunity for Election to Parliament in Twenty-Three Democracies," 487.
[31] *Ibid,* 494.
[32] *Ibid,* 495.

Thus, reforms to Canada's electoral system are required to allow women to overcome current barriers and provide them with a better opportunity of being elected to political office.

Some have argued that there are not as many women in politics because women just do not care, or have an "aversion to political life."[33] Studies have shown that, "Since the early 1960s women have been found to have lower levels of political efficacy and political knowledge, and less frequently campaign, contact public officials or attempt to convince others how to vote."[34] However, the lack of elected female MPs does not necessarily reflect women's indifference to politics, especially considering the fact that women vote in elections at about the same rate as men.[35] Rather, women's lack of political ambition could simply be the result of their evaluation of the possibilities they see available to them (or the lack thereof).[36] "It is equally possible that 'political motives and desires are moulded by the *availability* of political opportunities and that such opportunities are structurally determined'."[37] Thus is it not that women do not want to run for office, but more likely that they do not believe that they will have a chance of being successful in doing so. As it has been argued, women face innumerable barriers when contending elections, a fact which is more than a little discouraging. Even if a woman receives a party nomination, she has two systems working against her to prevent her winning the election.

Others have made the argument that the number of women in the House of Commons is irrelevant since political women are no different than political men. By extension then, any reforms which would increase the representation of women would be pointless and

[33] Louise Carbert, "Above the Fray: Rural Women Leaders on Regional Development and Electoral Democracy in Atlantic Canada," *Canadian Journal of Political Science* 36.1 (2003): 168.
[34] Vickers and Brodie, 61.
[35] *Ibid.*
[36] *Ibid,* 65.
[37] *Ibid.*

futile. Women have learned the necessity of "act[ing] like a man"[38] to be successful in politics, as exemplified on an international scale by women leaders such as Margaret Thatcher and Indira Ghandi.[39] Since most female politicians are "....fortyish, publicly heterosexual, able-bodied, white, well-educated, and urban,"[40] just like their male equivalents, "It is conceivable that the election of more women will simply replace men with women without altering the range of interests and identities being represented."[41] However, the lack of difference between the actions of male and female politicians could be the result of the strict party discipline employed in the Canadian House of Commons, requiring that MPs vote according to the policy of their party rather than on their own accord.[42] Women may not be free to support women's issues, even if they would do so otherwise. It has also be suggested that, "...if simply being a man is one of the lacking status attributes, in order to overcome this 'handicap' women may have to be even more of the other status requisites than their male counterparts."[43] Thus women may have to act *more* like men to make up for the fact that they are not men, in order to be accepted in political life. While not all women are feminists, and not all feminists are women, studies have shown that "...female legislators are more likely than their male counterparts to bring issues of importance to women onto the public agenda."[44] Former MP Sheila Copps once stated that "...if you increase the number of women in all political parties, you will see issues looked at in a

[38] Cheryl Simrell King, "Sex-Role Identity and Decision Styles: How Gender Helps Explain the Paucity of Women at the Top," *Gender Power, Leadership, and Governance*, ed. Georgia Duerst-Lahti and Rita Mae Kelly (Ann Arbor, MI: The University of Michigan Press, 1995) 67.
[39] Manon Tremblay, "Do Female MPs Substantively Represent Women? A Study of Legislative Behaviour in Canada's 35th Parliament," *Canadian Journal of Political Science* 31.3 (1998): 436.
[40] Arscott, 66.
[41] *Ibid.*
[42] Vickers and Brodie, 72.
[43] Clarke and Kornberg, 444.
[44] Young, 98.

different context."[45] Thus, while there is no way to ensure that once women get to the House of Commons they will support women's issues, studies have shown that it is probable that substantive representation for women will increase when there are more female MPs in Parliament. However, without reforms to the party and electoral systems, the chances of this occurring are unlikely.

Abraham Lincoln's concept of democracy, "Government of the people, by the people, and for the people,"[46] has yet to be realized in Canadian society since more than half of the people, women, are grossly underrepresented in the House of Commons. The perpetuation of traditional gender-roles affects women's opportunities to run for office, or prevents them from contending at all. Because of their family responsibilities, women have less time to devote to political work, are criticized by the media more than men, and are often a "step behind" men when they begin their political careers. Structures within political parties, such as the processes for promotion and nomination, restrict women's abilities to successfully compete in elections, and our electoral system is *least* compatible with the election of women. Jane Arscott acknowledged, "The general expectation would be that, in the absence of systemic discrimination and barriers, women will in fact be elected in about the same numbers as men."[47] It will not be until these barriers and gender-biases that face women are abolished that female politicians will have a fair chance at running for office, and our government will finally be reflective of the people it is supposed to represent.

[45] *Ibid.*
[46] Rule, "Parliaments of, by and for the People: Except for Women?," 15.
[47] Arscott, 68.

SELECTED TOPICS

"Man is by nature a political animal"
-Aristotle

FATAL ATTRACTION:
THE MOTIVATIONS BEHIND SUICIDE TERRORISM AND HOW IT CAN BE PREVENTED
By Andrew Clesle

One of the most under researched aspects of terrorism is that of suicide terrorism. When analysts study terrorist attacks, such as the airplane hijackings in the United States of America on 11 September 2001, the tendency is to focus on the attacks themselves, and the fact that it is also a suicide operation is often overlooked. Suicide terrorism has become an increasingly popular weapon ever since its inception in 1981 in Beirut, Lebanon[1]. Although suicide operations accounted for only three percent of all terrorist attacks in 2003, they were responsible for forty-eight percent of all fatalities[2]. Additionally, the global diffusion of this tactic is similarly chilling, with the number of annual suicide terrorist attacks increasing from three in 1983 to fifty in 2003[3]. The devastation caused by suicide terrorism calls for further research into the subject and a method by which future attacks can be prevented. This paper attempts to address the individual and group motivations behind suicide terrorism, with the aim of creating an effective 'toolbox' to counter this rapidly spreading phenomenon. To begin, a working definition of suicidal terrorism is required.

Ariel Merari, a leading expert on suicide terrorism in the Middle East, defines a suicide terrorist attack as a "situation where a person intentionally kills himself for the purpose of killing others, in

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[1] Rohan Gunaratna, "Suicide Terrorism: A Global Threat." In *Terrorism in Perspective*, Ed. Pamela L. Griset and Sue Mahan. (London: SAGE Publications, 2003): 220.
[2] Robert Pape, "The Strategic Logic of Suicide Terrorism," *American Political Science Review* 97 no.3 (2003): 6
[3] *Ibid*, 6

service of a political or ideological goal[4]." The perpetrator's ensured death is a precondition to the success of the mission[5]. Incidents where the assailant dies as a result of capture or accidental death are therefore not classified as suicide operations. This definition helps us distinguish between conventional terrorist operations where there is a chance of death, and modern suicide terrorism.

The first modern suicide terrorist attack is believed to have been the December 1981 bombing of the Iraqi embassy in Beirut that left 27 dead and more than 100 injured[6]. Suicide attacks did not become systematic however, until Lebanese based Hizb'allah began employing the tactic in 1983. The next group to engage in a suicide terrorist campaign was the Liberation Tigers of Tamil Eelam (LTTE) in 1987, followed by Hamas and Islamic Jihad in 1994, the Kurdish Worker's Party (PKK) in Turkey in 1996, Al Qaeda in 1996, and Chechen Rebels, Kashmir Rebels, and several smaller pro-Palestinian groups all beginning in 2000[7]. Between 1980 and 2003 there were 315 suicide attacks, with that number ballooning in the past three years as a result of the intensifying insurgencies and civil conflicts in Iraq and Afghanistan[8]. Now that a brief history of suicide terrorism has been given, the benefits of this strategy and the various motivations behind it will be discussed.

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[4] Ariel Merari, "Social, Organizational, Psychological Factors in Suicide Terrorism." In *Root Causes of Terrorism: Myths, Realities, and Ways Forwards*, Ed. Bjorgo, Tore. (London: Routledge, 2005), 70.
[5] Yoram Schweitzer, "Suicide Terrorism: Development and Characteristics." In Countering Suicide Terrorism: An International Conference, Herzliya, Israel, February 20-23, 2000, *International Policy Institute for Counterterrorism.* (Somerset, NJ: Transaction Publishers, 2002), I.
[6] Scott Atran, "Mishandling Suicide Terrorism," *The Washington Quarterly* 27, no. 3 (2004), 68.
[7] Walter Laquer, *No End to War: Terrorism in the Twenty-First Century.* (New York: Continuum, 2003), 78-86.
Pape, 357-360.
Schweitzer, 2-3.
[8] Mohammed Hafez, "Suicide Terrorism in Iraq: A Preliminary Assessment of the Quantitative Data and Documentary Evidence," *Studies in Conflict and Terrorism* 29 (2006), 592.

Suicide attacks offer a tremendous tactical advantage in that they are relatively inexpensive, require easily accessible materials and equipment, and are highly lethal[9]. Additionally, they are nearly impossible to deter- as it is extremely difficult to threaten someone who is already willing to die, and provide an advantage over conventional bombs because a suicide bomber can be more readily delivered to a location that is otherwise inaccessible, and the timing and detonation can be more effectively controlled[10]. Even though few ever fall victim to terrorism, its psychological impact affects entire targeted societies[11]. Finally and perhaps most importantly, volunteers are in endless supply if the group's "constituent population supports the use of this tactic[12]."

A common misconception of suicide terrorism is that it is the product of either religious indoctrination into Islamic fundamentalism or the suicidal inclination of individuals who would likely end their lives in any event. These arguments insufficiently explain why individuals become suicide terrorists and why organizations rely on this form of attack. In proving these assumptions false and discovering the true motivations behind suicide terrorism, individual and group motivations must be discussed. Individual motives can be broken into two categories: social and psychological, with the former being discussed first.

The average suicide attackers are in their early to mid twenties, usually single, and can be male or female[13]. After over two

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[9] Anne Speckhard, "Defusing Human Bombs: Understanding Suicide Terrorism." In *Social and Psychological Factors in the Genesis of Terrorism*, Ed. Jeff Victoroff. (In preparation, 2006), 3.
Richard Jackson, "Understanding Suicide Terrorism," *New Zealand International Review* 30 no.5 (2005), 24.
[10] Boaz Ganor, "Suicide Attacks in Israel," In Countering Suicide Terrorism: An International Conference, Herzliya, Israel, February 20-23, 2000, *International Policy Institute for Counterterrorism.* (Somerset, NJ: Transaction Publishers, 2002), 4.
[11] Bruce Hoffman and Gordon H. McCormick, " Terrorism, Signalling, and Suicide Attacks," *Studies in Conflict and Terrorism* 27 (2004), 251.
[12] Speckhard, 3.
[13] Merari, *Social*, 75.

decades of suicide terrorism, researchers have been able to acquire a wealth of data to draw on, and have been able to overturn some persistent myths. One of these is the idea that suicide terrorists tend to come from poor socio-economic backgrounds and have a poor education[14]. This belief has played a vital role in many American foreign aid programmes, with President G.W. Bush remarking, "We fight against poverty because hope is an answer to terror[15] ." Suicide terrorists in fact tend to come from middle class or wealthy families, and often possess post-secondary education[16]. In the words of Rohan Gunaratna, "They are like you and me[17]." The failure to discover any other unique demographic trends, as will be discussed later, has led many to point to religion, specifically Islam, as the principle motivation behind suicide terrorism.

Robert Pape, head of the University of Chicago Project on Suicide Terrorism, is quick to point out that the group responsible for the largest number of suicide attacks until 2003 was the LTTE, a Marxist-Leninist group adamantly opposed to religion[18]. While many suicide terrorists posses a strong religious affiliation, their actions are predominantly secular in nature[19]. Although Mohammad

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Leonard Weinberg, Ami Pedahzur, and Daphna Canetto-Nisim, "The Social and Religious Characteristics of Suicide Bombers and Their Victims," *Terrorism and Political Violence*, 15 no.3, (2003), 143.

[14] Khapta Akhmedova and Anne Speckhard. "The Black Widows: The Chechen Female Suicide Terrorists." In Female Suicide Terrorists, Ed. Yoram Schweitzer. (Tel Aviv, Israel: Jaffe Centre Publication, 2005), 14.

[15] Michael Bond, "The Making of a Suicide Bomber: What Drives Someone to Kill Themselves While Killing Others?," *New Scientist* 182, no. 2447 (2004), 34-35.

[16] Alan B. Kruger and Jitka Maleckova, "Education, Poverty, Political Violence and Terrorism." In *National Bureau of Economic Research,* http://www.nber.org/papers/w9074.pdf (April 22, 2006), 6-9.

Laquer, 87.

[17] Gunaratna, 223.

[18] Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism.* (New York: Random House, 2005), 4.

[19] Gunaratna, 223.

Andrew Silke, "The Psychology of Suicidal Terrorism." *In Terrorists, Victims, and Society: Psychological Perspectives on Terrorism and Its Consequences*, Ed. Andrew Silke. (Chichester, West Sussex, England: Hoboken, 2003), 102.

Atta, the believed leader of the September 11, 2001 terrorist plot, became increasingly fundamental throughout the 1990s, his main motivation behind his actions was his dislike of the United States' presence in the Middle East[20]. Moreover, the role that the concept of martyrdom, the idea of being sent to paradise in return for sacrificing oneself in the name of Islam, plays is often exaggerated[21].

In addition, individuals who participate in suicide operations occasionally have personal incentives, such as cultural, religious, and material[22]. Some become martyrs so they can be sent to heaven. In communities where suicide terrorists are admired and there is high public support for such actions, individuals may engage in this tactic to be remembered or even to gain fame for themselves as well as the family[23]. In the Palestinian case, posters picturing the latest martyr (Shahid) are usually posted, as well as his or her funeral being attended and celebrated by hundreds of supporters. Additionally, Shahids are often offered monetary compensation in exchange for their sacrifice to ease their mind knowing his or her family will be able to cope financially without them[24]. Although these incentives do play a role for some individuals, psychological motivations better explain the reasoning in becoming a suicide attacker.

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[20] Pape, *Dying*, 217-225.

[21] Laquer, 86-9, 95.

Silke, 100-101.

Lee Kuan Yew, "Can We Ever Understand Muslim Terrorists," *Forbes Global.* 6, no.19 (2003), 18.

[22] Mia Bloom, "Palestinian Suicide Bombing: Public Support, Market Share, and Outbidding," *Political Science Quarterly* 119, no.1 (2004), 85.

[23] Hisham H. Ahmed, "Palestinian Resistance and Suicide Bombing," In Root Causes of Terrorism: Myths, Realities, and Ways Forwards, Ed. Bjorgo Tore (London: Routledge, 2005), 100.

[24] Brenda J. Lutz and James Lutz. *Global Terrorism.* (New York: Routledge, 2004), 231.

Assaf Moghadam, "Palestinian Suicide Terrorism in the Second Intifada: Motivations and Organizational Aspects," *Studies in Conflict and Terrorism* 26, (2003), 72.

While suicide terrorists invariably come from oppressed communities, extensive research by psychologists and scholars suggests that they are no less rational or sane than the common individual[25]. Many leading experts argue that groups cannot create suicide bombers, but merely reinforce existing predispositions[26]. A common theme is for many suicide terrorists to have had personal histories of trauma. In Palestine for example, many suicide attackers have experienced the killing of a close family member or friend, or the personal wounding or beating at the hands of Israeli forces[27]. Suzanne Goldenberg notes, "Religious indoctrination is no longer central to the preparation of bombers, but the iron fist of Ariel Sharon[28]." This idea of personal trauma is not limited to the Palestinian case, with Chechen female suicide bombers being labelled Black Widows because they usually act in revenge for the deaths of their husbands, brothers, and sons[29]. In Sri Lanka, many of the Birds of Freedom, the LTTE's female suicide bombing division, are victims of rape at the hands of their enemy[30]. Both experiences being extremely traumatic, most likely played an essential role in their decision to make the ultimate sacrifice.

The psychologist Anne Speckhard also offers the idea of secondary traumatization. Speckhard has found a trend that the majority of suicide terrorists have either faced personal tragedy as mentioned above, or tend to be individuals removed from the conflict who have been alienated or marginalized by society and feel a sense of loss of identity[31]. Searching for a spiritual anchor and

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[25] Bond, 3.

George Michael and Joseph Scolnick, "The Strategic Limits of Suicide Terrorism in Iraq," *Small Wars and Insurgencies* 17, no.2 (2006), 114-115.

[26] Christoph Reuter, *My Life is a Weapon: A Modern History of Suicide Bombing*, (Trans. Ragg Kirkby. Princeton, NJ: Princeton University Press, 2004), 9-10.

[27] Nasra Hassan, "Letter From Gaza: An Arsenal of Believers," *The New Yorker*, November 19 2001.

[28] Ahmed, 97.

[29] Julian Madsen, "Murder and Martyrdom: Suicide Terror in the Third Millennium," *Arena Journal* 23 (2005), 99.

[30] *Ibid*, 21.

[31] Anne Speckhard, *Defusing*, 7-9.

sense of community in a bewildering world, they often learn of the struggles of marginalized societies through the media or Internet, and frequently feel sympathy to these groups[32]. Such individuals searching for a sense of belonging or purpose in life are vulnerable targets to terrorist recruiters in any society. This concept assists in explaining home-grown suicide terror and the migration of individuals from around the world to conflict areas where they volunteer to become suicide bombers. While individual psychological motivations assist in explaining why an individual becomes a suicide terrorist, they fail to explain the emergence and spread of suicide terrorism over the past twenty-five years, and why only certain groups utilize the tactic. This paper argues that suicide terrorism is an organizational phenomenon and is therefore more sufficiently explained by analyzing a group's motivation in employing this practice.

In a study of every suicide attack since 1983, Robert Pape concludes that nearly all suicide operations have been part of an organized campaign with a specific secular and strategic goal: to compel modern democracies to withdraw their military forces from what the terrorists see as their national homeland[33]. This is a contradiction to the common belief that suicide terrorism is a result of extremist Islamic Fundamentalism. To underline this argument, the leading employer of suicide operations between 1981 and 2003 were the Tamil Tigers, a Marxist-Leninist group adamantly opposed to religion, while Islamic groups were responsible for less than fifty percent of all suicide attacks in this same time period[34]. On the topic of democratic nations, Pape argues such countries are especially vulnerable to suicide terrorism because the democratic process makes it difficult to engage in rapid military retaliations. Furthermore, suicide terrorism is more likely to be practiced when

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[32] Scott Atran, "Individual Factors in Suicide Terrorism," *Science* 304, no. 5667 (2004), 48.

[33] Pape, *The Strategic*, 344.

Pape, *Dying,*, 4.

[34] Pape, *The Strategic*, 343.

Silke, 102.

the occupying power's religion differs from the religion of the occupied people because a conflict across religious divides increases fears that the enemy will seek to transform the occupied society[35]. Additionally, it makes it easier to label suicides as martyrdom missions in the name of religion, increasing public support for the operation[36].

This idea of foreign occupation can also be used to explain which countries are more likely to produce suicide terrorists. In his database, Pape discovers that Al Qaeda terrorists are ten times more likely to come from Muslim countries where there is an American presence than from other Muslim nations[37]. In the specific example of the Middle East, the sustained presence of heavy combat forces in Muslim countries may increase the odds of the next 9/11. While Pape argues that religious considerations are secondary, it is important to note that groups often use religion to recruit volunteers[38]. Where Pape falls short is that he fails to offer any other significant motivations of groups to engage in suicide terrorism, other than as a response to foreign occupation. A fellow leading academic in the field of suicide terrorism, Mia Bloom, picks up where Pape leaves off.

Bloom, who for the most part agrees with Pape's argument that terrorist groups hate us for our actions and not because of who we are, offers several additional important group motivations for engaging in suicide terrorism, all of which centre around the idea of public support. Bloom argues that a group's decision to use suicide terrorism is often influenced by the local community's support of the tactic, though public support is most likely associated with the

higher likelihood of political gains, rather than for the tactic itself[39]. Support for a terrorist group can come in several forms in that it provides food, safe houses, recruits, financial support, and most importantly political power[40]. In the Palestinian case, there has been a strong correlation between the level of public support and the number of attacks[41]. Suicide operations are often used as a method of increasing support, and therefore a group will not embrace the tactic if it decreases their support base. The public response to the tactical use of suicide terrorism depends on a variety of factors, including how the tactic is used, against whom, and for what purpose[42]. Although the concept of public support furthers our understanding of a group's motivation to engage in suicide campaigns, there are a few radical individuals such as Bin Laden and Zawahiri, who are not concerned with public approval, and only the achievement of their ideological goals.

Under the concept of public support is the idea of the "spoiler effect," which can be broken into three pieces[43]. Firstly, if terrorist sympathizers approve of suicide terror, there will be a shift of status and esteem away from moderates and peacemakers towards the terrorist group. Secondly, suicide operations persuade the target group that their enemy is fanatical and moderates cannot deliver a peace settlement that will hold. Thirdly, the target group is likely to respond to suicide attacks with new violence against terrorists and sympathizers, creating a new cycle of retaliation and escalation. This latter point is based on the idea of using an enemy's strength against itself and eliciting a response from the state that will

[35] Pape, *Dying*, 22.
[36] Jonathan Kay, "Numbers Racket," *Commentary* 120, no.2 (2005), 70-1. Moghadam, 74-86. Yew, 18.
[37] Pape, *Dying*, 103, 112.
[38] Mark Juergensmeyer, *Terror In The Mind Of God: The Global Rise of Religious Violence.* (Berkley: University of California Press, 2000), 70-78.

[39] Mia Bloom, *Dying to Kill: The Allure of Suicide Terror.* (New York: Columbia University Press, 2005), 19-22.
[40] Bruce Hoffman, "The Logic of Suicide Terrorism," *The Atlantic Monthly* 3 (2003), 61.
[41] Bloom, *Dying*, 19-22.
[42] *Ibid*, 81.
[43] Bloom, *Dying*, 20-4.
Clark McCauley, "The Politics of Suicide Terrorism," *The Middle East Journal* 59, no.4 (2005), 665-6.

do for terrorists what they cannot do for themselves: put down moderate competition and mobilize new supporters of terrorism[44].

The final concept offered by Bloom is that of outbidding. Many societies that face an unwanted foreign occupation often contain multiple resistance organizations[45]. Suicide terrorism is often part of a strategy to outbid a group's rivals or competitors. Such an example is Hamas competing with Islamic Jihad and smaller factions for the support of the Palestinian people[46]. Before it was routine to make a videotape of suicide terrorists delivering their last testament in which the banner of their affiliated group is shown, multiple groups would often attempt to claim responsibility for suicide attacks. Each group was seeking the political capital which increased public support could deliver. The various concepts mentioned above have enhanced our understanding of the motivations behind suicide terrorism, leaving only the global spread of it to be understood.

In explaining the global diffusion of suicide terrorism, this paper argues that an increasingly number of terrorist organizations are embracing this tactic because it has been proven to be an effective method of achieving their desired goals. When Hizb'allah engaged in a suicide campaign against American and French military targets in Lebanon in 1983, they were successful in driving out the foreign troops[47]. After Hizb'allah so easily convinced American and French troops to leave the country, many other terrorist groups became inspired. After a lengthy suicide campaign that included the assassinations of various high-ranking political leaders including the Prime Ministers of India and Sri Lanka, the Tamil Tigers effectively achieved a peace agreement and their desired autonomy[48]. Similarly, Palestinian groups have increasingly achieved their desired goal,

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[44] *ibid*, 666.
[45] Bond, 36.
[46] Bloom, *Dying*, 29-31.
[47] Ariel Merari, "The Readiness to Kill and Die: Suicidal Terrorism in the Middle East." In Origins of Terrorism: Psychologies, Ideologies, Theologies, State of Mine, Ed. Walter Reich (Washington, DC: Woodrow Wilson Center Press, 1998), 192.
Pape, *Dying*, 61-5.
[48] Silke, 105.

with public support for their actions being shown most recently with the election of Hamas as the official government of Palestine.

When suicide terrorism can be expected to emerge can be explained in two parts. Firstly, suicide groups are generally weaker than their opponents and do not possess the technological and military capabilities to engage in a conventional war[49]. Suicide terrorism is ultimately the most effective military tactic that these groups possess. Secondly, groups tend to result to suicide attacks and the local population will support it only after other strategies have been exhausted[50]. In almost every suicide campaign carried out to date, suicide operations were not exercised until the first phase of struggle produced few results[51]. Such an example is that of the Tamil Tigers who failed to achieve their goal of an independent state after years of struggle, and in Palestine where suicide terrorism did not become popular until the second intifada. The public audience is significantly more likely to support suicide terrorism only after it has seen that conventional and peaceful means proven ineffective.

After discussing the strategic advantages, successes, and rapid spread of this tactic over the past twenty-five years, it is imperative that various policy options be explored and pursued. Unnoticed, there is the possibility that this phenomenon will become the tactic of choice of insurgents in future incidents of unwanted foreign military presences, a sharp rise in the number of home-grown suicide terrorist attacks in the West could occur, and finally having already appeared in East Africa, it could spread rapidly among various conflict areas throughout the continent. Before discussing the various policy options, it must be noted that this paper is not seeking to solve the issue of radicalism, terrorism, or

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[49] Ahmed, 92-4.
Pape, *Dying*, 7.
[50] Bloom, *Dying*, 78.
[51] Martha Crenshaw, "The Logic of Terrorism: Terrorist Behaviour as a Product of Choice," *Terrorism and Counter Terrorism* 2 no. 1 (1998), 8.
Sandip Roy "Expert on Suicide Bombers Looks at London, Iraq," *National Catholic Reporter* 41 no.37 (2005), 21.

violent insurgencies in general, but is strictly focussing on how the specific use of suicide terrorism can be reduced and eliminated.

There is no single profile to describe every suicide terrorist or every group that employs the tactic, however, after discussing the various individual and group motivations, we are able to derive several methods that can be used to prevent and counter suicide terrorism. In doing so there are two types of power: hard and soft. Hard power refers to military responses and prevention techniques such as increased homeland security[52]. Military responses as have been argued in this paper do not serve a long-term solution. Though a strong military response may disrupt or destroy groups that employ terrorism, and appear effective in the short-term, it can create a new cycle of trauma and motivate the creation of new suicide terrorists[53]. It is important however, to exercise hard power in the sense of homeland security, eliminating vulnerability to attacks. This paper will argue however, that the most effective tactic in countering suicide terrorism is the exercising of soft power: using policy instead of military action.

Though this paper has suggested that suicide terrorism is a group and not individual phenomenon, there are several initiatives that can be taken to reduce the number of volunteers for suicide operations. After noting that very few trends could be found in analyzing the demographics or motivations of suicide terrorists, the most effective policies would be those aimed at the ideas of primary and secondary trauma. If a state ceases employing military reprisals and humiliation as a tactic, individuals will as a result have less motivation to retaliate by making the ultimate sacrifice. Not embracing aggressive tactics on the part of the target state, will assist in eliminating many individuals' motivation to become a suicide terrorist.

Speckhard notes that once the traumatic incident has taken place, there are still methods of decreasing the likelihood that an

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[52] Atran, *Mishandling*, 82-6.
[53] Bloom, *Dying*, 82.
Jackson, *Understanding*, 25.

individual will engage in suicide terrorism, such through the implementation of social programs. Many suicide terrorists embrace the tactic because they have lost hope that success can be achieved through conventional or peaceful means. Programs can be set up to target various audiences, such as the Black Widows, using education to offer them another path through which they can vent their anger and frustration at the Russian government. By educating individuals at the most vulnerable stage of their life on the benefits and successes of non-violent campaigns, a future generation of potential suicide terrorists may be prevented[54].

Additionally, victims of secondary trauma who are searching for a worthwhile cause may be prevented from choosing the path of suicide terrorism through the promotion of organized social groups. If these marginalized and alienated individuals are targeted and embraced by organized social groups and become integrated into society, they may be prevented from being vulnerable prey for terrorist recruiters. Besides using social groups as a method of achieving this, governments must attempt to increase the opportunities available to these individuals and create a forum in which they can express themselves[55]. Additionally, states should end the transmission of horrifying images through the media and Internet that will inspire marginalized and alienated individuals[56]. Although these methods may prevent the creation of suicide terrorists, they do not address the bigger issue of preventing suicide terror from being employed as a tactic.

After analyzing the trend that suicide terrorism tends to occur in nations where there is an unwanted foreign presence by a democratic country, the most common method of preventing suicide attacks is for these nations to withdraw their military presence. This however breaks the standard policy of Western nations of not negotiating with terrorists. Additionally, if a foreign presence is

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[54] Speckhard, *Defusing*, 11-12.
[55] Speckhard, *Understanding*, 20.
[56] Scott Atran, "Genesis of Suicide Terrorism," *Science* 229, no.5612 (2003), 1534.
Speckhard, *Defusing*, 11.

rapidly removed it will be considered a victory on the part of the group and can therefore inspire other groups to begin employing the tactic, as was the case in the American and French withdrawal of troops from Lebanon following several suicide operations by Hizb'allah. Rather than a quick withdrawal of troops as Pape suggests, slowly making concessions and engaging in peace talks may prove more effective. If progress is being displayed in the form of negotiations, a group will be motivated to not execute suicide attacks fearing it may ruin the negotiations, that is unless they feel the negotiation process and resulting agreement is unfair[57].

Previously when discussing a group's motivation of engaging in suicide terrorism, one of the key motivators was its effect on public support. Targeting this idea may prove to be an extremely successful tactic in reducing and preventing a group's use of suicide terror [58]. This suggestion has been made by a variety of academics over the past few years; few however have offered a method of accomplishing this. The same factors that affect public support are the same ones that affect an individual's and group's motivation to embrace suicide terrorism. Firstly, if the target ceases to engage in tit for tit attacks, this will reduce the public's hatred and in turn support of future attacks[59]. The difficulty with this is that if a government fails to respond with decisive military action, it can face decreased support amongst its constituents[60]. A solution is to arrest the leaders of these terrorist groups. This could please constituents while not angering the public of the opposition in the same manner that targeted assassinations would.

Secondly, it must be demonstrated to the public that peace negotiations are effective and do indeed work. In the Afghanistan or Iraq case, it would be ideal to find an area of the country where in one incident public pressure and moderates were successful in achieving the desired changes and goals. Once such an example has

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[57] Ahmed, 89-91.
Weinberg, 141-2.
[58] Ganor, 4-5.
[59] Atran, *Mishandling*, 82-86.
[60] Weinberg, 148.

been found, it must be broadcast throughout the region, displaying to the public that moderates can deliver peace settlements without resorting to violent methods. Such a success has the potential to inspire others opposed to the foreign presence to end their approval of suicide terrorism and support moderates and peaceful protest.

Finally, public support for suicide terrorism can be decreased through the creation of social programs. Implementing education programs aimed at promoting civil society, and the benefits and successes of non-violent means, will hopefully result in the increasing of the resilience of the civil population, resulting in an increase of a constituency's support of peaceful methods[61]. Additionally, if the occupying nation can contribute something to the society, it will be reflected in lower public support of suicide operations. For example, the creation of schools and health centres may not change the public's desire to have the occupying presence leave, however it may increase support for a peaceful struggle. Rather than Western Nations instilling these changes themselves, it might prove more effective to supply moderates with the resources to set up an effective infrastructure, successfully drawing support away from terrorist groups and insurgents. It is difficult to gauge whether these tactics will be effective, as few of these policy-oriented ideas have been implemented.

To summarize the various approaches outlined, a condensed blue print of policy options will be presented. In the short term, intelligence gathering, increased homeland defence, and the cessation of military reprisals must be coincided with crisis management and infrastructure reconstruction. In the long term, the imprisonment of terrorist leaders and ending of the transmission of horrifying images through the media must coincide with negotiations, humanitarian aid, a transfer of power to moderates, and the creation of trust. Although none of these policies will single-handedly end the struggle, they should decrease support of violent and bloody methods.

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[61] Ami Pedhazur, *Suicide Terrorism*. (Malden, MA: Polity Press, 2005), 194-7.

After discussing the various motivations behind suicide terror, this paper has suggested that although it is important to identify the individual factors involved in creating suicide attackers, suicide terrorism is ultimately a group phenomenon. Additionally, there is no single set of characteristics that can be applied to all individuals or groups that employ the tactic, but rather each case is built upon a variety of motivations. In countering suicide terrorism, two goals must be achieved: the defeat of the current pool of terrorists, while simultaneously undermining the conditions that otherwise produce the next and potentially larger generation of suicide attackers. Any new strategy must recognize the trade off between these two objectives, since the use of heavy force to defeat today's suicide terrorists is most likely to stimulate the rise of more. No one of the suggested policies will single-handedly eliminate suicide terrorism, but rather a variety of these suggestions must be implemented together on a case-by-case basis. Finally, in order to effectively counter suicide terror, it must involve worldwide cooperation[62]. Only if organizations and their constituency's population witness other groups around the world achieving success through non-violent means, will they be inspired to abandon their current tactics and embrace the same peaceful methods.

[62] Gunaratna, 245.

An Evaluation of the Capability Approach to Development
By Jackie Bonisteel

<u>Introduction</u>

As much as we try to avoid the unpleasant truth, our planet is in a state of emergency. Poverty, inequality, destitution, subordination and misery are words that too accurately describe the state of affairs for billions of people at all corners of the globe. In such a crisis situation, it is tempting to challenge the significance of theory in development efforts. Should we not be concerned instead with taking immediate and practical steps that will lead to tangible improvements in the lives of the suffering?

The literature on capabilities, however, provides glaring evidence that theory has an integral and inescapable role to play in easing global suffering. Theory helps to shape the worldview of the actors of the development community, which in turn shapes policy and action on the ground. It was a misguided worldview that led to the inept and sometimes disastrous Bretton Woods policies. The capability theorists, pushing for a change in perception, are thus engaged in a necessary and laudable pursuit.

This paper will argue that a capability approach to development is desirable for numerous reasons. Its widened focus, role for extensive deliberation, scope for contextually-sensitive policy, and potential to lead to genuine improvements in the lives of the world's poor make it far superior to other approaches. While implementing such a pluralistic framework in practice may be difficult, this should not deter development actors from seeking to do so. I will outline the capability approach as described by Sen and Nussbaum, then proceed to address two contested issues of practical import - applying the capabilities framework to comparative

measurement, and specifying capabilities. I will begin by discussing the shortcomings of the dominant income/wealth focus of the international (largely Western) development community.

<u>The Income/Wealth Approach</u>

The capability approach to development can be regarded as a response to the ineffectual and inadequate dominant paradigm of the past several decades. While it is certainly true that many actors acknowledged the need for a holistic approach to development, influential bodies such as the World Bank and the IMF focused primarily on raising incomes. This led to the institution of structural adjustment policies that forced cutbacks to social service provision and public sector employment. Deterioration in basic infrastructure and social safety nets had especially disastrous effects on women and children. While some developing nations saw overall GDP increase, the poor generally found themselves even worse off than before. Even by the World Bank's own standards, the policies failed miserably.[1]

The phenomenon of rising incomes coexisting with rising inequality was justified with reference to the Kuznets Curve, a model that predicts an eventual decline in inequality once a society reaches a threshold level of development. However, as Moller Okin reveals, the Kuznets hypothesis has not proven accurate.[2] In spite of the evidence, the IMF, World Bank and foreign governments continued to enact and support policies based on these faulty premises, thus condemning them to failure.

<u>A New Paradigm: Capabilities</u>

As Sen notes, the fact that the income focus has failed does not imply that income is inconsequential to well-being. Economic development and resultant income growth are undoubtedly necessary to free the world's poor from the constraints of poverty.

[1] Moller Okin, Susan. "Poverty, Well-Being, and Gender: What Counts? Who's Heard?" *Philosophy and Public Affairs* 31.3 (2003): 282.
[2] Moller Okin, 287.

However, income is instrumentally useful - it is a resource allowing individuals to meet their wants and needs. Monetary income is an important resource, but it is not the only one available. Education is an example of an instrumentally important resource for realization of functioning that can be ignored by income comparisons. Secondly, income itself is not equatable with well-being. The capability approach recognizes that various constraints can prevent individuals from gaining wealth and transferring it into capability. Sen identifies four types of constraints.[3]

For one, a person's capacity to earn income is affected by factors such as age, gender, and location. Applying the case of gender, even if a country's GDP is increasing and employment opportunities are becoming more abundant, social practices might prevent women from obtaining those jobs. Lack of educational opportunities, lack of time due to household duties, and subjection to the domination of male kin are some of the factors preventing women from realizing the fruits of economic development. An income focus tends to overlook these inequalities of opportunity.

Secondly, these same factors may also constrain individuals from transferring income into capability. An elderly woman with sick children to feed, for instance, may be less able to meet her needs from a given amount of income than a single, young, and healthy male. The income approach fails to recognize that a given amount of income may provide limited capabilities to some based on context.

Third, power structures within a household might result in some members receiving a disproportionate share of food, clothing, health supplies, and other goods essential to quality of life. Women and children (particularly female children) tend to be those to receive a comparatively small share of goods. Cross-country comparisons of wealth often ignore this distributional issue, treating a household as a "black box".[4]   Finally, relative deprivation is an issue ignored by income comparisons. Though a poor man in a rich

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[3] Amartya Sen, *Development As Freedom* (New York: Anchor Books, 1999), 88-89.
[4] Moller Okin, 286.

country may have higher income than a poor man in a poor country, the man in the rich country may be worse off due to the limited capabilities that his income can produce.

Thus, while income generation is an important component of development, the capability approach urges us to look beyond it. As Sen argues, a broadened perspective may actually be more successful in promoting the economic development that a narrow income focus seeks. Sen writes, "It so happens that the enhancement of human capabilities also tends to go with an expansion of productivities and earning power."[5] Expanded capabilities improve an individual's capacity to do productive work, and therefore to contribute to economic development. For this reason and those mentioned above, Sen argues that we must broaden our focus from income to freedoms.

Capability as Freedom

The central argument of Sen's *Development as Freedom* is that expanded freedoms should be both the ends and the means of development.[6] Freedoms, by Sen's conception, are what allow people to pursue the life path of their choice. Unfreedoms, such as lack of access to healthcare and education, gender inequality, authoritarian politics, and violence impede one's ability to make use of primary goods. Development policies must aim to remove unfreedoms and increase freedoms of various forms.

Sen conceives capability as a type of freedom, specifically, "the substantive freedom to achieve alternative functioning combinations."[7] While the importance of capabilities lies in their relation to human functioning (what we actually do), both Sen and Nussbaum argue that, for political purposes, capability should remain the focus. In Nussbaum's words:

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[5] Sen, *Development As Freedom*, 92.
[6] Sen, *Development As Freedom*, 3.
[7] Sen, *Development As Freedom*, 75.

It is perfectly true that functionings, not simply capabilities, are what render a life fully human, in the sense that if there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained. Nonetheless, for political purposes it is appropriate that we shoot for capabilities and those alone. Citizens must be left free to determine their own course after that.[8]

This freedom to choose is central to the capability focus. Nussbaum provides the example of fasting versus starving to illustrate the point.[9] Adequate nutrition is an important functioning, however a devoutly religious person or a political activist may choose to forego their nutritional requirements in order to honour their convictions. Still, those who choose to fast have the *capability* to meet their nutritional needs, while a starving child unable to access sufficient sustenance does not. Political enforcement of functioning could potentially disallow this personal choice to fast. If we accept Sen's claim regarding the centrality of freedom, such limitation would be undesirable and likely counterproductive. Forcing individuals to pursue a certain path because they possess the capability to do so would likely be met with apprehension and serve only to undermine the capability framework.

Agency and Contextual Sensitivity

This discussion of capability versus functioning brings forth the fundamental importance of agency to the capability approach. Rather than perceiving the poor as victims or patients, they are treated as active agents of their own destiny. Sen argues that increasing women's access to education and income-generating employment in turn boosts the well-being not only of those women,

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[8] Nussbaum, Martha C, *Women and Human Development* (Cambridge: Cambridge University Press, 2000), 87.
[9] Nussbaum, 87.

but also of society as a whole.[10] In other words, increasing women's agency increases their capability to pursue a wide variety of functioning options. This focus on agency, I believe, is one of the most significant contributions of the capability approach. It is not only arrogant to treat the poor as incompetent bystanders, but also foolish. Policies that fail to account for the specific wants and needs within a given community are likely to fail due to their inappropriateness. No one solution will apply in every context. To find the best solution, those with the most to gain from development must be the dominant actors.

The capability approach is thus a necessarily a pluralist approach. There is no single homogenous factor - such as income - that can be applied to compare overall well-being. Sen argues that this pluralism is not problematic, but simply an acceptance of reality. When we attempt to minimize the vast wealth of human experience to one good, we diminish our humanity. The gains of development efforts that maintain tunnel vision will be minimal or even damaging.

Measuring Capability

The capabilities approach to development is generally accepted on a theoretical level. Economists, political theorists and policy makers generally concede that the dominant income-based approach has failed to enact change, and that income alone is far from sufficient to guarantee well-being. It is difficult to argue with the conclusion that genuine development is dependent on what people are able to be and do.

Where controversy arises is in the implementation of a capabilities approach in practice. Translating the foundational claims to coherent development policy or cross-country comparison proves more difficult. Sen himself concedes that the foundational merit of the approach is evident, but that this does not necessarily

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[10] Sen, *Development As Freedom*, 190-192.

imply that practical attention should be focused upon capabilities. He says,

> The need for pragmatism is quite strong in using the motivation underlying the capability perspective for the use of available data for practical evaluation and policy analysis.[11]

Sen advances three different approaches for applying the capabilities framework in practice. The direct approach compares different vectors of functionings, the supplementary approach entails supplementing traditional procedures with capability considerations, and the indirect approach uses capability information to adjust income measurements.[12] Sen says, "Each of these approaches has contingent merit that may vary depending on the nature of the exercise, the availability of information, and the urgency of the decisions that have to be taken."[13] Individual contexts must then be examined to determine just how extensively capability considerations can be applied.

Other theorists are less optimistic about the feasibility of incorporating a capabilities framework into development in practice. Srinivasan argues that the Human Development Index (HDI), the UN's attempt to incorporate Sen's capabilities approach into a comparative measurement tool, faces too many practical problems to be effective. Srinivasan argues, "The HDI is conceptually weak and empirically unsound, involving serious problems of non-comparability over time and space, measurement errors, and biases."[14] While he does not criticize Sen's capability approach itself, he sees the HDI as an example of a failed attempt to incorporate capabilities into cross-country comparisons. Srinivasan concludes

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[11] Sen, *Development As Freedom*, 81.
[12] Sen, "Development As Freedom", 81-83.
[13] Sen, "Development As Freedom ", 84-85.
[14] T.N. Srinivasan, "Human Development: A New Paradigm or Reinvention of the Wheel?" *The American Economic Review* 84.2 (May 1994): 241.

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that Sen's capabilities framework is too complex and contextually variable to be applied to effective comparative tools.

Robert Sugden is reverential in his treatment of Sen's capabilities approach. However, he is unconvinced that implementation constraints can be overcome. He writes, "Sen, I think, sees his main object as that of convincing us that functionings and capabilities provide the most appropriate 'informational base' for normative economics. Constructing a theory on that base is of lesser priority for him."[15] While Sugden concedes that Sen has indeed persuaded him that functionings and capabilities should be central considerations for development economics, he is sceptical of the potential to create operational metrics given disagreement over conception of the good life and the problem of how to value sets. Sugden is more sympathetic to an approach that first looks to the rules that govern social interaction, and evaluates those rules against procedural criteria.[16]

As detailed above, the plurality of the capability approach implies that it will be more complicated than an approach that focuses upon a single factor like income. While Sugden is correct to argue that this complexity may make it difficult to apply a capability framework in practice, I am not convinced that this is sufficient grounds for economists and policy-makers to abandon the approach. As Sen argues, the world is complex, and disregarding that fact will only undermine development efforts. Given the failure of attempts to reduce development to a single factor, continuing along this same path would be senseless. Commitment to contextually-sensitive development efforts grounded by a capability focus is an ideal starting point for innovative and effective development. Sen provides three types of strategies for doing so, and exploration of these proposed options is certainly advisable.

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[15] Robert Sugden, "Welfare, Resources, and Capabilities: A Review of Inequality Reexamined by Amartya Sen," *Journal of Economic Literature* 31.4 (Dec. 1993): 1954.
[16] Sugden, 1961.

Identifying Capabilities: Nussbaum's List

Nussbaum presents a list of capabilities that she argues are universal to humanity regardless of cultural, social or political differences. The list includes what Nussbaum refers to as "combined capabilities", meaning that both internal and external factors must be considered when determining whether a capability is being fully realized.[17] For instance, citizens living under a repressive regime may have the internal capacity to articulate opinions (due to health, learning etc), but external forces may still prevent them from utilizing this capacity. Nussbaum argues that her list provides a basic framework that can be employed by governments in the formulation of constitutional principles.

The capabilities on the list are meant to allow pluralism in implementation, or what Nussbaum calls "multiple realizability".[18] There is no need for consensus on the nature of human good, or proper ways to secure capability realization in practice. The principles of the list, while they should all be articulated within constitutions, are worded in general terms so to allow scope for interpretation at the level of implementation. Also, Nussbaum applies the notion of a threshold level of capability, beneath which human functioning at a reasonable level is not possible.[19]

Sen avoids endorsing such a list due to his belief that lists and weights cannot be formulated without reference to the context in which they are to be applied. The capabilities that people believe to be central will vary from region to region, culture to culture, or individual to individual. Furthermore, Sen argues that a definitive list of capabilities might diminish the scope for public reasoning, which should be the primary means for developing the application of the capability approach.[20]

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[17] Nussbaum, 84-85.
[18] Nussbaum, 77.
[19] Nussbaum, 6.
[20] Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy and Public Affairs* 32.4 (2004): 333.

Based on her personal interactions with poor women in developing nations, Moller Okin is critical of Nussbaum's extensive list. Moller Okin's work led to her to the conclusion that, when speaking about their deprivations, the poor tend to mention lack of assets and resources to meet basic needs, need for peace and security, the centrality of human capital (healthcare, basic literacy) and issues of psychological poverty. Ability "to search for the ultimate meaning of life" or "to use imagination and thought in connection with producing self-expressive works and events of one's own choice" were never articulated as necessary capabilities by the poor with whom she interacted, though these are included on Nussbaum's list.[21] According to Ackerly, liberal values of autonomy and independence are more culturally dependent than Nussbaum acknowledges. To include them on a universal list is to impose her own values upon all of humanity.[22]

However, it is important to recognize that Nussbaum's list is not meant to be static or exhaustive. She mentions that her inclusion of matters such as literacy and basic scientific education are not timeless, but intended for the modern world.[23] This implies that there is room for the list to be amended based on changing circumstances. Furthermore, there is room for amendment based on deliberative processes. Nussbaum writes,

> Since the intuitive conception of human functioning and capability demands continued reflection and testing against our intuitions, we should view any given version of the list as a proposal put forward in a Socratic fashion, to be tested against the most secure of our intuitions as we attempt to arrive at a type of reflective equilibrium for political purposes.[24]

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[21] Moller Okin, 306-310.
[22] Ackerly, Brooke A, *Political Theory and Feminist Social Criticism* (Cambridge: Cambridge University Press, 2000), 105.
[23] Nussbaum, 77.
[24] Nussbaum, 77.

Thus, Moller Okin and Ackerly's criticisms of specific points on the list can be conceived as part of this necessary deliberative process.

Furthermore, Nussbaum contends that, simply because women may not articulate desire for the opportunity to exercise particular functionings, this does not imply that they are not important.[25] For instance, circumstances may make education impractical in the life of a poor woman in a rural area. More pressing concerns for her are likely obtaining adequate nutrition or freeing herself from the subordination of her husband. To be relevant, education must be both accessible and capable of leading to new opportunities. Once this is the case, education will likely be considered as an important capability.

More problematic than the content, though, is Nussbaum's methodology in the formulation of her list. Moller Okin, Ackerly, and Sen all argue for an approach that accounts for the views of women in the developing world. While Nussbaum agrees, and does consult women on the ground, her approach is intellectualized and based upon Aristotelian methodology. Since Nussbaum's method contains no explicit requirement to consult with the silent voices of a society, Ackerly argues that it is incomplete. She writes, "Like Aristotle, Nussbaum inadvertently imports into her specific criticisms priorities that are different from those of her subjects."[26] According to Ackerly, Nussbaum's list may be useful as a guideline, but must be subject to criticism based on the voices of the poor. Ackerly advocates a method which she refers to as Third World Feminist Social Criticism. This approach entails "an alternative methodology that requires critics to listen to many critical views and to hear all of the silent voices and thus achieves a significant innovation over Nussbaum's capability ethic."[27]

Deliberation is an essential component of the capability approach. Sen phrases it thus:

[25] Nussbaum, 110.
[26] Ackerly, 96.
[27] Ackerly, 110.

> The richness of the capability perspective broadly interpreted (. . .) includes its insistence on the need for open evaluational scrutiny for making social judgments, and in this sense, it fits in well with the importance of public reasoning.[28]

That it is able to evolve in response to deliberation is a merit of the capability approach. I agree with Ackerly that the voices of the oppressed and silenced must be actively sought out, and that Nussbaum's methodology may be problematic as it fails to do so in a coherent manner. While Nussbaum's list is more adaptable than Ackerly acknowledges, development efforts must not be based on outside principles, but on direct consultation with those they seek to affect. While many of the important capabilities articulated by the "silent voices" will likely be consistent with those found in Nussbaum's list, the list itself may limit capacity to be contextually sensitive.

I agree with Sen that the capabilities to participate in public discussion and political processes are no less vital than the capability to achieve physical well-being. Political rights are imperative for inducing social response, and also for conceptualizing needs.[29] The capabilities approach must maintain its commitment to deliberation by allowing flexibility in defining various capabilities. Still, pressing circumstances necessitate pragmatism, and some consensus on the content of capabilities may be required to move forward. In light of such concerns, I maintain that deliberation is central to ensure that working lists such as Nussbaum's are constantly evolving.

Conclusion

Development should be about expanding the freedoms and opportunities available within a given society. Such development will never occur by way of inflexible and contextually ignorant

[28] Sen, "Philosophy and Public Affairs", 333.
[29] Sen, "Development as Freedom", 154.

policies. Deliberative processes that include "silent voices" are essential, and the capability framework (broadly defined) prioritizes such deliberation.

The issues involved with applying capability in comparative measurement and of specifying the content of capabilities must be addressed. While no simple solution exists, I am convinced that broad perspective and flexibility will allow the capability framework to effectively cope with complexities. The capacity to adapt to changing circumstances, convictions, and precedents will allow the approach to survive challenges and shape development efforts for decades to come.

INTERNATIONAL RELATIONS

"Interest does not tie nations together; it sometimes separates them. But sympathy and understanding does unite them." – **President Woodrow Wilson**

AMNESTY INTERNATIONAL AT WESTERN

Amnesty International at Western is a youth branch of Amnesty International Canada. A political awareness and philanthropy student club, Amnesty International at Western consists of over 150 members and holds several events throughout the school year to spread awareness about human rights to members and to the rest of the Western community. The club unites students from various faculties, countries and interests, all of whom share a passion for human rights. Members work individually and as a group to end human rights violations world-wide. By joining, members have the chance to speak out and stand up for human rights at UWO, in London, in Canada, and in the World. This school year's motto in conjunction with an Amnesty International campaign is "Human Rights for All, No Exceptions!"

The past semester was extremely successful, due to motivated, committed members, and the support of UWO Oxfam. Past events included a Photo Petition Booth on Concrete Beach to stop the arms trade, a No-Sweat Fashion Show in the University Community Centre (UCC) featuring ethically made clothing, sweat shop information and live performances and an Awareness Booth in the UCC regarding child rights, which coincided with International Children's Day. The club also partnered with the London Guluwalk committee to raise awareness for the night commuters of Northern Uganda. Future events include a "Write for Rights" letter writing day, a free film screening and a workshop at the upcoming Millennium Development Goals Seminar on campus.

All are welcome to join! For more information please
Email uwoamensty@hotmail.com
And visit http://www.usc.uwo.ca/clubs/amnesty.

With hope,
Katie Omstead and Jasdeep Khosa
Co-Presidents
Amnesty International at Western 2006-07

WESTERN OXFAM STUDENTS' ASSOCIATION

The Western Oxfam Students Association is a club which was founded in recognition of the mission and campaigns of Oxfam, an international non-profit organization working in more than 100 countries to find lasting solutions to poverty, suffering and injustice. Oxfam seeks an increased public understanding of how economic and social justice is crucial to sustainable development. We strive to be a campaigning force promoting the awareness and motivation that comes with global citizenship while seeking to shift public opinion in order to make equity the same priority as economic growth. At Western, the Oxfam club works each year on Oxfam campaigns such as Make Trade Fair, Control Arms, and Make Poverty History, as well as on other events like the AdBuster's Buy Nothing Day and the United Nation's World Food Day. The club also works in solidarity with other groups to found events such as the Oxfam/Amnesty No-Sweat Fashion Show. Western Oxfam's primary goals are to provide students with opportunities to become involved first hand with social and economic justice movements as well as providing educational activities discussing these issues to the Western student body.

Heather Perquin
President
Western Oxfam Students' Association 2006/2007

SPECIAL INTRODUCTION

As a professor who first taught at Western over 30 years ago, it was a great pleasure to read these very fine essays by some of our best students. Two things struck me upon having done so. First, the quality of the best of them was at least as high as any of the essays I can remember marking in the mid-1970s, so I see no evidence from these compositions that writing standards have declined over the years, at least not among our best-performing students. Second, none of the papers would have been written at all in the mid-1970s, or at least would have been very different, which can be taken as evidence – as if more evidence was needed – that the world has indeed changed a great deal.

The Universal Declaration of Human Rights, for example, has been around since the late 1940s, but the essay here on that subject – which attempts to reconcile the concepts of universality with cultural relativism in relation to human rights – would have been almost inconceivable until very recently. This seems particularly true of the presumed obligation upon all member states of the United Nations to uphold and protect in all countries the rights stipulated in the UDHR, even if this is contrary to local norms, customs and values. The author recognizes that this form of universality is highly prone to betrayal, mostly for want of effective enforcement. At the same time, strict enforcement of universality can deny forms of individual dignity because social/legal practices that are not universally shared are not necessarily invalid. The author reconciles these opposing principles by settling on the notion of what I would call regionalized "sub-declarations" (and enforcement) of human rights, along with a call for a multi-tiered specification of rights, where some are defined as universal others are formally recognized as regional variations on those rights.

For different reasons, the essay on Europe's so-called democratic deficit would also have been almost unimaginable thirty years ago, if only because the legal and institutional edifice of European integration was so modest then compared with that of today. Here, the author's main point is that the institutions of the

European Union are legal without being legitimate. The legality is conferred by the investment of powers in EU structures by national governments; however, member states cannot confer legitimacy upon such institutions, which rather must earn it from citizens through their exercise of those powers. However, the EU's institutions and processes are failing miserably at this. The European Parliament is barely democratic, partly because the election of MEPs tends to turn on national, rather than European issues, and partly because coalitions form within the EP after the fact, with very little cross-national party affiliations evolving. For another, the Council meets in secret and relations between Council and Commission are opaque. Not surprisingly, therefore, polling repeatedly suggests a low level of popular legitimacy for European institutions. The author proposes to solve this problem with what he or she refers to as "liberal-democratic internationalism" but is not very clear about what the political vehicle for such a reform process might be.

Finally, the essay on Chinese-Russian energy relations helps to register some of the momentous changes that have taken place in the international economy and political system over the past thirty years, in particular the collapse of the Soviet Union and the spectacular rise of China. At the surface, it provides a strong overview of the opportunities and challenges involved in connecting Russian supplies of oil (and to a lesser extent, natural gas) with Chinese markets. The author touches upon practically all of the significant issues surrounding this question, most notably the current transportation bottlenecks associated with the rapid increase in China's demand for fuels and the consequent necessity for large-scale pipelines. There are also problems surrounding the conversion of markets from one predominant fuel source to another. In back of all this, though, there is the compounding difficulty of other markets competing for Russian supplies; Russian concerns about China's developing energy links with other countries of the former Soviet Union that border on China; the physical security of any pipelines that do come to built; and, looming over everything, the power politics involved in relations between Russia, China, Japan, and the Koreas. As the author correctly points out, the economic "fit"

between the expanding Chinese need for fuels and the Russian need for investments and markets is a natural one, but that by no means guarantees that the right deal can be struck in a timely manner.

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UNIVERSALITY & RELATIVISM:
FINDING A NEW DIMENSION FOR HUMAN RIGHTS DEFINITION
By Eduardo Cuartas-Villada

The United Nations (UN), through its General Assembly, adopted the Universal Declaration of Human Rights (UDHR) on December 10, 1948. The UDHR was created with the aim of protecting the rights of individuals in every corner of the world. Nevertheless, this document has been under constant criticism virtually since its inception. One of the features that has been under most scrutiny, which also will serve as the focus of this paper, is that of its universality concept. The idea of universality was introduced to stress the principle that the human rights presented in the UDHR were to be enjoyed by every individual on the basic premise that we are all human beings. This paper will provide evidence that the concept of universality and the basis for it, as currently presented by the UDHR are not an appropriate approach to human rights. In addition, the idea of cultural relativism will be presented, as it is of outmost importance if we are to formulate a new definition of human rights that will more effectively provide said rights to all individuals around the world – while addressing the concerns of those that reject the current approach. In order to do this, the essay will start by defining the concept of universality and its grounding in the current definition of human rights, followed by a brief description of the mechanisms currently used for their enforcement. This will be followed by an explanation of the concept of cultural relativism and a summary of the pros and cons that this perspective presents to the current approach to UDHR. The conclusion will provide alternative, based on a halfway point between universality and relativism, which will offer a new definition of human rights that is acceptable – and applicable – by all individuals and cultures throughout the world.

As previously mentioned, the UDHR puts forward the idea that the rights that are proclaimed therein are universal in nature, and that all members of humankind must have access to them. It has a secular grounding, and it aims to "establish a minimum standard of decency, a common denominator of what is morally acceptable in a civilized society."[1] Proponents of universality argue that the articles of the UDHR, particularly 3 to 11[2], "are so clearly connected to basic requirements of human dignity, and are stated in sufficiently general terms, that any morally defensible contemporary form of social organization must recognize them."[3] These articles deal with the rights to life, liberty, security, protection from slavery, arbitrary arrest and inhumane treatment. In this respect, the principle of universality does not seem unfounded. In fact, as some scholars point out, "these rights should be upheld not only for moral reasons. There are sound functional reasons [for their preservation]."[4] Moreover, they argue that these rights exist on a level that goes beyond the authority of states[5] – although all members of the UN are assigned the responsibility of promoting the "Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations."[6] It follows then, that the universality of human rights not only refers to the accessibility to those rights by every individual, but also applies to the responsibility of member states to promote and respect these rights above all obstacles, even if

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[1] Christina M. Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts," *Human Rights Quarterly* 16.4 (1994): 749.
[2] United Nations, "Universal Declaration of Human Rights." 1996. <http://www.unhchr.ch/udhr/lang/eng.pdf > (November 21, 2006): 2-4.
[3] Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6.4 (1984): 417.
[4] Cerna, 745.
[5] Rowan Kruft, "Human Rights, Individualism, and Cultural Diversity," *Critical Review of International Social and Political Philosophy* 8.3 (2005): 266.
[6] United Nations, I.

these obstacles "find their expression in their local cultural norms and values."[7]

The subject of the responsibility of member states provides us with a direct link to the application and enforcement of human rights. On this subject, we must distinguish two separate steps: signature, and ratification. By signing the UDHR, a member state demonstrates its intention to become one of the followers of the principles outlined by the declaration. However, it is in through the ratification process that member states accept their obligation to apply, and enforce, the principles contained within the UDHR. If we take into consideration the number of countries that have ratified the UDHR since its creation in 1948, there is great reason to believe in its principle of universality.

Unfortunately, experience has shown that ratification of the UDHR, or any other human rights instrument for that matter, does not always guarantee that the state in question will in fact follow through on the enforcement of the principles that are contained within it. On this subject, Neumayer suggests that "ratification can deflect internal or external pressure for real change. In combination with the poor monitoring and enforcement mechanisms of international human rights treaties, [...] ratification can even lead to worse human rights records."[8] The argument behind this being that ratification can be used by states simply as a symbolic gesture, to get regulatory bodies attention off their case, without necessarily implementing measures to advance their human rights record. A possible solution to this problem, Neumayer argues, is to promote values of democracy and civil society: "treaty ratification often becomes more beneficial to human rights the more democratic the country is. In addition, we also find evidence that ratification is more beneficial the stronger a country's civil society, that is the more its

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[7] Zehra F. Kabasakal Arat, "Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights," *Human Rights Quarterly* 28 (2006): 424.
[8] Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution* 49.6 (2005): 927.

citizens participate in international NGOs."[9] Although there might be some truth to this argument, it is not an adequate defence for the principle of universality since, as common knowledge indicates, democracy and civil society are values that are not universally upheld.

Kabasakal takes a more radical approach when dealing with the issue of enforcement of human rights. Her perspective is that the human rights regime compels member states to respect and enforce human rights "by restricting the state's behaviour toward its own citizens and residents, and by obliging the states parties to uphold and protect universal rights of all persons, including those living within the borders of other states."[10] Kabasakal's theory introduces the concept of interventionism – that is, a state intervening in another's affairs if the latter one is a human rights violator – in order to protect the rights of individuals. It is not hard to see the serious sovereignty debates that such an action would cause. In addition, it is a stance that clearly favours military powerful nations – it is difficult, for example, to imagine Somalia taking action to prevent the United States from illegally holding prisoners in Guantanamo Bay. Yet it is far more likely to picture the opposite – a U.S. led effort to invade Somali soil with the motive of rescuing individuals from some human rights abuse. Moreover, even if we ignored the issues of sovereignty and favouritism towards powers, experience shows that powerful nations are not likely to take action when human rights violations do not affect them, or their citizens, directly. The reasoning behind this being that "contrary to, say the extent of trade openness, a country and its citizens are hardly affected if the human rights of citizens from other countries are violated in other countries."[11] A clear, and current, example of such as situation is the events taking place in Darfur, western Sudan, where various ethnic

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[9] Neumayer, 950. Heidi Morrison (2004) also supports the argument of the respect for human rights being closely tied with democratic values, on page 5 of the article "Beyond Universalism," she states that "no matter the cultural context they [human rights] cannot take hold unless the political system is a modern democracy."
[10] Kabasakal, 428.
[11] Neumayer, 926.

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groups are being systematically eliminated, without any intervention from any of the UN's member states.

The issue of interventionism, or any other enforcement mechanism for that matter, leads us back to the idea of universality. If the values promoted by the UDHR were in fact universally shared, it would be of relatively little importance if there were no effective instruments to force states into compliance. Because, in theory at least, if all states shared the values of the UDHR, they would all comply with relative ease. Unfortunately, as we have previously seen, acceptance and even ratification of the UDHR is not an accurate indicator of enforcement and respect of human rights. As Donnelly points out: "consensus is no measure of truth. Without it, however, any particular theory – and any international action based on it – is vulnerable to attack."[12] Therefore, it becomes clear that basing the application of human rights on the principle of universality is not an effective approach because, although most states have signed and ratified the UDHR, this is of little importance if the values promoted by the declaration are not in harmony with those of the particular state. With this in mind, a new approach must be taken. The possibility presented by this essay will be based on the perspective of cultural relativism.

The concept of cultural relativism, as it applies to human rights, holds that culture plays a role in defining the validity of a specific right.[13] Therefore, the starting point for the cultural relativist approach is the fact that, as critics of the universalist approach point out, the UDHR is an originally Western concept. This feature became clear since the moment the declaration was first conceived. "The principal drafters of the Universal Declaration were Canadian and French, while the American representative on the Commission on Human Rights, Eleanor Roosevelt, played a leading role in ushering the Declaration through the UN."[14] Moreover, the wording

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[12] Jack Donnelly, *International Human Rights* (Oxford: Westview Press, 1993), 22.
[13] Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (New York: Cornell UP, 2003), 89-90.
[14] Heidi Morrison, "Beyond Universalism," *Muslim World Journal of Human Rights* I.I (2004): 8.

of the preamble of the UDHR is also a matter of concern for Morrison, who asserts:

> The word 'whereas' implies an assumption about what the readers knows, as if the phrase it fronts is commonly held knowledge. 'Whereas', synonymous with words like 'because', 'seeing that', 'considering', and 'since', gives the idea that there is no doubting the information that is to follow. The following phrase is an example that elucidates this point: "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world." This phrase is essentially saying that because dignity and inalienable rights are the foundation of freedom, justice, and peace, then the Universal Declaration has the authority to declare a common standard of rights for all. But, why does the Declaration take it as a given that inalienable rights are the foundation of justice? Who says all members of the human family are equal? While not to dismiss the value of the concepts of justice and equality, the style of writing in the preamble of the Universal Declaration can be criticized for assuming a consensus on the merit of Enlightenment Law.[15]

If Morrison's concerns were taken into the discussion for relativism, the argument would be that the Enlightenment was a phenomenon purely based in the West, and therefore it is not valid to use it as the basis for a universal definition of human rights. The reason being that, as the relativist argument emphasizes, the rights set forth by the document would not necessarily be applicable in the context of a non-Western culture. It is essential then, in order to find a new definition of human rights to realize that "human rights cannot be conceived of as a list, but instead as a complex idea to be understood in light of a country's history, culture, economics and relations between its individuals, families, tribes, communities,

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[15] *Ibid,* 14.

ethnic groups, associative groups and state institutions."[16] What this means is that it is impractical to pursue the application of the Western conception of human rights to non-Western cultures, instead, a different basis must be found to provide these cultures with a definition of human rights that is more reflective of their cultural values. An example of such a norm is presented by Donnelly by using the subject of free and consenting spouses in marriage. He contends that, as it is defined in article 16 of the UDHR, consent of spouses in marriage[17] "reflects a historically and culturally specific conception of marriage that it would be unreasonable to apply everywhere without exception." It is important to highlight the fact that Donnelly is in no way advocating forced marriages, but instead he suggests "accepting certain notions of consent that would be unacceptable in the contemporary West."[18] A simple example of such a notion is that of arranged marriages, a widely practiced, and valued, tradition among members of various non-Western cultures.

Advocates of universalism however, argue that allowing human rights to be modified is problematic since, from their point of view, human rights are based on the concept of human dignity. The argument to counter this claim is that "neither the concept of human dignity nor its connection with rights, however, are objective or fundamental. Dignity as recognized and granted by others is subjective and variable."[19] A way to illustrate this is the practices of some indigenous communities that deal with wrongdoers by means of physical punishment, alleging that "in their cultures,

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[16] *Ibid,* 5.

[17] The UDHR defines the right to marry as follows: 16.1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
On the subject of consent to marry, it states: 16.2. Marriage shall be entered into only with the free and full consent of the intending spouses.

[18] Donnelly, *International Human Rights,* 37.

[19] John O'Manique, "Universal and Inalienable Rights: A Search for Foundations," *Human Rights Quarterly* 12.4 (1990): 469.

imprisonment as a punishment is more torturous than inflicting shame and physical pain by whipping."[20] For members of these groups, it is less dignified to walk among their peers without having received what they consider 'proper' punishment. Therefore, relativists argue, that "there is no valid reason to deny them the status of the name of human rights simply because they are not universal."[21] In other words, it is unjustified to deny them of these rights – in this case, to be punished according to the laws of their particular community - simply because their claims are not corroborated in the Western conception of rights.

The example of physical punishment, along with practices that might be labeled authoritarian in Western contexts, provide the grounds for opponents to challenge the cultural relativist perspective. These scholars proclaim that minority groups and indigenous populations within a state that claim self-determination in an effort to maintain their cultural identity and resist assimilation, might be in fact influenced by their leaders, who wish to maintain their authoritarian structures and monopoly over the interpretation of rights. These critics go on to assert that without democratizing the interpretation and decision-making process, these people cannot truly exercise their right to self-determination.[22] Moreover, the criticism also alleges that the UDHR "was formulated through debates that involved participants from different cultures [...] not limited to Western states."[23] I will respond to these two claims in the order they were stated. First, the idea of indigenous leader wishing to maintain control over their communities is an allegation that is based on the idea that these leaders were somehow self-appointed or that are tyrannical in their rule. While this might be sometimes the case, it is not accurate to generalize this claim, at least not at long as there exists the possibility that these peoples did in fact, even if it was through tacit agreement, take part in the selection of leadership

[20] Kabasakal, 435.
[21] Kruft, 270.
[22] Kabasakal, 436.
[23] Ibid, 421.

at some point. To suggest otherwise or to question their choice, should be considered condescending and would undermine their rights to self-determination. The second claim – the idea that the current human rights definition was conceived with both Western and non-Western input – lacks validity simply based on the idea that, at the time the UDHR was conceived, it was "formed when much of the world was still under colonial rule."[24] We must note that, although the colonial rule of the West at the time of the conception of the UDHR might not have been a decisive factor, it does provide grounds to argue that the West's influence over the rest of the world at the time, could have undermined the cultural identity of the non-Western states participating in the process.

Is this essay suggesting then, that relativism offers the solution to the human rights issue? As it is to be expected, the answer is more complicated than yes or no. It is important to stress the fact that, as Donnelly argues, "radical or unrestricted relativism is as inappropriate as unrestricted universalism."[25] In other words, a possible solution to the dilemma might be finding a place somewhere in between. Basically, we must understand that outlining fixed rules as to what constitutes human rights, as proven by the current definition of the UDHR, is not the solution. At the same time, allowing every state to set its own rules offers no guarantee that basic privileges – such as the rights to life, liberty, security, protection from slavery, protection arbitrary arrest and protection from inhumane treatment – will be respected. A better approach would start by distinguishing different levels for human rights:

> At the top are what we can call the 'concepts,' very general formulations such as the rights to political participation or work. Here very little cultural variability is justifiable. Below these are what we can call 'interpretations.' For example, a guaranteed job and unemployment insurance are two interpretations of the right to work. Some interpretative variability seems plausible for most

[24] Morrison, 2.
[25] Donnelly, *Cultural Relativism*, 406.

internationally recognized human rights. And at the third level, considerable variation in the particular form in which an interpretation is implemented may be justifiable.[26]

If a basic enough definition of human rights is defined – one that guarantees the rights we mentioned before (life, liberty, security, and protection from slavery, arbitrary arrest and inhumane treatment), in addition to dignity, as defined on a cultural basis – a common ground can be found for all cultures. Moreover, this process can be done without undermining the right to self-determination, since these states will have the authority to interpret these rights as they best suit their particular community. The third level, implementation, will be discussed next.

When tackling the issue of implementation, we must revisit the idea of acceptance and compliance, something that, as previously discussed, presented one of the main flaws of the current human rights system. Nevertheless, if the system is modified to reflect the cultural differences of nations around the world, a possible solution arises. Cerna argues that "change and acceptance of these norms must ultimately come from within the region and cannot be imposed by outside forces. The creation of a regional human rights arrangement provides [...] accelerated acceptance [...] of international rights norms."[27] In other words, organizing states on a common cultural ground, should offer them a means to discuss implementation of human rights on the terms of their own identity. This approach will eliminate the concerns of some states that their cultural values are being undermined by the cultural imperialism of the West and will, as in the case of The Cairo Declaration of Human Rights in Islam, accommodate the culture and values of a specific group of states.[28] Efforts such as this, will increase the chances of compliance by member states, re-enforce their cultural identity, and provide a more effective method of enforcement of compliance –

[26] Donnelly, *International Human Rights*, 37.
[27] Cerna, 752.
[28] Morrison, 8.

member states will not be able to use cultural relativism as a shield for abuses – since the formulation of the rights was conducted in a culturally relative environment. The underlying philosophy behind this proposal is that we are not all the same, and although we share biological similarities, being human is about more than organic functions. We are all unique beings and as such value certain aspects of human rights more than others. As summarized in the words of Rowan Kruft: "we need to break the link between universality and human rights and to acknowledge that while some human rights are universal, others are not or need not be."[29]

[29] Kruft, 270.

THE EUROPEAN UNION'S DEMOCRATIC DEFICIT:
LEGALITY WITHOUT LEGITIMACY
By Heather Foulkes

In half a century, the European project has evolved from an intergovernmental treaty to an increasingly unified entity with its own territory, flag, currency and central bank, as well as its own executive, legislature and court. The issue of the European Union's (EU) democratic deficit gained prominence in response to the collapse in popular support in the early 1990s. Although the legality of EU institutions is undisputed, legitimacy is somewhat lacking in the eyes of the public. The European Parliament (EP) is a directly elected transnational parliament responsible to almost 460 million citizens in 25 countries.[1] Despite various characteristics of democracy, some areas of the EU could benefit from reform. I argue the European Union suffers from a democratic deficit, which it must rectify in order to improve its public relations. I will address legitimacy, democracy and European citizenship before turning to specific evidence of a democratic deficit in the European Parliament, Council and Commission. I adopt a liberal-democratic internationalist theoretical perspective in arguing the modern EU requires a higher level of democratization. The level of support among citizens for the EU further reveals the need to address the democratic deficit. Finally, I emphasize the limits of Moravcsik's defense of the democratic deficit and suggest a few ways to resolve the situation.

First, the level of the EU's legitimacy depends on output legitimacy or effectiveness, and input legitimacy or democratic process. The democratic method is that "institutional arrangement for arriving at political decisions in which individuals acquire the

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[1] Simon Hix, *The Political System of the European Union* (New York: Palgrave Macmillan, 2005) 11.

power to decide by means of a competitive struggle for the people's vote."[2] Competitive elections foster political debate, form political identities and guarantee that elected officials and policies respond more or less to the preferences of citizens.[3] According to Greene, the principle that the people affected by policies and decisions should be enabled, at least indirectly, to participate in an open process of public deliberation and argument based on rationality and public good is fundamental to democracy.[4] Democracy is a "system of political institutions that enables the members of a political community to secure their common interest, where those members are prepared to treat one another as political equals and where there is recognition of human fallibility."[5] Citizens must exercise influence through selection and authorization, and control through transparency and accountability. Political leaders must gain information through the electoral process and the public sphere, and respond to the interests of the ruled. For this paper, a regime is democratic if a number of its systemic features allow citizens, acting as free and equal members of the regime, to participate effectively in governance.

Second, feelings of a common European political identity vary across countries, regions and social groups. The Treaty of Rome aims to "lay the foundations of an ever closer union among the peoples of Europe."[6] The formal provisions in articles 17-22 of the Treaty on European Union, as amended by the Treaty of

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[2] Thomas D. Zweifel, *Democratic Deficit? The European Union, Switzerland, and the United States in Comparative Perspective* (Lanham, Maryland: Lexington Books, 2002) 6.
[3] Hix, 179-180.
[4] Owen Greene, "Democratic Governance and the Internationalisation of Security Policy: The Relevance of Parliaments," *The Double Democratic Deficit: Parliamentary Accountability and the Use of Force Under International Auspices*, ed. Hans Born and Heiner Hanggi (Aldershot, England: Ashgate, 2004) 25.
[5] Albert Weale, "Between Representation and Constitutionalism in the European Union," *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, ed. Albert Weale and Michael Nentwich (London: Routledge, 1998) 51.
[6] Zweifel, 13.

Amsterdam, establish a limited form of EU citizenship as a complement to national citizenships.[7] In terms of informal citizenship, citizens are increasingly mobilizing at the EU level.[8] Some degree of *demos*, or political identity based on shared values and practices must exist for the EU to function democratically. First, citizens must believe they belong to the same EU-level political community. Second, citizens must believe the system is legitimate and reflects their values, so that disaffection about a particular policy does not become disengagement with the system. A Euro-*demos* focuses on "civil inclusion and shared values rather than common traditions, ethnic identities or cultures."[9] It is misguided to assume a well-developed *demos* is a social prerequisite for democracy. Such an assumption fails to explain progress toward democracy in many states in recent decades. Canada, Switzerland and the United States prove that ethno-cultural homogeneity is not a prerequisite for democratization. The development of political community, specifically trust, collective argument and solidarity, can accompany the development of democratic institutions and processes. In fact, these processes mutually re-enforce each other. European citizens may come together based on shared understandings of rights and the common pursuit of solutions to shared problems. Thus, a Euro-*demos* exists to the limited degree necessary for further democratization of the EU.

Third, in 1988, the EP defined the democratic deficit as the transfer of powers from the member states to the European Community and the exercise of these powers at the Community level by institutions other than the EP.[10] The EU is legitimate because its authority is recognized and confirmed by the acts of other legitimate authorities. However, derivative legitimacy is no longer adequate because EU law "impacts directly on citizens, as producers,

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[7] Alex Warleigh, *Democracy in the European Union: Theory, Practice and Reform* (London: Sage Publications, 2003) 115.
[8] *Ibid*, 10.
[9] Warleigh, *Democracy* 114.
[10] Julie Smith, "The European Parliament and Democracy in the European Union," *Balancing Democracy*, ed. Roland Axtmann (London: Continuum, 2001) 284.

employees and consumers, etc., and requires their acknowledgement of it as binding on them, and therefore their recognition of the EU as a rightful source of valid law."[11] The principal aspects of the democratic deficit are insufficient legitimacy and participation. To be democratic, the EU must provide regular opportunities for citizens to engage with the decision-making process. Currently, citizens face inadequate and ineffective opportunities.[12] Interest groups and non-governmental organizations (NGOs) lobby and influence policy decisions made by the EU. Over 3000 interest groups and 100 regional offices are based in Brussels.[13] However, interests groups and NGOs may lack financial independence, internal democracy and political education.[14] The participation of civil society actors in international institutions narrows the participatory gap, but cannot close the gap on its own.

Unfortunately, the "structure of European governance does not fully conform to any meaningful interpretation of the many standard definitions of democracy."[15] Bellamy and Castiglione argue that none of the main European institutions fully satisfies the democratic principles of popular responsiveness and accountability.[16] The EU increases executive power in the form of elite consensus and decreases national parliamentary control. The Council, the Commission and the EP share legislative powers. No single decision-making authority can be held accountable for EU decisions, contributing to the system's incomprehensibility. Much of the business of government is not subject to the normative publicity

[11] David Beetham and Christopher Lord, "Legitimacy and the European Union," *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, ed. Albert Weale and Michael Nentwich (London: Routledge, 1998) 17.
[12] Warleigh, 10.
[13] Richard Bellamy and Dario Castiglione, "The Uses of Democracy: Reflections on the European Democratic Deficit," *Democracy in the European Union: Integration Through Deliberation?* ed. Erik Oddvar Eriksen and John Erik Fossum (London: Routledge, 2000) 68.
[14] Warleigh, 118.
[15] Bellamy, 69.
[16] *Ibid.*, 69.

associated with transparent decision-making. Supranational institutions such as the EP, Commission and courts do not gain legitimacy from the democratic regimes of the member states and therefore must acquire legitimacy for themselves.

Moreover, parliaments are the central locus of legitimacy and accountability in democratic polities. The EP possesses several positive powers and rights that further democracy in the EU. The EP amends legislation, shares budgetary authority with the Council and appoints other EU bodies such as the Ombudsman.[17] The EP may convene Committees of Inquiry into alleged maladministration in the implementation of EC law and ask questions of the Council and Commission.[18] Although the EP has the ability to discard the entire Commission, it lacks a provision to censure individual Commissioners. The EP is consulted on the Council's nominee for Commission President, but may only accept a College of Commissioners nominated by national governments.[19] The EP possesses only a limited formal right of legislative initiative, and has more powers to oversee the Commission than to scrutinize the Council.[20]

However, despite significantly increased power and a role in some ways more extensive than some national parliaments, legitimacy remains lacking. The EP suffers from a relatively low profile and its influence usually goes unseen by the public, which compromises its ability to constitute a forum for public debate.[21] Although codecision empowers the EP, it also brings it into a secretive system of making policy with the Council. Conciliation, an important stage of the codecision process whereby the EP and the Council resolve their differences over proposed legislation, takes place behind closed doors. The EP's seat is divided between Brussels and Strasbourg, necessitating a considerable amount of expensive

[17] Warleigh, 79.
[18] *Ibid.*, 79.
[19] Smith, 285.
[20] Warleigh, 79.
[21] *Ibid,* 78.

travel between the two cities.[22] The distance contributes to a sense of alienation and reduces the legitimacy of the EP. Public interest in the EP has been steadily declining but further strengthening the powers of the EP may reverse this trend.[23]

Furthermore, direct and consensual authorization through the election of the EP is still largely ineffective. Ideally, political parties mobilize interests, facilitate broad coalitions of diverse interests and raise the level of public discussion. The EP is unable to develop patterns of partisan politics and debate which would award it greater visibility. Political parties are "primarily national in terms of organization, funding, constituent support, candidates, and the targets of their programs."[24] European elections are almost national by-elections because electoral campaigns typically focus on national issues.[25] Intraparliamentary coalitions and symbolic associations of national parties exist instead of European parties. The Christian Democrats' grouping, the European People's Party (EPP), the Party of European Socialists (PES), the Federation of Green Parties, and European Liberal, Democrats and Reform Party remain essentially umbrella organizations.[26] Voters supporting many of these parties do not know before the elections which groups their MEPs will sit with in the EP.[27] In 1999, there were 16 different electoral systems for EP elections because even Britain and Northern Ireland had different systems.[28] Although the EP possesses some significant powers, the lack of partisan debate on European issues hampers its democratic contribution to the EU.

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[22] Smith, 278.
[23] Warleigh, 78.
[24] James A. Caporaso, "The European Union and the Democratic Deficit," *Federalism Doomed? European Federalism Between Integration and Separation*, ed. Andreas Heinemann-Gruder (New York: Berghahn Books, 2002) 89.
[25] Michael Th. Greven, "Can the European Union Finally Become a Democracy?" *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, ed. Michael Th. Greven and Louis W. Pauly (Lanham, Maryland: Rowman and Littlefield Publishers, 2000) 37.
[26] Smith, 280.
[27] *Ibid.*, 283.
[28] *Ibid*, 286.

To continue, the Council is the only legislature in the democratic world that makes decisions in secret.[29] The Council consists of representatives of the governments of the member states, who are democratically answerable to elected assemblies. Although the Council may claim some form of democratic authorization, it is rare for national governments to be elected on a clear European agenda. The lack of transparency is exacerbated by the fact that voting is more implicit than explicit and decisions are frequently reached by persuading potential adversaries to demur.[30] Similarly, the Commission is "selected in ways that correspond more to bureaucratic and diplomatic criteria than to anything resembling democratic mechanisms," yet proposing legislation and supervising the implementation of decisions are politicized tasks.[31] The Commission may employ a Russian doll strategy whereby "the initial passage of framework legislation meets with less initial resistance but later necessitates more specific legislation and triggers gradual self-commitment and a self-promoting dynamic of consent."[32] Thus, the structure of the Council and Commission contribute to the democratic deficit.

As for theoretical perspectives, liberal-democratic internationalism, radical communitarism and cosmopolitanism are relevant to a discussion of the EU's democratic deficit. The theoretical perspective I adopt in my argument, liberal-democratic internationalism, aims at reforming the current institutions. Liberal-democratic internationalism seeks to develop and reform pluralist international institutions to strengthen patterns of representation within them.[33] Radical communitarism "promotes the creation of alternative structures based on transnational participatory governance according to functionalist rather than geographical

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[29] Hix, 178.
[30] Zweifel, 15.
[31] Bellamy, 74.
[32] Zweifel, 35.
[33] Greene, 27.

patterns."[34] This theory seeks to build on new social movements to govern according to common problem areas. However, geographical patterns remain salient, since the precondition for holding a European passport is citizenship in one of the EU's member states as national governments issue passports. Cosmopolitanism posits the reconstruction of global governance on all levels based on a democratic law transcending national and other sovereignties. The EU democratic process could then complement and reinforce national democratic processes and mechanisms. Cosmopolitanism exhibits excessive reliance on the concept of a *demos*, as revealed by the belief that only nationality provides citizens the necessary shared set of understandings and cultural practices.[35] For these reasons, I believe liberal-democratic internationalism's focus on strengthening patterns of representation is most relevant to resolving the EU's democratic deficit.

Moreover, I argue that the EU is no longer merely a pareto-efficient regulatory state and therefore requires a higher level of democratization for the sake of legitimacy and credibility. The European project has "evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory."[36] The EU has the capacity to make decisions with significant impact on the social and economic orientation of public life, engage in international agreements with third countries and international organizations, and spend large amounts of public funds.[37] The EU shifts the ability of citizens to rely upon traditional channels of influence to secure their

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[34] Heiner Hanggi, "The Use of Force Under International Auspices: Parliamentary Accountability and Democratic Deficits," *The Double Democratic Deficit: Parliamentary Accountability and the Use of Force Under International Auspices*, ed. Hans Born and Heiner Hanggi (Aldershot, England: Ashgate, 2004) 6.
[35] Warleigh, 25.
[36] James A. Caporaso, "The European Union and the Democratic Deficit," *Federalism Doomed? European Federalism Between Integration and Separation*, ed. Andreas Heinemann-Gruder (New York: Berghahn Books, 2002) 93.
[37] Zweifel, 11.

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desired outcomes.[38] The European Union is more than an international organization, although less than a state, and requires better democratic credentials. The EU is "not solely, or even mostly, a tool by which national governments achieve their preferred policy outcomes without significant cost or compromise."[39] Therefore, some level of democracy is necessary at the EU level to compensate for the loss of democratic control at the national level. Legitimacy-generation through the mere production of public goods is no longer adequate because the integration process has developed to the point that the EU is capable of having a negative impact on the rights of member state nationals.[40] The EU is an independent source of governance because it "establishes political aims and policy programs and reinforces their implementation through its own competencies, resources, and instruments."[41]

In addition, the levels of support among citizens for the EU further reveal the need to address the democratic deficit. Most citizens accept the European Union to a degree and no member state has ever seriously contemplated leaving.[42] Therefore, calls are most frequently for reform rather than removal. Eurobarometer data and low voter turnout indicate insufficient trust in EU institutions related to a perceived lack of legitimacy.[43] States without historic traditions of democratic capitalism favour European integration as a means for its promotion, whereas states with stable democratic legacies are suspicious of the democratic deficit. Generally, higher levels of support for the EU exist in Italy, Spain, Portugal and Greece than in the United Kingdom, Denmark and Sweden.[44] Thus, concerns about the democratic deficit are more evident in states with strong democratic institutions.

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[38] Warleigh, 22.
[39] *Ibid.*, 7.
[40] *Ibid.*, 112.
[41] Greven, 46.
[42] Dinan, 325.
[43] Zweifel, 12.
[44] Hix, 155.

Although strong public support exists for the Europeanization of certain policy issues, this does not equate to a strong sense of support for, or identification with, the EU as a whole.[45] In the autumn of 2000, Eurobarometer data revealed only 47 percent of member state nationals believe their country has benefited from its membership.[46] In 2002, only 53 percent of respondents replied that they trusted the EU institutions, while 32 percent said that they did not trust the bodies.[47] In a Eurobarometer survey immediately after the European parliamentary elections, only 16 percent said they were very interested in European news content, while half replied they paid little attention and the remaining 33 percent paid no attention at all when European issues were broadcast on the news.[48] European coverage scored significantly below categories such as social issues, economics, sports and politics.[49] Interestingly, only 63 percent thought the EP had a significant role in the life of the EU.[50] This may partially account for low voter turnout rates for EP elections. At the 1999 European parliamentary elections, voter turnout hovered at 55 percent, a decrease of eight percent from the 1979 elections.[51] Significantly, a sense of civic duty took precedence over national interest and political party support as the primary reason for voting.[52] Thus, encouraging a stronger sense of EU citizenship through greater democratization could increase voter turnout rates for EP elections.

On the other hand, Moravcsik defends the democratic deficit by arguing that constitutional checks and balances, specifically "narrow mandates, fiscal limits, super-majoritarian and concurrent voting requirements and separation of powers" constrain EU

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[45] Warleigh, 111.
[46] Ibid., 12.
[47] David Ward, The European Union Democratic Deficit and the Public Sphere (Amsterdam: IOS Press, 2004) 5-6.
[48] Ibid., 6.
[49] Ibid., 6.
[50] Ibid., 6.
[51] Ibid. 6.
[52] Ibid., 6.

institutions.[53] Checks and balances by themselves do not constitute democratic process. He argues that the EU specializes in the functions of modern democratic governance that tend to involve less direct political participation.[54] However, immigration and foreign policy are emergent areas of EU action. Moravcsik admits that although national parliaments consider and comment on some EU policies, their ability to influence policy fluctuates by country.[55] He partially defends the EU by arguing that it is part of a larger trend in the late twentieth century of "the decline of parliaments and the rise of courts, public administrations and the core executive."[56] Moravcsik suggests that although "a greater sense of common identity might indeed increase support for the EU, this does not bear on the case for democratic reform but on the question of how extensive European integration should be."[57] I argue that democratic reform of the institutions of the EU will increase the sense of common identity by helping citizens believe they directly influence EU policies.

Significantly, the EU may absorb reform in several ways. Smith argues the composition of the Commission should depend on the results of the European elections.[58] The College of Commissioners could emerge from the EP, giving the Commission a virtually direct mandate from the people. Then the Commission would be reliant on the EP to keep it in office. Direct election of the Commission or the Commission President could lead to an excessive emphasis on the candidates' nationalities.[59] Increasing representation, transparency and accountability in the decision-making of intergovernmental bodies will reduce the democratic

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[53] Andrew Moravcsik, "In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union," Journal of Common Market Studies 40.4 (2002): 603.
[54] Ibid., 606.
[55] Ibid., 612.
[56] Ibid., 613.
[57] Ibid., 615.
[58] Smith, 290.
[59] Ibid., 291.

deficit. Brussels has one of the most extensive and sophisticated corps of journalists and more comprehensive media coverage could improve perceptions of legitimacy.[60]

In conclusion, the EU currently suffers from a democratic deficit that it must address to enhance its public relations. Despite recent improvements such as increasing the powers of the EP, the democratic deficit continues to take form in deficits of legitimacy and participation. Eurobarometer data indicates relatively low levels of support and trust. A Euro-*demos* focused on shared values is beginning to emerge and develop the EU's capacity for democracy. I argue further democratizing the EU will contribute to a positive sense of meaningful European citizenship. Increasing the level of democratic participation will encourage public perceptions of the EU's legitimacy and eventually improve voter turnout rates by increasing trust in the EU. Then the EU will enjoy both legality and legitimacy in the eyes of the public.

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[60] Philippe de Schoutheete, *The Case for Europe: Unity, Diversity, and Democracy in the European Union* (Boulder: Lynne Rienner Publishers, 2000) 56.

UNTAPPED POTENTIAL:
ENERGY RELATIONS BETWEEN CHINA AND RUSSIA
By Stephen Ristich

When the Universal Declaration of Human Rights (UDHR) was drafted in 1948, John Peters Humphrey attempted to craft a document that would be inclusive for all peoples of the world. However, the divisiveness that split world opinion on the definition of human rights at that time remains just as strong today. The quest for common ground on universal human rights has been repeatedly setback by those who support the cultural relativist school of thought. Cultural relativism generally argues that human rights are not universal, but are conceived using specific regional and cultural norms found in different societies and a specific branch of this theory is the Asian Values Thesis. The Asian Values Thesis attempts to portray the concept of universal human rights as an unwanted Western imperialist imposition on a culturally distinct region. This paper will argue that human rights are not merely a Western creation, but have universal applicability. In doing so, this position will be supported by demonstrating that Asian Values are themselves not monolithic given the internal diversity within Asia. Moreover, Asian Values are merely an argument used to justify autocratic political rule, and the universality of human rights discourse has been shown to have broad appeal even among Asian nations[1].

Contemporary debate, historical grievance

Asian nations first articulated their alternative approach to human rights in 1993 at a United Nations (UN) sponsored human

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[1] Peter Van Ness, *Debating Human Rights*. (New York: Routledge, 1999), 10.

rights conference in Bangkok[2]. Presenting this new set of values was meant to distinguish Asia from other parts of the world where Western values have become sacrosanct. Among the important aspects of Asian Values are respect for authority, deference to societal interests, a strong emphasis on pride and duty, political consensus rather than conflict and debate, and the central nature of the family in all social aspects of life[3]. According to certain Asian leaders such as Lee Kuan Yew and Mahathir bin Mohamad, the Western emphasis on individual freedoms and independent rights encourages societal corruption and promotes individual vice[4]. In addition, there is a strong argument that Western inspired human rights fundamentally destabilize state-citizen relations and impose unnecessary social and economic burdens on entire communities[5]. While Asian Values have only come into vogue in the past decade, one cannot merely assume that Asian nations implicitly accepted the universality of human rights in the past. Many Asian nations did not have independent voices in order to contribute to the debate on human rights since they had been under the political purview of their colonial masters[6]. Part of the contemporary rejection of Western human rights stems from negative experiences under colonialism where Asian nations were forced to abide by strict outside influence, and they have only now begun to reject the last vestiges of that influence.

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[2] Tony Evans, *The Politics of Human Rights: A Global Perspective*. (London: Pluto Press, 2005), 30.
[3] David A. Reidy, and Mortimer N.S. Sellers. *Universal Human Rights*. (Oxford: Rowman & Littlefield Publishers Inc., 2005), 24, 70.
[4] Jack Donnelly, *Universal human rights in theory and practice*. (New York: Cornell University Press, 2003), 112.
[5] Thomas Franck, "Are Human Rights Universal?" *Foreign Affairs* (80, 1, 2001): 196.
[6] Englehart, Neil A. "Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore." *Human Rights Quarterly* (22, 2000): 566.

Asian Values are not for all Asians

Political figures such as Lee, Mahathir, and Mao have attempted to frame the Asian Values debate as one of Asia versus the West, two monolithic blocs competing to define human rights. However, the reality is far from unambiguous as neither Western culture nor Asian Values are monolithic; these values have consistently failed to apply to all peoples in those respective blocs[7]. Former Sri Lankan President, Chandrika Kumaratunga has described human rights as being as "universal as the free market" and that those who argue for cultural relativism are simply using an excuse to cover a multitude of sins[8]. Similarly, Dato' Param Cumaraswamy, the former chair of the Malaysian Bar Council has pointed to the widespread ratification of human rights treaties by non-Western countries as evidence of their universal acceptance[9]. These two figures are prominent members of Asian nations, and yet they disagree that Asian Values are different from universal human rights. The evidence for strong acceptance of the universality of human rights is contained in the ratifications of major human rights covenants by Asian nations[10]. The major agreements are those on economic, social, and cultural rights and that on civil and political rights, both of which have garnered at least 25 signatories out of 37 countries in Asia[11]. Support for internationally approved treaties demonstrates that 2/3 of Asian nations subscribe to a common notion of human rights, which discredits the argument for Asian Values. One of the reasons for such a result is that while many Asian nations

are culturally different from Western nations, they do not all share one uniform culture that allows them to speak with one voice[12].

As the largest continent in the world, Asia is host to large diversity and many unique countries and peoples. Its people speak a myriad of languages, live under various political systems, and practice many religions or none at all, including Christianity, Atheism, Islam, Buddhism, and Hinduism[13]. Harvard economist and Nobel laureate Amartya Sen has warned against categorizing all Asians in a homogenous fashion since that misrepresents their individual backgrounds[14]. Sen argues that there is rich pluralism in Asia and as such, he claims that the proponents of Asian Values are attempting to refute universal human rights by instead stressing universal Asian Values, a disservice to their own cause[15]. A large part of Asian Values is derived from the political and philosophical teachings of Confucius (551–479 BCE), a Chinese thinker. Although Confucian thought is used to justify certain tenets of the Asian Values Thesis such as yielding to state authority and obedience before dissent, Sen and other prominent scholars claim that these teachings have been illegitimately construed for political gain[16].

Contrary to Lee and Mahthir's assertions, Confucius did not advocate blind allegiance to the state. In fact, Confucius did recommend a form of freedom of expression and thought. When Zilu asked Confucius how to serve the sovereign, Confucius replied that citizens should "tell him the truth, even if it offends him"[17]. Additionally, Confucius maintains that citizens should have the ability and duty to oppose bad government. "When the [good] way

[7] Amartya Sen, "Identity and Freedom." in *Reordering the World*, ed. Mark Leonard, (London: The Foreign Policy Centre, 2002), 31-32
[8] Franck, 197
[9] *Ibid*, 197.
[10] Daniel A. Bell, "The East Asian Challenge to Human Rights: Reflections on East-West Dialogue." *Human Rights Quarterly* (18, 3, 1996), 659
[11] Office of the United Nations High Commissioner for Human Rights (UNHCHR), "Status of Ratifications of the Principal International Human Rights Treaties." June 2004: <http://www.unhchr.ch/html/menu3/b/a_cescr.htm>
[12] Sen, *Reordering*, 32
[13] Robert F. Drinan, *The Mobilization of Shame: A world view of human rights*. (New Haven, CT: Yale University Press, 2001), 162-164
[14] Amartya Sen, "Democracy as a Universal Value." in *The Global Divergence of Democracies*, eds. Larry Diamond and M. Plattner, (Boston: Johns Hopkins University Press, 2001): 10
[15] Sen, *Reordering*, 35
[16] Amartya Sen, *Development as Freedom*. (New York: Random House, 1999), 234
[17] Sen, *Development*, 234

prevails in the state, speak boldly and act boldly. When the state has lost the way, act boldly and speak softly"[18]. While Asian Values supporters maintain that "speak softly" indicates that states should restrict speech and criticism of the state, the previous proverb has been interpreted in modern times to actually indicate that citizens should have the ability to act to correct a state's behaviour[19]. Such action can be in the form of electoral politics, peaceful protests or expression.

The Politics of Asian Values

Thorough analysis of the Asian Values arguments reveals certain political truths about those who promote such an ideology. The foremost proponents of this school of thought come from Singapore, Malaysia, and China, all of which are non-democracies. There is an intrinsic relationship between universal human rights and liberal democracy, which is why most Western countries do not carry out widespread human rights abuses[20]. The claim that Asians prefer state stability to political freedom simply aims to prolong authoritarian rule in countries where negative rights are not respected[21]. Sen argues that there is a fundamental lack of scholarship that has emerged from authoritarian Asian countries in support of Asian Values since they tend not to subscribe to that theory[22]. Instead, those who promote Asian Values are often political leaders or government spokespeople who aim to maintain the status quo[23]. Another tactic employed by political leaders is to blame Western imperialism for diverse ills of a state[24]. Lee and

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[18] *Ibid*, 235.
[19] Van Ness, 58-59
[20] Eva Erman, *Human rights and democracy: discourse, theory and global rights institutions.* (Burlington, VT: Ashgate Publishing, 2005), 46-47
[21] Donnelly, "Universal Human", 117
[22] Sen, "The Global", 15
[23] Donald K. Emmerson, "Singapore and the "Asian Values" Debate." *Journal of Democracy* (6, 4, 1995): 101
[24] Ann-Belinda Preis, "Human Rights as Cultural Practice: An Anthropological Critique." *Human Rights Quarterly* (18, 2, 1996): 289

Mahathir have consistently maintained that human rights are simply Western constructs that will encourage corruption, immoral behaviour, and tainted values[25]. These claims are questionable since there are strong examples of countries within Asia that have adopted Western-style liberal democracy and have worked to protect human rights without the negative effects that cultural relativists caution about[26].

Korea presents a case where a Confucian nation has managed to make the transition from authoritarian regime to vibrant democracy without losing their unique culture and heritage. In fact, former Korean President Kim Dae Jung has publicly refuted the Asian Values Thesis on the basis of his own country's experience. He has argued that humanity shares many rights in common and that they must be protected[27]. However, the methods to protect these universal rights may differ among regions or states due to their unique cultural and historical circumstances. The number of other democratic nations in Asia which contest Asian Values strengthens the argument for universality of human rights[28]. Japan, Thailand, India, Sri Lanka, Bangladesh, the Philippines, Taiwan, in addition to Korea, are examples of countries that have successfully implemented liberal democracy and have enshrined many human rights in their domestic laws[29]. There have also been recent developments in Georgia, Kyrgyzstan, and Indonesia that have overthrown autocratic leaders and have replaced them with democratically elected leaders who continue to work to protect human rights and improve the quality of life for their citizens[30]. Furthermore, there are a number of

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[25] Preis, 289
[26] Jack Donnelly, "Human Rights and Human Dignity: An analytic critique of Non-Western Conceptions of Human Rights." *The American Political Science Review* (76, 2, 1982): 309
[27] Emmerson, 100
[28] Xiaorong Li, "Asian Values and the Universality of Human Rights." *Business and Society Review* (102, 1998): 83
[29] Li, 83
[30] Reidy, 115

countries in Asia that currently have politically active movements to demand further rights and democratization.

Many countries in Asia are politically arrested with authoritarian regimes, among them are China, Nepal, and Burma[31]. Aung San Suu Kyi's League for Democracy in Burma is a prominent group that advocates for human rights for all citizens and has repeatedly clashed with the military junta that rules the country. If Asian Values represented people across Asia, then it is certainly not apparent by the number of countries which profess belief in the universality of human rights. The Asian Values argument is further weakened by human rights movements that are battling against authoritarian regimes across Asia for recognition of human rights and democratic reform[32]. China has witnessed protests in 1989 to demand more rights and more recently in Hong Kong that have placed pressure on the government to grant further right and freedoms to its people[33]. Similarly, Nepal's monarch has had to recently reinstate that country's elected parliament because of largescale protests that paralyzed daily life and forced King Gyanendra to back down from his totalitarian rule[34]. If Lee and Mahathir were correct, then this type of popular demand for further rights would not only be forbidden, but the citizenry would never mobilize. The pressure for human rights recognition across Asia demonstrates that such rights are not solely the domain of Western peoples, but are universally desired and sought after concepts.

Although Singapore, Malaysia, and China are staunch supporters of Asian Values and have been able to maintain their autocratic systems of governance, they have also accepted certain human rights realities and have loosened domestic restrictions. Additional liberties are seen most noticeably in the economic realm

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[31] Damien Keown, "Are there Human Rights in Buddhism?" *Journal of Buddhist Ethics* 2, 1995): 3, and Emmerson, 98
[32] Li, 84
[33] Evans, 127
[34] BBC News Corp. "Nepal MPs begin historic session." *BBC News Corp.* April 28, 2006, available: <http://news.bbc.co.uk/2/hi/south_asia/4952978.stm>

of those countries[35]. All three countries and indeed, most in the region have adopted a variation of free-market economics and trade practices in order to remain competitive in the global marketplace[36]. Part of these reforms have allowed for limited private land ownership by citizens of those countries, entrepreneurial opportunities, labour rights, and financial independence through spending and banking[37]. Lee Kuan Yew has most famously argued that raising Singapore's citizens out of poverty and ensuring adequate healthcare, educations, and the basic necessities to sustain human life is more important than engaging in other "bourgeois" rights. However, Sen disagrees with Lee's characterization and reports that in his research, granting civil and political rights do not hamper economic growth or stifle basic human needs[38]. Moreover, civil and political rights may actually help alleviate poverty and aid development by providing a feedback mechanism for government[39]. A former Korean Minister of Foreign Affairs has labelled the Singaporean position as precarious since he maintains that "it is neither justifiable nor appropriate to deny some human rights in order to guarantee others"[40].

Mahathir has also demonstrated certain inconsistencies with the Asian Values Thesis when criticizing Western human rights. Although he has condemned the West for imposing sanctions or military intervention on those countries perceived to be abusing human rights, Mahathir also critiques those same countries for not using coercive measures to help Iraqi Kurds or Bosnian Muslims[41]. This apparent contradiction demonstrates a selective application of human rights according to Mahathir's criteria and while doing so, it exposes the biases in his flawed logic. The Chinese delegation's claim at the UN Conference on Human Rights in Vienna was that

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[35] Donnelly, *Universal Human*, 111
[36] Bell, 665
[37] Donnelly, *Universal Human*, 112
[38] Bell, 665
[39] Bell, 665
[40] Donnelly, *Universal Human*, 112
[41] *Ibid*, 109

individuals had an obligation to put the state's rights before their own[42]. Yet this statement seems to be in direct odds with previous positions that China has taken in regards to human rights. China's primary objection to most human rights documents is that civil, political, economic, and similar rights do not take into account basic human needs[43]. It is the seminal argument that people will not care about elections if they do not have food on the table. Nevertheless, by arguing that citizens must put the state's needs before their own directly challenges the previous Chinese notion that humans need the basic necessities for survival and that those should come before duties to the state such as voting and economic rights. As previously discussed with Mahathir and Lee, China has also taken a shifting position that allows it to put forth inconsistent reasoning when it support their cause.

Finding a Compromise

The above discussion is not meant to suggest that Asian countries must follow Western models of human rights exactly or blindly. All societies, even among Western nations have implemented their human rights protections in a unique fashion. Some are more comprehensive than others, but there is no standard method for implementing human rights[44]. Within these legitimate variations in implementation, the end result must however be freedoms and human rights for all peoples as they have been universally established. While communist and authoritarian countries have historically argued for basic necessities of life before civil and political rights have been given, countries that have provided negative rights have also seen considerable gains in quality of life of their populaces, thus discrediting much of communist argument[45]. Proponents of Asian Values have constantly likened universal human rights to Western imperialism since they see it as

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[42] *Ibid*, 114
[43] Englehart, 549
[44] Donnelly, *Human Rights*, 305
[45] Sen, *The Global*, 7

foreign principles being imposed from the outside on an unwilling society. Unfortunately, this is misleading since the current human rights regimes have been drafted and agreed upon by a diverse consortium of countries around the world[46]. In addition, the agreements have been signed by a number of states, thus implying their agreement to uphold universal human rights. Recently there has been a shift towards human rights enforcement in the light of widespread abuses, but that should not discourage countries from giving additional rights to their citizens.

The *Responsibility to Protect* (R2P) doctrine was conceived primarily to uphold the basic human rights of citizens if their home governments are unable or unwilling to prevent or halt massive atrocities against them[47]. This doctrine has the potential to make a useful contribution to current human rights thinking since if adopted by the UN, it will help shift the entrenched international norm of state sovereignty towards a norm with more emphasis on human security[48]. States, especially Asian states should not fear R2P since it may assure a greater degree of protections for their citizens, and the state itself would not have anything to fear if it does not engage in harmful practices[49]. If Asian Values discourse is truly a method to prevent the imposition of a foreign human rights regime, then Asian nations can find comfort in knowing that not only have Western nations had vastly different experiences with their implementation of human rights, but those countries also restrict rights in order to prevent a slide into anarchy[50].

Freedoms and rights such as speech, assembly, religion, and others have been limited by the state in most instances to prevent manifestations of hate speech, violent protests, or crimes based on

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[46] UNHCHR, 2004
[47] Ramesh Thakur, "Intervention, Sovereignty, and the Responsibility to Protect: Experiences from ICISS." *Security Dialogue* (33, 3, 2002), 323
[48] *Ibid*, 329
[49] Evans, 121-122
[50] Perry, Michael J. *The idea of human rights: four inquiries.* (New York: Oxford University Press, 1998), 84

religion and the like[51]. Whether we believe that human rights are natural, biblical, or state-created, peoples around the world have generally accepted limited government-imposed restrictions on those rights as long as they benefit society as a whole without undue infringement on individuals[52]. It is conceivable that proponents of Asian Values would be more receptive to universal human rights if they understood that they could implement them and mildly regulate them in a way that took into account their unique culture and circumstances. However, the point remains that they must first be willing to accede to the relevant treaties and commit to upholding their tenets, which it appears that they are loathe to do for political, not cultural reasons.

Concluding Thoughts

Fundamental human rights that have been agreed upon by the UN and other international bodies are meant for all peoples, everywhere. Cultural relativist theories such as the Asian Values Thesis do not adequately represent the true nature and desires of the peoples they profess to support. As discussed in this paper, diverse peoples from all over the Asian Continent have demanded greater rights and freedoms from their governments despite the fact that Asian Values supporters have argued to the contrary[53]. Universal human rights have broad appeal since they reflect principles and necessities that all humans hold in common, rights that do not and should not stop at borders. With Asia's diversity, the Asian Values Thesis cannot claim to characterize all regions. This is particularly notable with a country such as India, which comprises numerous different groups. However, these groups still demand all the same human rights in common. Political considerations should be cast aside in light of crafting a uniform language that all peoples can understand and benefit from – that of human rights. Without commonality, world leaders are not only undermining their own

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[51] *Ibid*, 84
[52] Erman, 66
[53] Li, 84-85

credibility on the global stage, but are also causing great harm to the peoples that they claim to stand for.

BUSINESS & GOVERNMENT

"To found a great empire for the sole purpose of raising up a people of customers, may at first sight appear a project fit only for a nation of shopkeepers. It is, however, a project altogether unfit for a nation of shopkeepers, but extremely fit for a nation that is governed by shopkeepers."
- Adam Smith

FAILURE ROOTED IN SUCCESS
THE CASE OF THE JAPANESE ECONOMIC TRANSFORMATION
By Josh Zakkai

The political sources of Japanese postwar economic success emanate from both the domestic and international realms. On the domestic front, the Japanese government perceived the need to catch up to the western world in productive capacity and efficiency, while maintaining social stability. On the international front, the Bretton Woods System (BWS) provided a favourable environment for economic expansion. This was exacerbated by complementary American trade policies. However, the 1970s ushered in the collapse of the international order. The Japanese government's determination to artificially recreate these international conditions created the institutional sources of economic stagnation. This paper will initially address the developmental role played by the state in fostering industrial growth. Next, attention will be given to the BWS and asymmetric trade. Furthermore, the institutional sources of decline, which originated due to the collapse of the international order, will be analyzed.

The destruction of WWII left the Japanese economy in shambles and prompted the goal of catching up to the West in economic capacity.[1] In order to rebuild the devastated industrial base, vast amounts of capital were required for investment. The Bank of Japan (BJ), the primary monetary institution, adopted a growth oriented approach focused on supplying credit to major city banks, allowing them to lend aggressively to the private sector.[2] In effect, the government was pumping money into the economy to

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1 Robert Gilpin, Global Political *Economy: Understanding the International Economic Order* (Princeton: Princeton University Press, 2001) 159.
2 Bai Gao, Japan's Economic Dilemma: The Institutional Origins of Prosperity and Stagnation (Cambridge: Cambridge University Press, 2001), 76.

finance capital accumulation. The BJ was able to stimulate demand for credit by artificially implementing low interest rates. Monetary policy was organized to ensure that rates remained low under all conditions, regardless of changes in the money market.[3] Economics dictates that when there is a high demand for credit, inflation will rise, but Japanese monetary policy was crafted to prevent such a detrimental side effect from occurring. The government simply restricted the amount of available credit when inflation threatened.[4] Furthermore, corporations were made accountable to the banks in terms of investments and managerial decisions. Under state regulations, Japan's financial institutions, city banks, required firms to ensure that capital was directed to support domestic investment and export industries.[5] As a result of these policies, firms were able to borrow funds and use them to rebuild industry at low cost in a relatively short period of time.

Yet, the beneficial monetary policy was not the only strategy the state employed to foster growth. The Ministry of International Trade and Industry (MITI) also played a crucial role in state led development. It was a comprehensive government ministry that oversaw all sectors of industry and possessed a broad mandate to craft microeconomic trade and industrial policy.[6] Its primary role was to select industries deemed central to future economic growth and nurture them until they were able to stand on their own in the face of foreign competition.[7] This nurturing was characterized by "institutionalized business-government communication channels, technology transfer agreements, protection from foreign competition

3 Ryuichiro Tachi, "Fiscal and Monetary Policy," trans. Robert S. Ozaki, *Postwar Economic Growth in Japan*, ed. Ryutaro Komiya (Los Angeles: University of California Press, 1966), 19.
4 Tachi, 19.
5 Thomas F. Cargill, "Japan's Economic and Financial Stagnation in the 1990s and Reluctance to Change," *Institutional Change in Japan*, ed. Magnus Blomstrom and Sumner La Croix (New York: Routledge, 2006), 127.
6 Ellis S. Krauss, "Political Economy: Policymaking and Industrial Policy in Japan," *PS: Political Science and Politics* 25.1(1992), 47-48.
7 *Ibid*, 51-52.

in early stages of development, exemptions from anti-trust law, and government industry research consortia."[8] The formation of cartels, known as Keiretsu, where used as a means to create domestic stability and act as a barrier to foreign competition.[9] These cartels were legalized under the MITI legislations in the 1950s—the companies stabilization law and the exports promotion law.[10] In a sense, business and government were intertwined in a mutually beneficial manner, allowing for technological gains and protection that fulfilled the political goal of economic growth.

This relationship between the private and public sectors promoted not only their individual interests but also the national interest of social stability. Japanese corporations, and not the government, were responsible for the social welfare of citizens under a practice known as lifetime employment (LE). Originally a mechanism for industrial peace, LE functions as a privately funded social welfare system—firing redundant workers or selling subsidiaries was considered taboo.[11] This practice appears to be disadvantageous to growth, but it did have one substantial benefit. Firms did not have to pay the high costs of in house training as their workforces were experienced due to so many years on the job.[12] This practice was sustainable primarily because of the protection offered by MITI and the international economic order.

In July of 1944, the allied nations created an international system, under the auspices of the Bretton Woods Agreement, which proved to be extremely beneficial for the Japanese economy. The BWS's main purpose was to protect the member states from another great depression by seeking to eliminate its causes—a volatile

8 *Ibid*, 51-52.
9 The Keiretsu is "a business grouping or conglomerate whose members are bound together by the mutual trust and long-term relationships among a number of major firms, their suppliers, and their distribution networks...the keiretsu system has significantly limited foreign firms' access to the Japanese Market." Gilpin, 166-168.
10 Gao, 134-135.
11 S. Javed Maswood, *Japan in Crisis* (New York: Palgrave Macmillan, 2002), 78
12 *Ibid*, 64

monetary system and protectionism.[13] In order to stabilize the monetary system, it called for member countries to peg their currencies to gold, which was only exchangeable through the dollar.[14] Subsequently all currencies were tied to the dollar. The position of the dollar relative to other currencies was essentially permanent and the Japanese yen was now eternally undervalued.[15] This provided Japan with significant opportunities to export its products to the U.S. and improve its balance of trade deficit. An undervalued Japanese currency promoted exports because of their relative cheapness and dissuaded imports because of perceived higher costs. This was crucial for postwar economic success. A situation was created in which Japanese firms were supplying consumers abroad, while little foreign competition threatened their domestic market.[16] Japanese firms and jobs were indirectly protected by the BWS.

The other aspect of the BWS called for trade liberalization and a removal of controls on current account transactions.[17] Yet, these principles did not affect the Japanese economy negatively by introducing foreign competition as expected. "The U.S. adopted a foreign policy that emphasized the provision of economic benefits to its allies in exchange for their political, diplomatic, and strategic cooperation." [18] The United States, while lowering tariffs and liberalizing its market, allowed Japan to discriminate against its products and to erect trade barriers.[19] The Japanese market and firms, therefore, had another layer of protection from the liberalizing global economy. The new international order had provided Japan

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13 Jean Gilpin, *The Challenge of Global Capitalism* (Princeton: Princeton University Press, 2000), 59.
14 Gilpin, 59
15 Gao, 12
16 William K. Tabb, *The Postwar Japanese System: Cultural Economy and Economic Transformation* (Oxford: Oxford University Press, 1999), 95
17 Gilpin, 57.
18 Gao, 27.
19 Tabb, 92.

with all the benefits that created growth and stability, but exempted it from the drawbacks of enhanced competition.

Under these conditions Japan tripled its share of world production, became the third largest exporter of manufactured goods, became a leader in many areas of high technology, and surpassed the Soviet Union as the world's second largest economy.[20] However, both international sources of prosperity met their demise in the early 1970's. First, in 1971 the BWS was dissolved.[21] Second, throughout the early 1970's the U.S. rejected further asymmetric trade with Japan and began demanding the alleviation of market barriers. [22] Problems arose in the inflexibility of the Japanese to restructure to the new environment. There was an embedded belief in the Japanese mentality that growth depended on the conditions and strategies that were present during the BWS era. The government continued to adopt policies to protect its domestic market and to promote exports in pursuing its goal of economic growth and social stability. However, this strategy had effects centred on the country's financial and monetary institutions, which ultimately destabilized the economy.

Some scholars have attributed the recent problems of the Japanese economy to the cartelization of Japanese firms and their inability to adapt to global conditions; the entrance of low-cost producers from the developing world into the global economy; and the alteration in the electoral system, which politicized economic policy making.[23] However, this analysis will focus on three events which consecutively made the situation more volatile and susceptible to crisis: The resistance of the Japanese to compromise LE in the face of external shocks, the commitment to protect domestic

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20 Joseph S. Nye, "Coping with Japan," *Foreign Policy* 89(1993), 98.
21 Inflation was rampant in the United states during the late 1960's due to the costs of the Vietnam War and spending on the "Great Society". Furthermore, federal reserve activities to stimulate the dollar resulted in a ballooning of the U.S. trade deficit. The Nixon administration subsequently took the dollar of the gold standard on august 15, 1971. Gilpin, 68-69.
22 Gao, 206.
23 *Ibid*, 3-4.

markets, and an expansionary monetary policy to combat the appreciation of the yen.

The problems of the Japanese economy under the new economic regime must first be considered in light of the government and firms' continued commitment to social stability in the wake of the 1973 oil shock. The crisis caused the first instance of negative growth in Japan's postwar history.[24] Massive increases in costs were experienced by all industries due to hiked up fuel prices.[25] Firms had to find a way to keep expenditures low in order to maintain export competitiveness. However, because of the commitment to social stability and its importance to Japanese society, firms were unable to restructure by firing redundant employees or selling subsidiaries, as their American counterparts did.[26] In order to cut costs and raise profitability, Japanese corporations engaged in direct financing through stocks and bonds as a means of avoiding interest payments on bank loans.[27] Therefore, the primary consequence of the first oil shock, with regard to this analysis, was to introduce direct financing to firms as an attractive and viable method of increasing profitability without compromising the cherished goal of full employment.

The second factor that played a crucial role in the eventual decline of the economy was the liberalization of Finance. In 1983 Japan conceded to release its tight control over the country's financial institutions, in an attempt to deflect further American demands for an open market.[28] Under state regulation, Japan's financial institutions were required to implement policies that ensured capital was directed to support domestic investment and

24 Kazuo Sato, "Japan at a crossroads," *The Transformation of the Japanese Economy*, ed. Kazuo Sato (London: M.E. Sharpe, Inc., 1999), 6
25 Following the Yom Kippur/Ramadan War, the Organization of Petroleum Exporting Countries doubled world oil prices. This caused the costs of Japanese firms to increase, they were now producing less with the same amount of labour and capital. David Flath, *The Japanese Economy* (Oxford: Oxford University Press, 2000), 130
26 Gao, 168.
27 *Ibid*, 163.
28 *Ibid*, 200.

export industries. The firms were initially accountable to the institutions, but with liberalization there were few constraints on management decisions. The liberalization of financial institutions created an environment which encouraged reckless risk taking on the part of Japanese corporations.[29] Japanese firms had already realized the possible gains from engaging in direct financing—the pressures of the oil crisis led to this outcome. Yet, they now had far more authority to speculate as they saw fit. This led to an increase in investments in stocks from 300 billion yen in 1984 to 1.1 trillion yen in 1985.[30] In sum, the perceived notion that domestic markets must be protected in order to sustain growth led to concessions which created a dangerous environment for the fiscal and monetary policies which were used in the second half of the 1980s.

The BWS was crucial to Japanese success primarily because it held the undervaluation of the yen in respect to the dollar in place. This gave Japan an advantage in its export-led growth strategy. However, with the collapse of the system, exchange rates were no longer stable. This situation was not a serious problem throughout the 1970's and the first half of the 1980's—the U.S. dollar was quite strong and did not threaten the position of the yen.[31] The severe monetary issue did not arise until 1985 when the Plaza Accord was signed with the United States. Briefly, the Plaza Accord was a plan put forward by the U.S. to restore its balance of trade among the G-5, it was a plan to devalue the dollar in order to promote American exports.[32] The fall of the dollar provided American exports with increased competitiveness in the international market. Japanese firms began experiencing serious declines in profits in 1986, leading to the first growth slow down in eleven years.[33] As a result of the crisis in the export industries the Government intervened by

29 Maswood, 130.
30 Gao, 169.
31 Tabb, 206.
32 Kazuo Tsuda, "Japanese Banks in Deregulation and the Economic Bubble," *The Transformation of the Japanese Economy*, ed. Kazuo Sato (London: M.E. Sharpe, 1995), 269
33 Gao, 176-177.

attempting to create a favourable exchange rate and to stimulate firm investment. The BJ began lowering the interest rate in 1986, and by 1987 it reached its lowest in history at 2.5%.[34] However, with the experiences of the oil shock and the liberalization of finance Japanese firms no longer invested in productive capacity or efficiency to increase productivity. Real estate became the popular choice for investment—there were extremely generous tax regulations on land.[35] Therefore, with the availability of cheap credit and liberalized financial institutions, Japanese firms sought to increase profitability primarily by speculating in the real estate market.[36]

By decreasing the interest rate, the BJ effectively initiated the speculative activities. "A small decrease in interest rates can have a large effect on asset prices."[37] Japanese firms began pouring money into real-estate and the stock market, and this concerted act began pushing prices up.[38] Furthermore, 40% of the returns on these investments were re-invested in the system, this served to push stock prices even higher.[39] These practices helped to create a speculative bubble in the Japanese economy.[40] Another factor that played a role in the creation of the bubble was the increased bank loans channelled to the real estate sector. With firms no longer reliant on Japanese banks for capital, the commercial banks were forced to make loans to the real estate sector as a new source of profit.[41] This only perpetuated the rise in stock market prices. Finally, in 1987, the

government adopted a fiscal stimulus package that centered on urban development, which produced a further rise in the price of land, and subsequently the stock prices of companies owning land increased.[42] Thus, as the prices in land rose so did firm profitability, and the economy was perceived as healthy. At its peak, the market value of the city of Tokyo was large enough to purchase all the land in both the United States and Canada.[43] However, firm liquidity was based on large loans that were backed up by the overstated value of their land and stock investments.[44] When the speculative bubble finally burst firms were not able to repay their massive bank debts and the economy would be pushed into crisis.

The massive inflation in asset prices that prompted the high profitability of firms eventually led to concern within the BJ and government. In 1989, the central bank took action and popped the bubble in hopes of minimizing an imminent crisis.[45] The BJ burst the bubble and caused serious asset deflation by raising the interest rate, real estate taxes, and instituting a ceiling on bank loans to the real estate sector.[46] Real estate companies and land owning corporations experienced significant losses, prompting defaults on interest payments and eventually on loans themselves.[47] Furthermore, because land was the main guarantee for about half of all city bank loans, its decreasing worth caused a substantial amount of bank collateral to be significantly devalued.[48] The economy underwent serious dislocations and a recession ensued.[49] The reverberations of this crisis plagued the economy throughout the 1990's and are still felt till this day.[50]

34Takatoshi Ito, "Japan and the Asian Economies: A 'Miracle' in Transition," *Brookings Papers on Economic Activity* 2(1996), 216.
35 Maswood, 11.
36 Tabb, 212.
37 Ito, 216.
38 Tabb, 212.
39 *Ibid*, 212.
40 "A temporary market condition created through excessive buying, and an unfounded run-up in prices occurs. Speculative bubbles are generally a result of the 'bandwagon effect'." "Investors, seeing an upward trend in prices, quickly enter long positions in an attempt to participate in the stocks' profitability. Typically, these bubbles are followed by even faster sell-offs once the prices begin to decline." 16 November <http://www.investopedia.com/terms/s/speculativebubble.asp>
41 Tabb, 219.

42 Gao, 181.
43 Tabb, 210.
44 *Ibid*, 210.
45 *Ibid*, 209.
46 Ito, 217.
47 *Ibid*, 217-218.
48 Tabb, 210.
49 Gilpin, 178.
50 Maswood, 2.

The economic stagnation of the Japanese economy can only be understood by focusing on the causes of its initial success. Japanese firms were privileged by government institutions to have easy access to the necessary capital, technology, and protections from competition which allowed them to grow quickly and become the engines of Japanese economic ascent. With the protections imposed by the international political environment, Japanese markets were safe from foreign competition and companies could rely on export oriented growth while maintaining LE.

However, with the disintegration of the economic order, the crucial elements which manifested the atmosphere for the institutional foundations of economic decline arose. The government was faced with an alien and dynamic environment, and it reacted by adhering to the time tested formula for success—protect the domestic market and stimulate exports. The oil shock, although not an institutional cause, supplied Japanese firms with the precedent for using direct financing to boost profitability in order to maintain LE. This is of enormous significance because it provided the premise for the eventual collapse of the economy. The next step to stagnation was the liberalization of financial institutions. In a misguided attempt to protect the domestic markets, firms were stripped of all accountability. This institutional change created an explosive environment for the policies the Japanese monetary institution, the BJ, adopted in the second half of the 1980s in an effort to maintain a favourable exchange rate.

The blame for the stagnation ultimately falls on the inflexibility of firms and government in the face of changing circumstances. Based on this analysis it can be observed that through the great success they experienced in the first half of the postwar era, the Japanese developed a genuine belief that the free market would not be able to replicate the success provided by state guidance. This mistrust of the market, and the policies put in play to curtail its influence, led to the stagnation that is now the Japanese economy.

THE FORCE OF GLOBALIZATION
AN ANALYSIS OF THOMAS FRIEDMAN'S THE WORLD IS FLAT
By Osama Siddiqui

Some of the most influential works of the West were written to address growing social and political trends of their time. For instance, Alexis de Tocqueville's monumentally important *Democracy in America* was written at a time when the threat of democratic revolutions was encircling Europe. In many ways, de Tocqueville saw democracy as being an inexorably powerful force that would "sweep [European society] along, and drive [it] backwards towards the gulf."[1] Given his apprehension about the effects of democracy, de Tocqueville's primary intention was to outline ways in which the sheer force of democracy could be controlled and channelled resourcefully.[2] In this way, de Tocqueville's work has much in common with Thomas Friedman's *The World is Flat*, except the force to be dealt with this time is globalization, as opposed to democracy. While Friedman's book certainly does not match the influence that de Tocqueville's work has had on Western thought – although Friedman may convincingly challenge de Tocqueville in terms of absolute readership – both thinkers share many key characteristics. Like de Tocqueville, Friedman understands that a powerful force, globalization in his case, if left unchecked, would produce disastrous consequences. Thus, he too attempts to explain how society should be adapted to better face the challenges of this force. Ultimately, Friedman argues that the well-being of humanity rests in embracing globalization, not in resisting it. He bases this argument on grounds that welcoming globalization can open up a multitude of new opportunities, while

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1 Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (New York: The Colonial Press, 1900), 7.
2 De Tocqueville, 7.

resisting globalization can lead to economic marginalization. While Friedman has an insightful understanding of the effects of globalization, he often incorrectly identifies the reasons why globalization occurs in the first place. Not only this, but he also offers unsatisfactory solutions to combat the challenges of globalization.

Thomas Friedman's major argument in favour of accepting globalization is that it constantly gives rise to new economic opportunities. Friedman believes that in a globalized world, there is an unlimited amount of business opportunities because "human wants and needs are infinite."[3] This means that over the course of time, new ideas, products, businesses, and industries will continue to be developed. Furthermore, as technology continues to become more advanced, new specialties will be created in existing industries.[4] However, in order to take advantage of this development, it is important to embrace globalization because a global market will provide a larger forum for the exchange of goods and ideas. Friedman, thus, supports the idea of free trade. According to him, by trading freely, merchants from all involved countries have access to a "much expanded and more complex market" since they are no longer selling only to consumers in their native countries, but also to consumers in all other involved countries.[5] Friedman rejects the popular notion that free trade and other pro-globalization measures will lead to unemployment in a particular region. This is because he believes that any lost jobs due to increased competition will be more than compensated for by all the new jobs that will be created because of the larger market.[6] In summary, Friedman believes that the well-being of humanity rests in embracing globalization. He constantly alludes to the "global pie" of opportunities that is continually growing in size and complexity. For him, the only way to claim a slice of this larger pie is to welcome globalization.

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3 Thomas Friedman, *The World is Flat* (New York: Farrar, Straus and Giroux, 2005), 231.
4 *Ibid*, 233.
5 *Ibid*, 228.
6 *Ibid*, 229.

Not only does Friedman think that the welfare of humanity lies in accepting globalization, he also believes that there are grave dangers associated with resisting globalization. Among the foremost of these dangers is economic marginalization, which has the potential to occur both at the individual level and at the national level. On the individual level, those who resist globalization by not making themselves more competitive in the larger world market risk seeing their wages decrease, or worse, losing their jobs to outsourcing.[7] As Friedman explains, individuals can reap the advantages of globalization by constantly upgrading their skills and knowledge. This is because, "in the flat world...people with the knowledge and ideas" will be in the most favourable position to find and retain employment.[8] Those who do not upgrade their skills will find themselves economically sidelined.

Similarly, economic marginalization can also occur at the national level in countries that resist globalization. Making a direct connection between economic performance and resistance to globalization, Friedman reports that, "nonglobalizing countries...actually saw their per capita GDP growth shrink in the 1990s."[9] Similarly, he finds a correlation between poverty and globalization. He writes, "In sub-Saharan Africa...where globalization has been slow to take hold, there were 227 million people living on less than $1 a day in 1990, 313 million in 2001, and an expected 340 million by 2015."[10] He contrasts the example of Africa with that of China, a country that has experienced rapid globalization, showing that the number of people living in poverty in China has steadily declined.[11] Thus, according to Friedman, countries that resist globalization are faced with severe difficulties such as poverty and poor economic growth. By using these statistics, Friedman shows that he truly does believe that the future well-being of humanity is threatened when globalization is not nurtured.

7 *Ibid*, 240.
8 *Ibid*, 237.
9 *Ibid*, 315.
10 *Ibid*, 315.
11 *Ibid*, 315.

Now that the bearings of Friedman's arguments have been established, the strengths and weaknesses of his discussion can be examined. Friedman seems to have a firm grasp of the effects of globalization; however, he incorrectly identifies why certain areas are more receptive to globalization than others. Friedman is convinced that the countries that are not globalizing are doing so because of some internal fault of their own. According to him, the nature and culture of nations contain key explanations of why certain nations are able to globalize and others are not. Pointing to one example of the nature of countries, he says, "Some countries seem to be able to focus their energies on the priority of economic development, and others get distracted by ideology or feuds."[12] This implies that there is something intrinsically flawed with the culture of the country that is not able to direct its energy towards economic development. In proposing this viewpoint, Friedman seems to discount the external factors that could also affect a nation's ability to undertake development.

Indeed, there can be many external factors that can influence the way in which a nation approaches the issue of globalization and economic development. One such factor that is worth mentioning has been pointed out by Samir Amin in his essay "Capitalism, Imperialism, Globalization." In this essay, Amin argues that globalization in the present age has a fundamentally imperialist flavour that allows the dominant powers to maintain their monopoly over key resources. This, in turn, helps to preserve inequalities between nations.[13] Not only this, but Amin makes it very clear that for the underdeveloped regions of the world "the [present] kind of globalization does not offer the possibility of catching up."[14] In other words, there may be many nations that may be ready to globalize, but simply have not been given a chance due to overwhelming monopolies of the dominant powers. In this case, the blame for lack

12 *Ibid*, 330.
13 Samir Amin, "Capitalism, Imperialism, Globalization," in *The Political Economy of Imperialism: Critical Appraisals*, ed. Ronald M. Chilcote (Boston: Kluwer Academic Publishers, 1999), 166.
14 Amin, 158.

of development in a particular nation seems to rest not with the culture of that nation, but with the international climate, over which it has little control. It is important, however, to not dismiss Friedman's argument entirely. Certainly, culture may influence economy to some extent. The problem lies with disregarding external factors entirely, as Friedman seems to have done.

In addition to overlooking the external factors, Friedman also presents some inadequate solutions to the problems posed by globalization. It is evident through his analysis that globalization poses many challenges. As he says, "the flattening of the world is going to be hugely disruptive to both traditional and developed societies.... The disruptions are going to come faster and harder."[15] Keeping these challenges in mind, he concludes that the best solution for the future welfare of humanity is to embrace globalization. However, this solution is primarily an economic one that fails to consider social or cultural consequences. In many of his examples, such as in that of the Egyptian lantern (fawanis) industry, he does not consider cultural implications. In the Egyptian example, for instance, he only takes into account the economic implications of the decline of the lantern industry and not the cultural implications of the uprooting of a cherished national tradition.[16] Thus, it seems as if, for Friedman, the well-being of humanity is only dependant upon economic stability. This appears to be an inadequate response to the challenges of globalization since globalization brings social and cultural problems as well.

In conclusion, Friedman believes that the ultimate well-being of humanity lies in accepting globalization. He points to the myriad of new economic opportunities that are a result of a globalizing world, and warns against the dangers of economic marginalization on the individual and the national levels that can only result when globalization is resisted. However, despite his perceptive understanding of globalization, there do seem to be some weaknesses in his argument, such as his disregard for the external

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15 Friedman, 279-80.
16 *Ibid*, 311.

factors that prevent globalization, and his focus on only the economic challenges of globalization. As mentioned earlier, the kind of approach that Friedman has used to discuss globalization bears some resemblance to the approach that de Tocqueville used to discuss democracy. Like de Tocqueville said of democracy, Friedman talks about the inevitability of globalization by saying that "the flattening of the world is largely unstoppable." [17] However, unlike de Tocqueville, Friedman generally seems to have a largely optimistic attitude about globalization. In this way, he differs from de Tocqueville who approached democracy almost warily.

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17 *Ibid*, 237.