THE MEANING OF SHARE OWNERSHIP AND THE GOVERNANCE ROLE OF SHAREHOLDER ACTIVISM IN THE UNITED KINGDOM

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I. INTRODUCTION

Shareholder activism has been the key to effecting important corporate changes in recent years,[1] and may even be described as a rejuvenated exercise of ownership rights held by shareholders.[2] The concept of ownership allows corporate governance to be defined partly in terms of instituting accountability mechanisms to shareholders.[3]

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[1] For example, shareholder activists who opposed the re-election of Michael Eisner as Disney's Chairman in 2004 ultimately ousted him as Chief Executive a year later as well. UK's ITV also ousted Michael Green as Chairman in 2003. More empirical evidence of shareholder activism will be discussed in Part 3.

[2] The U.K. Government even considered shareholders as possibly owing a fiduciary duty to engage in appropriate activism in their investee companies. *See* DEP'T OF WORK AND PENSIONS, ENCOURAGING SHAREHOLDER ACTIVISM (Consultation Paper, 2002), *available* at http://www.dwp.gov.uk/consultations/consult/2002/myners/shareact.pdf. This is due largely to the tendency of institutional shareholders to be passive and insufficiently attentive to their investee companies' internal governance. *See* Helen Short & Kevin Keasey, *Institutional Shareholders and Corporate Governance*, *in* CORPORATE GOVERNANCE: RESPONSIBILITIES, RISKS, AND REMUNERATION 61–92, (Kevin Keasey et al. eds., John Wiley & Sons 1997); Rebecca Stratling, *General Meetings: A Dispensable Tool for Corporate Governance of Listed Companies?*, 11 CORP. GOVERNANCE 74 (2003).

[3] No doubt this view of corporate governance is based on the importance of the finance perspective, principally espoused as the agency problem, where owners are regarded as bearing the residual risk of corporate failure and hence having the best incentives to ensure accountability of management to them. Michael C. Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). This theory is often seen as being too narrow by stakeholder theorists, but Jensen and others have argued that the ultimate accountability of the managers to owners entails managerial goals to maximize the value of the corporation and that would also to a certain extent create social welfare. *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function*, *reprinted* in CORPORATE GOVERNANCE AT THE CROSSROADS (Donald H. Chew & Stuart Gillan eds., McGraw-Hill 2005); FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF

The concept of ownership may also appear to legitimate more active forms of engagement by shareholders in order to protect their residual interests.[4] This article first presents a brief but critical examination of the theoretical underpinnings of shareholder activism as an incident of "ownership." Part 3 then looks at the practice, trends and developments in shareholder activism in order to critically examine how shareholder activism may be accounted for and accommodated within the theoretical framework of the company and the legal framework's providing for shareholder involvement. Part 4 then discusses the governance role of shareholder activism and critically questions whether shareholder activism actually plays such a role, and additionally, the benefits and costs that arise from activism. The main thesis of this article is that certain aspects of shareholder activism may not be well-founded in theory and also gives rise to practical concerns. There is a need to understand these implications in order to consider appropriate steps forward in our perception of shareholder activism.

II. THE FABRICATION OF SHARE OWNERSHIP IN THE UNITED KINGDOM

A. The Legal Nature of Share Ownership

A classic starting point to describe the nature of share ownership in a company is as follows:

> A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se . . . .[5]

The above quotation does not actually describe the share as being an ownership interest, but a more limited interest entailing certain rights and liabilities. In fact, "of interest in the second" is vague, as no mention is made of the nature of the interest, and where the interest spe-

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CORPORATE LAW (Harvard University Press 1991). *But see* MARGARET BLAIR, OWNERSHIP AND CONTROL (Brookings Institution Press 1995) (arguing that stakeholders such as employees are also residual risk bearers); JOHN PARKINSON, CORPORATE POWER AND RESPONSIBILITY 262–71 (Oxford University Press 1994) (supporting his prolific arguments in theory and ideology against adopting shareholder primacy as the dominant model of corporate accountability).

[4] *See, e.g.*, Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); ROBERT A. G. MONKS, THE NEW GLOBAL INVESTORS (Capstone Publishing 2001) (positing the importance of investors as being crucial to the sustainability of corporations and their practices).

[5] Borland's Trustee v. Steel Bros. & Co., [1901] 1 Ch. 279.

cifically lies. Many commentators[6] agree that the ownership label placed on shares is not quite accurate, as shares represent a bundle of interests and liabilities[7] that differ somewhat from a conventional understanding of ownership.[8] Property theorists have often pointed out that a key feature of an ownership interest is the ability to exclude others from any use or enjoyment of the subject matter over which the ownership right is exercised.[9] One of the key characteristics that flow from the private exclusivity analysis is that property subject to an ownership right is indefeasible.[10] Shares, however, are not indefeasible, and the private "ownership" right to a share can be eclipsed by the occurrence of squeeze-outs,[11] either under the Companies Act[12] or by provisions in the company's Articles of Association.[13]

Further, it has been argued that it is perhaps inaccurate to describe proprietary rights over fungible items, such as shares as "ownership," as no distinction can be made between fungible assets to identify which asset is owned by a particular owner. When such assets are transferred, it is more accurate to refer to such transactions as an extinguishment of certain rights and liabilities held hitherto by a particular person, and the giving rise of a bundle of rights and liabilities to another, rather than to refer to such transactions as "property transfer."[14] A commentator has opined that proprietary rights (or

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[6] Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39 (2000); Helen Bird, *A Critique of the Proprietary Nature of Share Rights in Australian Publicly Listed Corporations*, 22 MELB. U. L. REV. 131 (1988); Sarah Worthington, *Shareholders: Property, Power and Entitlement*, 22 COMPANY L. 258, 307 (2001).

[7] Some of the notions will be teased out shortly.

[8] *See* R.M. GOODE, COMMERCIAL LAW 31–35 (Penguin Books 2004) (defining ownership as an absolute interest in the residual rights in property, and such interest is indefeasible).

[9] Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J 459 (2004). Both authors argue that private exclusivity is the hallmark of a proprietary right, and not a positive bundle of rights.

[10] Bird, *supra* note 6. *See, e.g.,* Kwei Tek Chao v. British Traders and Shippers, Ltd., [1954] 2 Q.B. 459 (such indefeasibility may however be subject to certain passing of property rules in sales of goods transactions or by governmental acquisition and compensation legislation).

[11] Referring to majority buy-outs of minority shares under certain circumstances.

[12] *See* 2006, c. 46 § 979 (discussing squeeze-outs in a takeover situation).

[13] Such Companies Act provisions in the company's Articles of Incorporation, if secured by amendment, may also be reviewed by the court, especially in Australia. *See, e.g.,* Gambotto & Anor v. WCP Ltd. & Anor, [1995] 182 C.L.R. 432 (Austl.) (requiring majority shareholders to act in the best interest of their company).

[14] James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471 (1990).

rights *in rem*) are no different in substance from other personal rights, such as contractual rights, as all rights in relation to things also define parameters of rights and correlative duties, just like rights in relation to persons. The distinction is hence not substantively meaningful.[15]

Therefore, we are left with the perspective that share ownership gives rise to a bundle of rights and liabilities, but such a bundle sits between the realm of personal and proprietary rights. This is because a share can be regarded as a subject of proprietary transfer, although it does not relate precisely to a share in corporate assets. It is arguable that the fabrication of share ownership as a proprietary notion has been important for the following reasons: (a) shares need to be regarded as tradeable and negotiable assets; (b) private property notions such as ownership rights attached to primary investments in companies are important to the development of investment capitalism.

The growth of the modern corporation very much depended on investment capitalism. In an earlier research paper, this author argued that business growth requires investment in the form of equity and that there is a limit to the roles of debt and retained earnings as sources of corporate finance.[16] Equity investment is arguably only attractive if investment securities are able to pass good title to the holder, and are negotiable so that the holder can then freely transfer such securities, and also trade them regularly if supported by liquid stock markets.[17] Hence, the aspect of a share as an investment asset that could be held or transferred is fundamentally important to both the issuing corporation and the shareholder. This is the *external* dimension of the share, or in other words, the proprietary nature of the share as an asset recognized by the issuing corporation, and the market including the holder, as well as the third parties who could acquire such an asset. The proprietary notion attached to a share is fundamental in ensuring that the *external* dimension of the share entails no doubt as to its asset quality. The maintenance of such asset quality is arguably crucial to the development of an investment economy, as defining investment instruments, such as shares, as proprietary assets allows them to be fabricated in terms of economic resources that may be allocated and protected from arbitrary expropriation.[18] That is to say that, "[P]rotecting private property rights [in share ownership] is

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[15] Pavlos Eleftheriadis, *The Analysis of Property Rights*, 16 OXFORD J. LEGAL STUD. 31 (1996).

[16] Hse-Yu Chiu, *Can UK Small Businesses Obtain Growth Capital in the Public Equity Markets? An Overview of the Shortcomings in the UK and European Securities Regulation and Considerations for Reform*, 28 DEL. J. CORP. L., 933 (2003).

[17] GOODE, *supra* note 8, at 570.

[18] Harold Demsetz, *Toward A Theory of Property Rights II: The Competition between Private and Collective Ownership*, 31 J. LEGAL STUD. 653 (2002); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

vital for preventing coercion, securing liberty and enhancing personal welfare. More recently, a growing body of empirical work demonstrates a strong positive association between the degree to which countries protect private property and economic development."[19]

The legal protection of the share asset as private property is key to stimulating economic activity in relation to the investment market, arguably towards maximum efficiency.[20] In sum, the economic development of investment capitalism requires the expansion of private rights to stimulate market activity and such expansion includes establishing property rights over a range of private assets including investment assets.[21]

On the other hand, the *internal* dimension of the share is not completely or clearly defined. In other words, the share is clearly identified as an asset in its *external* proprietary terms and this is how it is fabricated for the market. Buyers, sellers and issuers have no doubt as to what is being traded, but what other enjoyment can be derived from the share as an incident of property from the prospective of the holder of the share? Does the holder of a share own any part of the issuing corporation? This refers to the *internal* dimension of the share and it is the *internal* dimension that the article focuses on to determine if and to what extent the enjoyment of ownership (other than in transferability) in a share may form the basis to support many modern forms of shareholder activism today. The *external* dimension of a share, which is supported by proprietary notions of ownership in order to facilitate the acceptance of a share as asset, and the free transferability of shares, should not arguably be borrowed to fabricate the paradigm of the *internal* dimension of a share.

The bundle of rights in the *internal dimension* of a share may still be argued to be "proprietary" in nature, as these rights allocate control over certain corporate assets and corporate decisions to shareholders.[22] In *Her Majesty's Commissioners of Inland Revenue v. Laird Group PLC,* Lord Millett stated:

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[19] Ross Levine, *Law, Endowments and Property Rights*, 19 J. ECON. PERSP. 61 (2005).

[20] *See* Randall Collins, *Weber's Last Theory of Capitalism*, 45 AM. SOC. REV. 925 (1980) (explaining Weber's exposition on how private property rights in general are indispensable to the economic use of assets towards maximum efficiency).

[21] SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT (Basic Books 1998); Wesley C. Mitchell, *Commons on the Legal Foundations of Capitalism*, 14 AM. ECON. REV. 240 (1924).

[22] Sven-Olof Collin, *Governance Strategy: A Property Right Approach Turning Governance into Action*, 11 J. MANAGERIAL GOVERNANCE 215 (2007); Michael Whincop & John A. Armour, *The Proprietary Foundations of Corporate Law*, 27

> It is customary to describe [a share] as "a bundle of rights and liabilities," and this is probably the nearest that one can get to its character, provided that it is appreciated that it is more than a bundle of contractual rights. . . . These rights, however, are not purely personal rights. They confer proprietary rights in the company though not in its property.[23]

In Henry Smith's conceptualization of ownership property rights,[24] which is distinguished from what he terms as "governance rights," Smith describes governance rights as existing in the rules of liability permitting defined actions and regarding certain other actions as forms of encroachment. As rules of liability define each permitted action *vis a vis* the property concerned, they are different from ownership rights. Ownership rights are defined in the ability to exclude others and there is, therefore, no need to define a bundle of rights, such as governance rights over the property. In Smith's conceptualization, a bundle of rights representing certain extents of control would merely be a form of governance and is not to be regarded as ownership.

Many would acknowledge that a stronger case may be made for saying that proprietary rights in the firm actually lie with management, as management has the power to make decisions regarding the use and allocation of corporate assets—although subject also to mandatory duties in law—and hence, although the legal fiction of the corporation actually owns any asset, the proprietary rights over the assets are more significantly exercised by management.[25] The right of the Board to manage is defined as "general authority" and a right to exercise "all the powers of the company."[26] This is consistent with Smith's conceptualization of ownership as having an unspecified bundle of powers. It may be argued that the Board is but an agent of the shareholders, as finance economists suggest. "Agency," however, as understood in finance economics is rather different from the understanding under the law. An agent in law derives the remit of powers from the principal—and even in apparent authority, such authority is

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OXFORD J. LEGAL STUD. 429 (2007); Curtis J. Milhaupt, *Property Rights in Firms*, 84 VA. L. REV. 1145 (1998).

[23] [2003] UKHL 54 at para 35.

[24] Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Henry E. Smith, *Exclusion and Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002).

[25] JOHN MCDERMOTT, CORPORATE SOCIETY: CLASS, PROPERTY AND CONTEMPORARY CAPITALISM 80–91 (West View Press 1991).

[26] Model Articles for Private Companies Limited by Shares, and Model Articles for Public Companies, art. 2 (similar to the position to the predecessor to the Model Articles, Art 70, Table A of the Companies Act 1985).

derived from the principal's representation[27] to begin with. The powers of the Board and shareholders are however seen in a paradigm of "division" of roles and the proper principal of the Board is the real entity, the company. This may be explained by a series of cases testing the nature of the directors' employment contracts. Often the terms of directors' employment with the company are spelt out in the Articles of the company. As the Articles are a contractual document representing the relationship between members *inter se*,[28] only members acting in the capacity of members are able to enforce the Articles in court.[29] Terms benefitting or relating to directors are often not enforceable as directors are regarded not to have a contract with members of the company as such.[30] If the law upholds the agency model of corporate governance and directors are treated as agents of shareholders, then surely shareholders can embody in a document that represents their collective agreement, the terms of the agency. The law has recognized directors' employment contracts with the company, the real entity. The provisions of the Articles dealing with directors may to some extent be implied into the employment contract,[31] but in the absence of an independent employment contract with the company, directors are unable to enforce employment terms in the Articles *in vacuo*. The "division of powers" paradigm is arguably the dominant legal paradigm that defines the relationship between directors and shareholders and the law does not seem to subscribe to a pure conception of "agency." This is affirmed in the key case of *Breckland Group Holdings Ltd. v. London & Suffolk Properties Ltd.*,[32] where a majority shareholder's usurpation of the power to decide to institute proceedings against a minority shareholder was set aside as the decision had to be taken by the Board. Where the Board is to have general management authority, English law has quite firmly held that shareholders do not have the arbitrary power to intervene.

Why do many commentators and the judiciary accept that shareholders' powers have a "proprietary character?" This may be partly attributed to the legal position that shareholders have a reserve power[33] to direct management if shareholders procure a special resolution to do so. Hence, the enabling framework in company law may allow shareholders to be more involved in management decisions and

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[27] Freeman and Lockyer v. Buckhurst Park Properties, [1964] 2 Q.B. 480.

[28] Hickman v. Kent or Romney Marsh Sheepbreeders Ass'n, [1915] 1 Ch. 881.

[29] Eley v. Positive Gov't Sec. Life Assurance Co., (1876) 1 Exch. Div. 88.

[30] *See* Read v. Astoria Garage (Streatham) Ltd., [1952] Ch. 637; S. Foundries v. Shirlaw, [1940] A.C. 743.

[31] *See Read v Astoria,* Ch. 637.

[32] [1988] 4 BCC 542.

[33] *Id.* at art. 3 (codifying the position in Quin & Axtens v. Salmon, [1909] A.C. 442).

having proprietary control over the company's assets if the Articles so provide or if the reserve power of shareholders is exercised. English law has always accorded a special provision to the equity capital suppliers of the firm. This may be due to the fact that companies evolved out of partnership law and until 1855, members of a company did not have limited liability.[34] Equity providers were not seen as a collective mass of anonymous persons but often as participants in the company.

The recognition of the reserve power dates back to 1909 in the seminal case of *Quin & Axtens v. Salmon*.[35] In that case, a company with two directors was obligated to comply with an Article providing that all decisions with respect to acquiring or letting of property, required the consent of both directors. One director dissented and the other procured a general meeting where the resolution of securing a lease was passed by simple majority. The court held that only if the resolution was passed by a special majority would the resolution be binding on the company. Hence, the case set the rule for reserving residual management to the general meeting only if the general meeting exercised such power with a three-fourths majority. This position has now been adopted in the Model Articles under the Companies Act, which form the default constitution for companies. The U.K. legal regime has provided for a generous regime of governance for shareholders through the reserve power, which is not available in the United States. The "reversion" of power may be regarded as an acceptance of some proprietary notions of the concept of share ownership. It could also be argued that the "reversion" is based on a "division of powers" paradigm as shareholder power is only summoned if the Board is deadlocked or unable to act.[36] Today, it is arguable that the regime of the reserve power may be supported by reference to the development of the "residual claimant" theory in institutional economics.

Mandatory law also confers on shareholders certain specific governance rights to which we shall turn shortly and these arguably reinforce the perception that shareholders are "residual owners." There are, however, other aspects of the legal regime that do not un-

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[34] Ross Grantham, *The Doctrinal Basis of the Rights of Company Shareholders*, 57 CAMBRIDGE L.J. 554 (1998).

[35] Quin & Axtens v. Salmon, [1909] A.C. 442.

[36] *See, e.g.*, Re Opera Photographic, [1989] 5 BCC 601; Union Music Ltd. v. Watson Arias Ltd. V. Blacknight Ltd., [2004] BCC 37. These cases concerned whether a shareholder could ask the court to order the convention of a general meeting in order to resolve any deadlock in management, but the court has used such power carefully so that reversion is granted only when it is necessary for the general meeting to make a management decision that otherwise would not be made. The court has refrained from aiding the calling of general meeting with an often amended quorum if doing so will override minority and class rights that were sought to be protected. *See* Ross v. Telford, [1997] BCC 945.

equivocally support shareholder primacy. The article now turns to examine the contesting aspects of the legal regime in framing shareholders' governance and rights in a company.

B. *Governance and Control Rights: The Legal Principles*

1. *Nature of the Right To Vote*

The key governance right derived from share ownership is the right to vote. Shareholders are entitled to vote on their shares as an incident of property,[37] and so the legal framework recognizes voting as the main control mechanism for shareholders to participate in the governance of a corporation. A vote allows an expression of preference between given options, but the nature of the vote is such that only the collective aggregation of votes into a majority matters for the outcome.[38] Hence, the allocation of an individual right to vote does not *per se* entail the exercise of strong powers, such as those inherent in the exclusionary nature of ownership rights.

However, the right to vote may translate into stronger forms of control and exercise of ownership rights under certain situations. This seems to be the case in companies with a concentrated large blockholding where shareholders are in the position to vote themselves or trusted persons onto the Board, and the right to vote becomes a strong control right that can ultimately take decisions directly affecting corporate assets and the existence of the corporation itself. Commentators have observed how concentrated large blockholding, particularly by families, affects the management expertise and decisions of the company,[39] as well as the use, acquisition, or disposal of corporate assets.[40] This is also the case where the right to vote may be weighted, and the extent of control that such a right entails becomes sufficiently

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[37] N. Counties v. Jackson & Steeple, [1974] 1 W.L.R. 1133; North-West Transp. Co. Ltd. v. Beatty, [1887] 12 App. Cas. 589.

[38] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1970) (arguing that the social choice aggregated from the voting decisions need not provide the most optimal outcome for all participants).

[39] *See* Sven-Olof Collin, *Governance Strategy: A Property Right Approach Turning Governance into Action,* 11 J. MANAGERIAL GOVERNANCE 215 (2007); ROLF H. CARLSSON, OWNERSHIP AND VALUE CREATION (2001) (describing how Swedish owners who are also in management bring various forms of input and motivational impetus to the corporation).

[40] David L. Kang & Aage B. Sorensen, *Ownership, Organization and Firm Performance*, 25 ANN. REV. SOC. 121 (1999); R. Gilson, *Controlling Shareholders and Corporate Governance* (ECGI Working Paper 49/2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=784744 (reporting of tunnelling and extraction of corporate value for private interest are also rife); M. ARARAT, B. SENER & E. TABOGLU, INTERNATIONAL CORPORATE GOVERNANCE: A CASE STUDY APPROACH 269, 283 (C. Mallin ed., 2006).

significant.[41] Further, the majority vote at a general meeting may indicate the general meeting's advice to management, and where the majority vote is a super-majority, the special resolution could direct management to be bound to take certain courses of action,[42] which is earlier described as the shareholders' reserve power. Where the right to vote is concentrated, sufficiently collective, or sufficiently weighted, it can be used to further the exercise of exclusionary rights over corporate assets and decisions, and hence, the ownership of shares could practically translate into ownership rights over the firm itself.

The mandatory framework in company law has arguably played a stronger role in reinforcing the ownership notion underlying shareholdership. This is because the mandatory framework in company law has co-opted shareholders into a governing role *vis a vis* management, especially in situations of conflicts of interest. Such a co-option seems to be based on the perspective that sees shareholders as the ultimate residual claimants of a company, and hence residual owners.

The mandatory framework in company law reserves certain decisions to shareholder meetings, or prohibits certain executive decisions to be made unless shareholders approve. Provisions dealing with the appointment and removal of directors are examples of the former.[43] Such powers may translate into the direct or indirect exercise of ownership rights in the firm, as may often be the case in concentrated blockheld companies. Further, directors, or their connected persons, are not allowed to enter into substantial property transactions with the company,[44] or to benefit from a company loan or quasi-loan[45] or other credit transaction,[46] without the approval of shareholders by an ordinary resolution. These provisions co-opt shareholders into monitoring the prospects of self-dealing by management, and in turn translate into a form of proprietary control for shareholders. Mandatory law has also provided for shareholders to have the right of ratification or otherwise of breaches, negligence, or omissions commit-

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[41] Bushell v. Faith, [1970] A.C. 1099. Also the weighted voting structures frequently used in family-founded firms even where the founding family shareholders are no longer in the majority. *See* J. AGNBLAD, E. BERGLOF, P. HOGFELDT & H. SVANCAR, OWNERSHIP AND CONTROL IN SWEDEN: STRONG OWNERS, WEAK MINORITIES AND SOCIAL CONTROL, THE CONTROL OF CORPORATE EUROPE 250, 255 (Barca & Becht eds., 2002).

[42] Quin & Axtens v. Salmon, [1909] A.C. 44 (now codified in Art. 3, Model Articles).

[43] Companies Act, 2006, c. 45, §§ 160, 168–69, 188 (with respect to long-service contracts exceeding two years with the company).

[44] *Id.* at §§ 190–196.

[45] *Id.* at §§ 197–200, 213–14.

[46] *Id.* at §§ 201–14.

ted by directors.[47] The right of shareholder ratification seems particularly based on the perspective of shareholders as residual risk bearers and hence the appropriate assessors of whether or not to accept irregularities committed by management and how such irregularities may affect their investment.

2. Are Shareholders Residual Claimants or Owners?

The residual claimant theory was developed from an economic theory about the organization of a firm. Coase's famous theorem[48] argued that firms were organized in order to internalize certain contractual arrangements on a revolving basis, such arrangements would otherwise have to be sourced on the market. Williamson took Coase's theorem one step further by showing how internalization minimized opportunity costs (or transaction costs) that took place with repeated on-market arrangements and hence the organization of a firm was based on efficiency of economic arrangements minimizing transaction costs that would otherwise have been incurred on the market.[49]

The internalization, however, of a firm as a nexus of contracts would feature some long term open-ended contracts, as specific rights are unlikely to be completely spelt out in an ongoing relationship where myriad possibilities exist, such as a shareholder's investment in a company or long-term employees with firm specific expertise.[50] Such open-ended contracts would result in renewed negotiations and arrangements over time, and hence it is argued that "[the] Board of directors thus arises endogenously, as a means by which to safeguard the investments of those who face a diffuse but significant risk of expropriation because the assets in question are numerous and ill-defined and cannot be protected in a well-focused, transaction-specific way."[51] Who are these residual risk bearers whose investments are long term and ill-defined? Alchian and Demsetz argue that internalization of a nexus of contracts within a firm must be subject to a centralized contractual agent, that organizes the input into the team production process of the firm.[52] Such a centralized contractual agent must then have the incentives to monitor the rest of the team in overseeing their inputs. In order for the monitor to be incentivized to monitor, he or she could be designated a residual owner of the net earnings

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[47] Foss v. Harbottle, (1843) 2 Hare 461 (codified with modification in § 239 of the Companies Act 2006).

[48] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[49] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 15 (1985).

[50] *Id.* at 306.

[51] *Id.*

[52] Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organisation*, 62 AM. ECON. REV. 777 (1972).

of the firm so that he or she would not be incentivized to shirk the monitoring responsibility. By this argument, it is not yet necessary to designate the shareholder as the residual owner, and constituents who fall within this category arguably include management itself, shareholders, long term creditors and employees.

Another group of economists, however, took the contractual relationships in constituting the firm to another level, the level of property rights. Grossman and Hart argued that in order for the contractual relationships in the firm to be sustained, contractual relationships must spell out either specific rights or residual rights.[53] Where specific rights cannot be spelt out and the rights are long-term, unspecific and residual, the holder of residual rights in effect holds proprietary rights over the net assets of firm, as such proprietary rights are the platform upon which the residual rights are based. Hart[54] argues that as the organization of the firm is centered around the use of the firm's non-human assets, the residual rights should then be structured as residual ownership rights over those assets.[55] In economic theory, little distinction is made between capital providers and managers of the firm, and the usual assumption is the fusion of the two. However, where there is separation of ownership from control, who then is the residual claimant in the firm?

The "finance perspective" of the firm, introduced by Jensen and Meckling, is crucial to our recognition of shareholders as the residual claimants in the firm with property rights. The "finance" perspective placed emphasis on the role of the capital providers to the firm (such as shareholders and creditors). Jensen and Meckling worked on a

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[53] Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

[54] Oliver D. Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989).

[55] *Id. But see* Charles F. Sabel & Jane E. Prokop, *Stabilization through Reorganization, in* CORPORATE GOVERNANCE IN CENTRAL EUROPE AND RUSSIA 151 (R. Frydman et al. eds., 1996) (arguing that new economies need not be built upon capitalistic notions of residual ownership of corporate assets and decisions made by the pricing mechanism of the free market, thus revealing that Hart's view may be outdated). This is because production is getting harder and more product runs are short, making work organization less based on product-specific property but on more flexible forms of property that can be used for all sorts of production. This means that suppliers, firms and customers should combine with each other at different points to produce a collaborative network that may always be changing. In this context, to make residual owners who also have diversified portfolios as economic owners and deciders of firm decisions may not be optimal. Alternative forms of defining ownership of residual assets that are decoupled from control is necessary, and that will allow more collaborative frameworks to arise so that governance may be provided by different actors who have different incentives to drive production as may be necessary.

model of separation of capital provision from managerial control, and opined that the capital providers would be interested in maximizing the cash flow rights and residual value of the firm while managers may be interested in maximizing their private utility and job satisfaction. The relationship between owners, managers, and creditors would hence manifest in agency costs.[56] The structure of the firm would then depend on the monitoring and bonding activities undertaken by creditors and shareholders to reduce management expropriation of private benefit in their position of control.[57] They also opined that although capital will always be a mixture of debt and equity, debt produces enormous agency costs for creditors and costs for both the manager and the firm itself in being constrained by various covenants. Hence, debt is not a preferred source of finance. From a finance perspective, the separation of ownership from control creates conflicts of objectives between shareholders and management, and management may direct the firm into transactions that need not necessarily maximize the net cash flow for shareholders. This represents agency costs for shareholders, and hence they bear the residual risk of the value outcome of the firm.[58] The finance perspective is arguably responsible for identifying the shareholder as the residual claimant/owner developed in organizational economic theory. Agency costs are therefore seen as the dominant factor affecting the risk borne by shareholders, but is a necessary evil, as Fama and Jensen argue that from an organizational perspective, the separation of professional managers from diverse shareholders is still most likely to be efficient, and managers may be controlled by internal monitoring and ratification, and external forces such as the market for corporate control and monitoring from the stock market that is pricing the stocks.[59]

The development of shareholder primacy is founded both on the perspectives of shareholders as "principals" controlling agents, and as residual claimants/owners in the firm. These perspectives firmly entrench shareholders in a position where it is accepted that shareholders would naturally bargain for maximization of cash flow rights and hence firm value, and that would be what managers as agents are

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[56] *But see* A.A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (describing directors as trustees of power in managing the corporation). Subsequent finance literature has brought the negative self-dealing incentives of the "trustees" to the forefront.

[57] *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[58] Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302 (1983).

[59] *See generally id.*

hired for.[60] These theoretical perspectives lend support to the fabrication of "ownership" of the firm by shareholders. It is even arguable that legal developments manifested in the United Kingdom Companies Act of 1985 on shareholder controls on director expropriation (which, as discussed earlier, are imposed under mandatory law), are derived from this perspective of shareholders as "owners."[61] The legal framework, however, on the whole is arguably ambivalent in recognizing shareholders as the only residual owners, as will be discussed below.

The finance perspective, supporting shareholders as residual owners and shareholder primacy, has been criticized by a number of leading proponents. Margaret Blair has criticized the shareholder primacy model as based on an erroneous assumption that only shareholders are residual risk bearers.[62] Blair argues that employees are also a class of residual risk bearers as they acquire firm specific expertise and the longer they work for the firm, the less likely they will be able to move freely to another job.[63] Long service employees hence make a firm-specific investment and are residual risk bearers of a firm's insolvency.[64] Blair, together with Lynn Stout, developed a director primacy theory arguing that directors must maintain their primary roles in managing the different inputs into a firm, including those of shareholders, employees, and creditors, and allowing shareholder primacy to dictate the objectives of the firm, or the actions shareholders can take in monitoring and controlling, is misplaced.[65]

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[60] *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard Univ. Press) (1991).

[61] The Companies Act 1948 contains significantly fewer and less detailed provisions controlling director expropriation than later Companies Acts. The provisions controlling directors' transactions with the company were first introduced in Part IV of the Companies Act 1980, thereafter consolidated as Part X of the Companies Act 1985, and now retained in the 2006 Act. The 1980 Act's provisions may be attributable to the explosion of awareness of the agency problem developed in finance literature in the 1970s and 80s.

[62] MARGARET M. BLAIR, OWNERSHIP AND CONTROL 223–45 (Brookings Inst. Press 1995).

[63] *See id.* at 230–31, 238–39.

[64] *See id.* at 238–39.

[65] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719 (2006); *accord* Armen A. Alchian & Susan Woodward, *The Firm Is Dead; Long Live The Firm*, 26 J. ECON. LITERATURE 65 (1988) (reviewing OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985)) (viewing labor as another form of capital and hence refusing to accord primacy only to cash capital suppliers); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789 (2007); Sarah Worthington, *Shares and Shareholders: Property, Power and Entitlement,*

Blair's director primacy theory augments Dodd's early model that managers are trustees for the corporation as an entity in itself.[66] This school of thought endorsing director primacy is arguably in line with the Model Articles and *Breckland Holdings*, and is wary of shareholders taking advantage of their positions in interfering with management to satisfy their private interests which may not have anything to do with maximizing cash flow rights for all.[67]

Economists Alchian and Woodward also argue that the view treating shareholders as residual claimants over non-specific firm value and hence superior to the other constituents in the firm is erroneous. They argue that managers invest firm-specific input not only in terms of expertise, but frequently in terms of investment of capital in the firm itself too, and similarly for employees of the firm. That is why many professional firms are labor-owned and not capital-owned, as the input by labor is regarded as specific and non-time limited to the firm, and there is no reason why labor should not be responsible for administering the proprietary decisions over the firm and sharing in the residual claims.[68]

In their words:

> First, the leader of a team (management) is the member with the comparative advantage in deciding what the team and its members should do, and this manager need not be an owner or even part-owner in the firm; second, ownership of the team is the residual claimancy on the most team-specific resources, which may be labor or capi-

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22 COMPANY LAW. 258, 307 (2001) (rejecting "ownership" fabrication of shareholdership, and arguing that there is no entitlement on the part of shareholders to require firms to be run for their primary interests).

66 E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932).

67 *See generally* Martin Lipton & Paul K. Rowe, *The Inconvenient Truth about Corporate Governance: Some Thoughts on Vice-Chancellor Strine's Essa*, 33 J. CORP. L. 63 (2007) (voicing similar concerns); Jeffrey N. Gordon, *Shareholder Initiative and Delegation: A Social Choice and Game Theoretic Approach to Corporate Law*, 60 U. CIN. L. REV. 347 (1991); Lynn A. Stout, *Shareholders Unplugged*, LEGAL AFFAIRS, Mar.-Apr. 2006, at 21, *available at* http://www.legalaffairs.org/issues/March-April-2006/argument_Stout_marapr06.msp; Theodore N. Mirvis, Paul K. Rowe, & William Savitt, *Bebchuk's "Case for Increasing Shareholder Power"*: An Opposition Harvard Discussion Paper No. 586 (2007), *available at* http://ssrn.com/abstract=990057 (responding to Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005)); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); Iman Anabtawi, *Some Skepticism about Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006).

68 Alchian & Woodward, *supra* note 65.

> tal. To start an analysis of firms by assuming the presence of "capital" or that capital hires labor is to beg the question of the basis for the existence of a firm.[69]

Further, modern perspectives of the firm see the firm as not an organization around assets that are used towards a production of the same outputs, but as networks of resources that can be combined, collapsed, and re-combined to produce a variety of outputs for the competitive markets. Such a view allows a network of interacting and flexible relationships in an organization less based on pools of stable property, hence even diminishing the stature of the "residual claimant," as resource providers can move freely and flexibly with less committal to particular economic arrangements in order to meet changing production objectives.[70]

Another school of thought disagreeing with shareholder primacy approaches from the social welfare stance. Parkinson argues that the emphasis on wealth maximization may be misplaced when looked at in the context of social or moral welfare.[71] In considering these other priorities, he advocates a model that includes other stakeholders such as employees in management, based on arguments that employees need to have a right to democratic self-government in an organization, and such rights should not be sidelined by conventional efficiency and "capital as property" perspectives.[72] This school of thought is echoed in many other "stakeholder" theories[73] that reject the fundamental analysis of shareholder primacy from the finance perspective.

Modern developments may also undermine the finance perspective. The finance perspective is based on recognizing that shareholders bear the greatest amount of residual risk in the firm due to agency costs. The assumption made by all institutional economists is that the residual claimant is subject to a long term, undefined, and open-ended risk of expropriation of the firm's assets, as if the risk

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[69] *Id.* at 72.

[70] Charles F. Sabel & Jane E. Prokop, *Stabilisation through Reorganisation*, *in* CORPORATE GOVERNANCE IN CENTRAL EUROPE AND RUSSIA 151 (R. Frydman et al. eds., 1996).

[71] *See* J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY (Oxford Univ. Press 1993).

[72] *See id.*

[73] *See generally* Shann Turnbull, *Stakeholder Governance: A Cybernetic and Property Rights Analysis*, 5 SCHOLARLY RES. & THEORY PAPERS 11 (1997); Tony Ike Nwanji & Kerry Howell, *The Stakeholder Theory in the Modern Global Business Environment*, 1 INT'L J. APPLIED INSTITUTIONAL GOVERNANCE (2008), *available at* http://www.managementjournals.com/journals/ig/article148.htm; Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002).

borne residual claimant is wholly defined by his relationship to the firm. If shareholders' risks are gradually being mitigated or dissipated by other means outside of the firm's boundaries, then they may be less affected by agency costs within the firm, and according them primacy for being the most vulnerable residual risk bearers may then become misplaced. For example, many modern shareholders of firms are institutions such as pension funds, mutual funds, and hedge funds. These funds, being professionally managed, are diversified, or are able to hedge their investments in order to mitigate risk. Next, some shareholders are able to enter into arrangements where they do not have to bear the risk of cash flow rights but only holding on to voting rights. In situations where the cash flow rights have been decoupled from voting rights, can we really say that the holder of the voting rights bear a residual risk in the changing values of the firm?[74] Partnoy and Martin discuss how the decoupling of rights in shares affects the propensity to vote, and the perversity of allowing certain technical "holders" of shares to vote who may have economic interests adverse to the firm.[75] Further, it is documented that many joint venture shareholders have complex arrangements where cash flow rights, voting rights, liquidation rights, and Board representation rights may all be separated, and hence, it may be too simplistic to hold on to a perception of the "residual owner" as a residual risk bearer in the firm.[76]

Further, it is arguable that the co-option of shareholders to exercise strong governance rights over potentially conflicting transactions involving directors need not be based on shareholders' proprietary claim to the company or a fabrication of "ownership" in the company. Regulatory theory argues that the complexities of modern regulation often make it difficult for regulators to have comprehensive oversight or control, or to design comprehensive incentives to direct or facilitate the working of the market in a particular way.[77] Regulators therefore co-opt other actors in the market as these have their own

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[74] *See generally* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006); Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625 (2008).

[75] Shaun P. Martin & Frank Partnoy, *Encumbered Shares*, Legal Stud. Res. Paper Series No. 05-23, at 14–19 (2004), *available at* http://ssrn.com/abstract=621323.

[76] Hirokazu Takizowa, *New Institutional Arrangements for Product Innovation in Silicon Valley*, *in* OWNERSHIP AND GOVERNANCE OF ENTERPRISES: RECENT INNOVATIVE DEVELOPMENTS 69 (Palgrave MacMillan 2003).

[77] Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation* (London School of Economics Public Law Working Paper Group, Paper No. 63, 2003); Julia Black, *Decentring Regulation* (London School of Economics Current Legal Problems Working Paper Group, Paper No. 103, 2001); Colin Scott, *Analysing Regulatory Space: Fragmented Resources And Institutional*

resources and leverage upon the natural incentives of these actors to perform certain roles that would achieve a regulatory effect. Hence, the role that mandatory law has given to shareholders may be read no more than in that light, and it may arguably not represent the law's endorsement of a fabrication of "ownership."

Turning to the legal framework in the United Kingdom, it is arguable that the law is ambivalent about shareholder primacy. Although shareholders have "reserve powers" that can intervene specifically in a management decision, and can contract for powers of control in a company other than in accordance with the Model Articles, there are aspects in company law that do not accord shareholders with primacy. Worthington has argued that whether we view the company as a "nexus of contracts" or as a "real entity," the legal framework does not support any assertion that shareholders are entitled to have directors run the company for the purposes of shareholder wealth maximization. The "nexus" perspective allows companies to be seen as a web of interactions among constituents, but the theory itself does not give primacy to shareholders. It is only if we accept the finance economists' attribution of importance to the residual risk bearer (at least in terms of financial capital) that a primary position can be accorded to shareholders. The law recognizes that shareholders risk their capital in the company for the long term without easy prospects of withdrawing the capital.[78] Shareholders, on the other hand, are ameliorated by the rule on limited liability, and the prospect that their shares can ordinarily (subject to contractual restrictions in the Articles) be sold in a liquid market or otherwise. Looking at rules on transaction avoidance,[79] directors' duty to creditors during the twilight of a company[80] and provisions protecting creditors at a voluntary liquidation,[81] company law clearly allows others' concerns to be given priority over shareholders under certain circumstances. The mandate to consider a wide range of stakeholders' interests in the discharge of directors' duties[82] and the need for shareholders to consider stakeholders' interests in pursuing a derivative action[83] are examples of when shareholder primacy does not rule. Further, the legal framework is also heavily based on the "real entity" theory as the company's interest is regarded

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Design (London School of Economic Public Law Working Paper Group, Paper No. 32, 2001).

[78] Trevor v. Whitworth, (1887) 12 App. Cas. 409 (demonstrating modern day limitations in the rules on maintenance of capital).

[79] Insolvency Act, 1986, c. 45, §§ 238, 239, 245.

[80] The Liquidator of West Mercia Safetyware Ltd v. Dodd, [1988] 4 B.C.C. 30.

[81] *See, e.g.*, Insolvency Act, 1986, c. 46, §§ 84, 89.

[82] Companies Act, 2006, c. 45, § 172.

[83] Companies Act, 2006, c. 45, § 263(2) and (3).

as distinguishable from shareholders' interests and directors' duties are defined as duties to the company.[84]

Case law has repeatedly affirmed that a shareholder's nominee director on the Board should serve the company's interests first and foremost, and it would be a breach of duty if such director did not consider the company's interests as such, only considered the appointing shareholder's interests.[85] Even where shareholders engage in the activity of voting to amend the Articles, the "real entity" theory is arguably at work as the vote must be exercised *bona fides for the benefit of* the company as a whole.[86] Finally, the case of *Short v. Treasury Commissioners,* it is stated that "shareholders are not, in the eye of the law, part owners of the undertaking."[87] Shareholders do not have a proprietary stake in the assets of the company, the "real entity,"as was affirmed in the much more recent case of *Her Majesty's Commissioners of Inland Revenue v Laird Group PLC.*[88]

The legal framework in the United Kingdom has the following features:

(a) Unless otherwise modified, the enabling legal framework provides for director primacy;

(b) Shareholders have a reserve power to direct management in a specific resolution passed by special majority, but not a general power of interference;

(c) Shareholders are empowered under general mandatory law to have exclusive governance over various areas such as appointment and removal of directors, approval of certain transactions and in general ratification;

(d) But directors are allowed to consider other constituents' interests and above all, the interests of the "real entity," the company, above shareholders;

(e) The law regards the value of the company as separate and distinct from shareholders' share values in aggregate,

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[84] Companies Act, 2006, c. 45, § 170(1).

[85] Scottish Coop. Wholesale Soc'y Ltd. v. Meyer, [1959] A.C. 324; Kuwait Asia Bank E.C. v. Nat'l. Mut. Life, [1990] 1 A.C. 187.

[86] Allen v. Gold Reefs of West Africa, Ltd., [1900] 1 Ch. 656. This position has been somewhat changed by the interpretation given in the later case of Greenhalgh v. Ardene Cinemas Ltd., [1951] Ch. 286, where the benefit for the company as a whole is to be determined by the "reasonable corporator". This arguably links shareholders' interest to be the same as what benefits the company, and such a presupposition may be questioned. However, the "reasonable corporator" is itself a fiction and hence it could be argued that there is no difference between the two expositions.

[87] Short v. Treasury Comm'rs, [1948] 1 K.B. 116.

[88] [2003] UKHL 54.

> hence affirming the "real entity" as separate from shareholders.

The above analyses show that the fabrication of shareholders as "owners" has come largely from a finance perspective whose dominance may not be completely warranted. The law acknowledges the special nature of shareholders' bundle of interests, and the reserve power goes fairly close to a fabrication of ownership. Shareholders are also endowed with a general power of ratification in such a way that shareholders are treated as the only residual claimant or owner of the firm that can decide whether to forgive or enforce against irregularities committed against the firm—for example, that other constituents do not have a say in this. It is also to be noted that shareholders' power of ratification is subject to their freedom to vote,[89] and the *Allen v. Gold Reefs* limitation arguably does not apply.[90] On one hand, the enabling framework of company law can allow shareholders to contract for substantial control over corporate decisions and assets, making their power more "proprietary" in nature. However, on the other hand, this is rarely the approach taken in public and listed companies that uphold the division of powers in the default Model Articles. Many provisions in mandatory law reinforce the conception of the shareholder as residual owner and not just as a participant in certain aspects of governance. However, the other aspects of mandatory company law do not quite support that fabrication unequivocally. Mandatory law co-opting shareholders into a specific form of governance over directors may be explained as regulatory techniques in the public interest instead necessarily of an endorsement of the fabrication of ownership.

Against this backdrop, this article examines the practice of shareholder activism in the name of "ownership." Notably, shareholder activism is generally carried out by minority shareholders—many in widely held public and listed firms. Where there is a dominant or majority owner and there is fusion with management, proprietary control over the firm may take place without the need for activism.[91] This article does not address the many unique arrangements that may be made in the context of private companies, but instead focuses on public and widely held companies as activism occurs under circumstances where the shareholders do not have better control rights than the conventional governance rights found in the Model Articles.

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[89] N. Counties Sec. Ltd. v. Jackson &. Steeple Ltd., [1974] 1 W.L.R. 1133.

[90] *Allen*, 1 Ch. at 656.

[91] Majority—or even just large shareholders with a significant block, for example, 25%—can make a direct impact on key issues such as R&D policy, executive compensation and dividends. See Henrik Cronqvist and Rudiger Fahlenbach, *Large Shareholders and Corporate Policies* (2008), *available at* http://www.ssrn.com/abstract=891188.

3. Shareholder Activism

In Dalia Tsuk Mitchell's insightful article,[92] U.S. shareholders are conceptualized as "investors" whose primary right is to sell as they choose, rather than as participants in the internal reform of companies. This conceptualization is supported by the U.S. law's emphasis on securities market regulation and transparency, which underlies the political antagonism against concentrated power, favoring dispersal of corporate ownership amongst a mass of investors.[93] Although the same political culture is absent in the United Kingdom, the United Kingdom and the United States converged in the ownership structure of firms since pension funds and institutional investors—such as mutual funds and insurance companies—own the majority of publicly traded equity.[94] In the United Kingdom, empirical evidence indicates that institutional investors behave first and foremost as "investors" with respect to their shareholdership.[95] Thus, this pre-occupation influences their engagement with their investee companies.

Alternative funds such as hedge funds and some sovereign wealth funds are starting to acquire more significant stakes in Anglo-American jurisdictions companies. Hedge funds especially engage in activism to influence various corporate governance and management decisions in a company. Although there is no deliberate ideological movement towards dispersal of shareholding, the evolution of investment capitalism and pension saving in the United Kingdom has led to a similar shareholding structure in the most significant public companies.

Shareholder activism may be defined along a spectrum of actions—from gaining corporate control (corporate raiding in 80s America) to instituting shareholder litigation to other forms of influence changing corporate directions without changing the stake of control (such as accessing the proxy system, making proposals and

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[92] Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 65 WASH. & LEE L. REV. 1503 (2006).

[93] Mark Roe, *Strong Managers, Weak Owners* (NJ: Princeton University Press 1996).

[94] Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 468 (2001).

[95] Kathleen Rehbein, Sandra Waddock & Samuel B. Graves, *Understanding Shareholder Activism: Which Corporations are Targeted?*, 43 BUS. & SOC'Y 239 (2004); John Hendry, Paul Sanderson, Richard Barker & John Roberts, *Responsible Ownership, Shareholder Value and New Shareholder Activism*, (ESRC Centre for Business Research, Working Paper No. 297, 2004); Andrew Jackson, *Towards A Mutual Understanding of Objectives? Attitudes of Institutional Investors and Listed Companies to Corporate Governance Reforms* 9(3) CORP. GOVERNANCE 196 (2001).

initiating dialogue, or relationship investing).[96] The current, rising form of shareholder activism is that which systematically influences corporate direction and decisions with a minority stake without resorting to the legal framework supporting shareholder litigation. This form of activism was led in the United States in the mid 1980s by public pension funds, such as CALPers, and influenced other private investment funds, such as LENS and the U.K. Hermes funds.[97]

Relationship investing of contemporary shareholder activism can be undertaken through a range of actions. Shareholders could make proposals to be voted on at general meetings. In the United States, Rule 14a-8 of the Securities Exchange Act 1983 allows a holder of $2000 in market value or 1% in equity to submit a single proposal to be voted on the general meeting.[98] In the United Kingdom, a member in a public company can ask for circulation of a proposal if he holds at least 5% of the company's equity or the proposal is supported by at least 100 members each having an equity value of not less than £100.[99] Further, members' proposals for resolutions must be received by the company at least six weeks[100] before the general meeting, but as companies are entitled to give a minimum of twenty-one days' notice[101] for the general meeting (or twenty-eight days if the removal of a director is proposed[102]), members may be unable to send proposals to a company in time—including for the removal of directors. This may, however, be made up for by the power of members to call an extraordinary general meeting. Hence, members are not limited by the directors' power to call a general meeting. The law also allows voting to be carried out by appointed proxies.[103] Empirical evidence shows that members' proposals for resolutions in the United States are increasingly successful as they attract fellow shareholders' support and although not binding in nature, could practically change the direction that the company was originally taking.[104] The proposal process is

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[96] *See* Stuart L. Gillan & Laura T. Starks, *A Survey of Shareholder Activism: Motivation and Empirical Evidence* (1998), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=663523&rec=1&srcabs=796227.

[97] *Id.*; *See* Sanford M. Jacoby, *Convergence by Design: The Case of CalPERS in Japan* (2006), *available at* http://ssrn.com/abstract=920883 (explaining how CALPers influenced other funds).

[98] 17 C.F.R. § 240.14a-8 (2008).

[99] Companies Act, 2006, ch. 46 § 338.

[100] *Id.*

[101] Companies Act, 2006, ch. 46 § 307(2)(a).

[102] Companies Act, 2006, ch. 46 §168, 312.

[103] Companies Act, 2006 ch. 46 §324.

[104] Randall Thomas & James F. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction* (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868652; Stuart L. Gillan

also helped by rules allowing for solicitation of proxies.[105] However, the proxy process may sometimes be fraught with difficulties in terms of communication, coordination and cost.[106] That said, the threat of putting up a proposal for a resolution may itself be an influence for management to be reckoned with, whether or not the proposal is in fact put through and the proxy solicitation efforts are undertaken[107] Other indirect forms of activism that leverage on the power to vote are in the form of "just vote no" to appointments and re-elections of directors, as a form of protest in order for management to register other specific shareholder demands.[108] Empirical evidence shows that such campaigns are being noticed by management and could lead to a change in corporate policy and even CEO turnover.[109]

However, the proposal and solicitation process are less likely to be relied on in the United Kingdom as means of activism, and private

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& Laura T. Sparks, *The Evolution of Shareholder Activism in the US* (2007), *available at* http://ssrn.com/abstract=959670; Cindy R. Alexander, Mark A. Chen, Duane J. Seppi, & Chester S. Spatt, *The Role of Advisory Services in Proxy Voting* (Jan. 2008) (unpublished manuscript, on file with University of Maryland); Ernst G. Maug & Kristian Rydqvist, *Do Shareholders Vote Strategically?* (ECGI, Finance Working Paper No. 31/2003, 2006).

[105] *See* 17 C.F.R. § 240.14a-1 (2008).

[106] Shareholders may be passive due to the collective action free rider problem, or their behavior may largely depend on private motivations and whether they face conflicts of interest managing the funds of their investee companies. See Bernard S. Black, *Shareholder Passivity Re-examined*, 89 MICH. L. REV 520 (1990); Gerald F. Davis & E. Han Kim, *Would Mutual Funds Bite the Hand that Feeds Them? Business Ties and Proxy Voting* (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=667625; Pengfei Ye, *On Investors' Ownership and Voting Decisions: Evidence from Mutual Funds* (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100362; Rasha Ashraf & Narayanan Jayaraman, *Determinants and Consequences of Proxy Voting by Mutual Funds on Shareholder Proposals*, *available at* http://ssrn.com/abstract=962126. Shareholders may also face communication costs problems. *See* Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy* (ECGI, Working Paper No. 92/2008, 2008), Jennifer E. Bethel & Stuart L. Gillan, *Corporate Voting and the Proxy Process: Managerial Control Versus Shareholder Oversight* (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236099 (describing how shareholders can be subject to distortions and manipulations introduced by management).

[107] N. K. Chidambaran & Tracie Woidtke, *The Role of Negotiations in Corporate Governance: Evidence From Withdrawn Shareholder-Initiated Proposals* (1999), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=209808.

[108] *Id.*

[109] Diane Del Guercio, Laura Seery & Tracy Woidtke, *Do Boards Pay Attention when Institutional Investor Activists Just Vote NO?* (2008), *available at* http://ssrn.com/abstract=575242.

forms of engagement are regarded as more effective.[110] Shareholder activism carried out by a minority shareholder in the United Kingdom is most likely in the form of private dialogues and negotiations.[111] Empirical research from a number of jurisdictions, including the United States, has generally opined that such engagement successfully leads to changes implemented by the Board.[112]

III. TWO PARADIGMS OF SHAREHOLDER ACTIVISM

A. *Open-ended Contracting*

Early shareholder activism—such as that undertaken by CALPers in the United States in the 1980s and onwards, or other public pension funds such as TIAA-CREF, and the U.K. Hermes—targeted underperforming companies. These campaigns are phrased in terms of "unlocking shareholder value," where shareholders are perceived to have been short-changed on what could be the potential price growth for their shares. These campaigns surrounded issues such as making executive compensation linked to performance,[113] removal of anti-takeover defenses,[114] changing Board composition to include independent directors, and other stakeholder concerns such as employment and environmental issues,[115] all seen as measures that could be linked to improvement in share values.

The "unlocking of shareholder value" movement is arguably shareholder-centric, as its label itself suggests, and emphasizes the

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[110] Marco Becht et al., *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund*, 10 REV. OF FIN. STUD. 1093 (2008).

[111] *Id.*

[112] Roberta Romano, *Less is More: Making Shareholder Activism a Valued Mechanism in Corporate Governance* (2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=218650; Jonathan M. Karpoff, Abstract, *The Impact of Shareholder Activism in Target Companies: A Survey of Empirical Findings* (Sep. 2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885365 (surveying of a range of other studies showing that private negotiations are more effective in inducing change than shareholder proposals); William T. Carleton, *The Influence of Institutions on Corporate Governance through Private Negotiations: Evidence from TIAA-CREF*, 53 J. FIN. 1335; Becht et al., *supra* note 110.

[113] Kenneth J. Martin & Randall S. Thomas, *The Effect of Shareholder Proposals on Executive Compensation*, 67 U. CIN. L. REV. 1021, 1021 (1999) (discussing shareholder activism against excessive remuneration for CEOs of underperforming companies).

[114] Particularly in the United States, as the United Kingdom has always had a friendly regime supporting takeovers and discourages the use of anti-takeover defenses such as the poison pill.

[115] Kathleen Rehbein, Sandra Waddock & Samuel B. Graves, *Understanding Shareholder Activism: Which Corporations are Targeted?* 43 BUS. & SOC. 239 (2004).

share price value of the shareholder's investment, not the operating performance of the companies or its long-term profitability and survival.[116] However, calls for reforming excessive executive compensation may entail a social benefit in lessening the gap between top managers and employees, and not concentrating corporate gains at the top. But unlocking shareholder value is chiefly concerned about distributing the gains from management to shareholders, and the social benefit if any, is incidental.[117] Calls for changing Board composition, arguably, also have a social benefit dimension in that independent directors may be able to check abuses and excesses on the Board. This may increase the firm's risk management against management

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[116] This is also consistent with empirical findings on the financial impact of shareholder activism. Most literature argue that the financial impact on share prices may be mildly significant in the short run, but long term impact on operating performance is almost non-existent. *See* Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, (1996), http://www.pensionsatwork.ca/english/pdfs/scholarly_works/sw_edition3/Smith.pdf; Karpoff, *supra* note 112; Sunil Wahal, *Pension Fund Activism and Firm Performance*, 31 J. FIN. & QUANTITATIVE ANALYSIS 1 (1996); Becht et al., *supra* note 110 (discussing returns to shareholders in the form of increased share prices after activism). Where hedge funds are concerned, similar findings of short term share price abnormal returns are recorded after activism, see Nicole M. Boyson & Robert M. Mooradian, Abstract, *Hedge Funds as Shareholder Activists from 1994–2005*, (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=992739; Chris Clifford, Abstract, *Value Creation or Destruction? Hedge Funds as Shareholder Activists* (2007), http://ssrn.com/abstract=971018; Alon Brav, Abstract, *Hedge Fund Activism, Corporate Governance and Firm Performance* (2007), http://ssrn.com/abstract=948907. *But see* Yvan Allaire, Abstract, *Hedge Funds as "Activist Shareholders": Passing Phenomenon or Grave-Diggers of Public Corporations?* (2007), http://ssrn.com/abstract=961828.

[117] Although some commentators insist that shareholder value maximization will also result in the maximization of utility of stakeholders, see generally Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, *available at* http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html; Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002); HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY (1972); Bernard S. Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Philip Goldenberg, *Shareholders v. Stakeholders: The Bogus Argument*, 19(2) COMPANY LAW. 34 (1998).

fraud,[118] and mitigate the possibility of severe consequences such as insolvency that would affect a range of constituents.[119]

Shareholder activism is a self-help measure that shareholders undertake in order to protect their investment. This may be theoretically framed as part of the open-ended contracting process among the nexus of contracts, of which shareholders are a part. As such, shareholder campaigns in terms of anti-takeover defenses in the United States or against excessive executive remuneration in the United Kingdom are examples of contractual responses from shareholders in navigating the balance of interests in the nexus. This type of activism contracts for terms that are hitherto unregulated, hence falling within the enabling framework of company law. Shareholders are giving input, via the contractual process, on issues that have been left open, such as what executive remuneration should be related to or how it should be computed, the composition of the Board and whether a particular Chief Executive should continue to hold office. Such self-help measures may be accommodated within the understanding of the firm in institutional economics and within the enabling framework in company law. Perceived as such, shareholder activism may be regarded as part of the natural contractual outworking of the nexus of contracts, and this type of shareholder activism is termed as "open-ended contracting" in this article. It is suggested that shareholder activism of the "open-ended contracting" type is a natural manifestation of the bargaining process in the nexus, and can be theoretically supported. However, it must be questioned whether such activism is form of improper pressure in contracting, and whether such activism is unfair to other constituents in the nexus of contracts within the firm.

It may be argued that activism is not an improper form of pressure because shareholders as "residual owners" have the right[120] to bargain over an open-ended range of matters. But this argument depends on acceptance of the finance perspective of shareholder primacy, to which the legal framework does not completely subscribe.

In the enabling framework of company law, it may be possible that an activist is pushing for an agenda that may not be accepted by other shareholders. If the Board succumbs to that pressure, without

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[118] Richard C. Nolan, *The Legal Control of Directors' Conflicts of Interest in the UK- Non-executive Directors following the Higgs Report*, 6 THEORETICAL INQUIRIES L. 413 (2005).

[119] *See* Iris H-Y Chiu, *The Role of Securities Disclosure Regulation in Investor Protection Relating to Corporate Insolvency? Some Observations of the US, EU and UK Regulatory Frameworks*, 29(2) COMPANY LAW. 35 (2008).

[120] What one has a right to carry out may not be regarded as a form of improper pressure or coercion upon another, see Tony Honore, *A Theory of Coercion*, 10(1) OXFORD J. LEGAL STUD. 94 (1990) (commenting on ALAN WERTHEIMER, COERCION (1987)).

the matter going to a vote, the activist would arguably have excluded other shareholders from the bargaining process in the nexus of contracts. The law has attempted to strike a balance between allowing an individual shareholder to pursue his grievances,[121] and not allowing certain individual grievances to undermine the collective resolution of the interests of all shareholders in a company.[122] Hence, it is imperative that shareholder activism in the extra-legal realm be examined carefully to discern to what extent the legal framework that protects other shareholders' interests is undermined. If we accept an "ownership" and proprietary fabrication of shareholders' rights in a company, the danger, when combined with shareholder activism, is that proprietary notions often give rise to and justify self-interested behavior to the exclusion of others (the essence of property rights).[123] This may form the foundation for justifying activists' extraction of private benefits through activism, leading to abnormal returns on share price at the announcement and at the end of the activism campaign. One has to recall that proprietary notions underlie the phenomenon of allowing concentrated shareholders of a company, who are also in management, to expropriate private benefits through their position in the company, often at the expense of minority shareholders.[124] Since there is broad consensus that majority extraction of private benefit needs to be controlled and regulated,[125] would there not be a case for examining the extent of private benefit extraction by minority activists which did not go to a vote?

If activists could influence direct implementation of changes they propose without going to a vote, and extract private benefit for themselves in the process, then the minority shareholding of an activist shareholder is disproportionate to its power. The exercise of such power, in the extraction of private benefit must be considered carefully to ascertain if legal controls are necessary.[126] Even if it could

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[121] Companies Act, 2006, S994, *available at* http://www.opsi.gov.uk/acts/acts2006/ukpga_20060046_en_1.

[122] For example, enforcement of personal rights in the Articles may be trumped by collective ratification, see MacDougall v. Gardiner, [1875] 1 Ch. D. 13, or that a shareholder's campaign to amend the company's constitution has to be subject to the collective benefit of the company, see Allen v. Gold Reefs of West Africa, Ltd., [1900] 1 Ch. 656.

[123] Reed, *supra* note 9.

[124] Ronald J. Gilsson, Abstract, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy* (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=784744.

[125] *See generally* World Bank, *Minority Shareholders* (Aug 2003), http://rru.worldbank.org/PapersLinks/Open.aspx?id=2397.

[126] Ronald J. Gilsson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=417181; Iman Anabtawi &

be argued that a Board bowing to an activist may be in breach of directors' duty by failing to take the course of action that best benefits the real entity, the company itself,[127] such a course of action does not address the real concern. Penalizing the Board for taking on board certain activists' demands may affect the value of the company for the other shareholders, after the activists have already extracted their private benefits. The activist could also be regarded as a shadow director under U.K. law if the Board is accustomed to listening to and acting on his wishes.[128] However, such a threshold is difficult to mount if an activist merely engages in an intensive short term campaign and the pattern of Board obeisance over the long term, as required under the law, cannot be established. Hence, even if an activist is acting consistent with the concept that s/he is influencing the open-ended contractual process within the nexus of contracts, the appropriation of private power through activism and its impact on shareholders must be considered carefully as to its desirability. The legal framework at present does not address this issue, since minority shareholder remedies in the United Kingdom[129] may not be applicable against a minority activist shareholder, and legal controls over directors' duties or shadow directors may not sufficiently address the concern.

The abovementioned issue is likely to remain a moot point as the present climate is not antagonistic to minority shareholder activists. If activism achieves abnormal returns in share price that can be enjoyed by all shareholders in the market, then other shareholders are unlikely to complain or be antagonistic towards that activism although the collective interests of shareholders may not be the same.[130] Further, other shareholders are generally supportive of activism, as activist shareholders help in overcoming the free-riding problem faced in the collective action dilemma amongst shareholders,[131] and there is no reported evidence of counter-activism or anti-activism. The issue of improper influence exercised by activists is unlikely to be mounted by other shareholders for now.

In the United States, as there is no regime of "reserve power" for a special majority of shareholders, it is arguable whether share-

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Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1256 (2008).

[127] Companies Act, 2006, S172, *available at* http://www.opsi.gov.uk/acts/acts2006/ukpga_20060046_en_1; In Re Smith v. Fawcett Ltd., [1942] A.C. 304. (appeal taken from Ch.).

[128] Secretary of State v. Deverell [2001] ch. 340.

[129] Companies Act 2006, c.46, § 994.

[130] Ian B. Lee, *Corporate Law, Profit-Maximisation and the Responsible Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 37 (2005).

[131] Michael Smith, *Shareholder Activism By Institutional Investors: Evidence From CalPERS*, 51 J. FIN. 227, 229 (1996).

holder activists should be regarded less unfavorably in tilting the balance of power which has overly favored directors. As argued, shareholder activism pursuant to "open-ended contracting" is theoretically supportable subject to the concern raised above on whether an activist's action results in any externalities to other constituents in the nexus.

B. *Property Rights Activism*

When a shareholder activist is acting on his own, outside of the mandatory framework for shareholder governance, and where the reserve power of the general meeting is not summoned, the legal framework allows management to ignore such a shareholder unless his personal right under the Articles has been undermined,[132] or a case of unfair prejudice can be sustained.[133] Such a shareholder is not acting within the empowerment of mandatory law and is also not entitled to call upon the reserve power of shareholders under the enabling framework of company law. Increasingly, management frequently listens to and gives in to certain aggressive shareholder's demands. This explains how, for example, Nelson Peltz could influence Cadbury Schweppes in selling off its non-core beverage business with only a 3% minority stake in the company. Many issues campaigned in contemporary shareholder activism relate to how a company's property may be used or allocated. For example, shareholders have campaigned for dividends,[134] share buybacks where they believe that companies were "sitting on a cash pile,"[135] for companies to sell off non-core businesses or assets[136] or to expand into certain areas believed to generate more shareholder value.[137] These directly relate to the areas that management has control over—the corporate property and corporate decisions.

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[132] Pender v. Lushington (1877) 6 Ch. D. 70, 81.

[133] O'Neill v. Phillips [1999] 1 WLR 1092, 1098 (interpreting § 994 of Companies Act 2006).

[134] *E.g., TCI Embarks on Proxy Fight to Change J-Power*, NIKKEI WEEKLY, May 26, 2008 (discussing the Children's Investment Fund's campaign against J-Power in June 2007).

[135] For example, CALPers' campaigns against their Japanese investee companies in the 1980s. *See* Jacoby, *supra* note 97.

[136] Jane Wardell, Associated Press, *Cadbury Spins Off Beverage Partner: Schwepp Jettisoned Investor Pressure Eased*, J. GAZETTE, March 16, 2007, at 3E (discussing Nelson Peltz's campaign against Cadbury Schweppes to separate its drinks and candy businesses, 2007).

[137] *E.g.*, David Litterick, *Cadbury Activist Pursues Kraft*, DAILY TELEGRAPH, June 22, 2007, at 4 (describing Peltz's campaign for Kraft to expand into frozen foods and pizzas).

The type of activism mentioned above, if successful and causing management to take the action recommended by the activists, would have had a direct effect upon the allocation of corporate property and resources. Although the chain of causation that leads up to final management decision may be indirect and tortuous to determine,[138] the influence of such aggressive shareholder activism would arguably be tantamount to an appropriation of a share of management powers over corporate property by the activist shareholders. This form of activism is tantamount to form of co-governance with management and seems to be founded upon a fabrication of shareholdership as ownership. This shareholdership as ownership, as argued earlier, is somewhat flawed, as it fails to take into account the complete picture of both institutional theory and company law. The article terms this type of shareholder activism "property rights activism," as co-governance may apparently be justified on ownership claims. This article is concerned that shareholder activism in issues such as campaigns in relation to pressuring companies to sell off non-core assets, making certain investment decisions such as R&D, carrying out share buybacks or handing out dividends, relate to an interference with the managerial discretion traditionally upheld in the separation of ownership from control model affirmed in the Model Articles.

Activists are not exercising the managerial power, but are only making demands to management to exercise their powers in a certain way. Hence there is no subversion of the principles upheld in *Breckland Holdings*. However, if activist shareholders could get a company to reallocate its corporate assets after a series of campaigns, then such activists would have been able to surpass the limitations of their non-majority stake, to circumvent the need to summon the reserve power of the general meeting, the limitations of the mere majority advisory vote in the general meeting, the perhaps opposing views of other shareholders, and the legal framework that takes into account the collectivity of the general meeting[139] in any enforcement of shareholder rights. Such forms of activism that directly affect how the legal framework has allocated control and governance rights over a company's property may undermine the values supported by the legal framework itself. Where the Model Articles and *Breckland Holdings* regarding division of powers in a company apply, the nexus has made a fundamental bargain that vests management powers in directors with reserve power to the general meeting in special majority. Although the division of powers is not immutable, the issue being situated in the enabling framework of company law, changes to the division would

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[138] Anabtawi & Stout, *supra* note 126, at 1297.

[139] MacDougall v. Gardiner (1875) L.R. 20 Eq. at 396; Allen v. Gold Reefs of West Africa, Ltd. (1900) 1 Ch. at 667.

possibly have to be negotiated through the nexus and not imposed arbitrarily by any one constituent within the nexus.

Shareholder activists who are in a position to push through their agendas would effectively be co-governors with management without having the legal safeguards of director liability imposed on them. Shareholder activism is arguably an investment strategy carried out by investors, a move away from more market-based strategies such as buy-and-hold, or hedging using derivatives such as options, warrants or swaps, or short-selling. Where shareholders combine their own investment objectives with co-governance, there is a conflict of interest that may not be addressed by established regimes of director liability unless the activist may be regarded as a shadow director, which is rare because the threshold for establishing shadow directorship is rather high. Shareholder activists and management that engage in co-governance have arguably bypassed the other constituents of the nexus, in rewriting the fundamental governance arrangement in the division of power. This is a breach of the understanding among the nexus and should not be regarded as legitimate unless the nexus has consented to such co-governance. Under current law, if shareholder activism in the property rights type can be argued to be a contractual breach, then the law only extends recognition to the contractual relationship between members under section 33 of the Companies Act, and not broadly to the wider nexus that theoretical frameworks accept. Jurisprudence on section 33 has dealt with specific breaches of Articles,[140] and it remains questionable as to whether shareholders can sue an activist minority for breach of an Article relating to the division of power that confers management powers upon the Board.

From a theoretical point of view, this article argues that shareholder activism amounting to co-governance is incompatible with the nexus, unless the nexus is co-opted into information and dialogue on the change in the foundational understanding on division of powers and accommodates such co-governance. If one argues from the property thesis that "property rights activists" are entitled to exercise "ownership" rights in activism as an incident of property, then we are allowing the property thesis to undermine the nexus, when such property thesis has never been unequivocally accepted in the scholarship of institutional economics or the legal framework.[141] Although institutional economists such as Alchian and Demsetz[142] opined that the "residual claimants" in the nexus would be of greater importance in the nexus, residual claimants were defined according to the nature of

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[140] *E.g.* Pender v. Lushington (1877) L.R. 6 Ch.D. at 75–76; Hickman v. Kent or Romney Marsh Sheepbreeders Association [1915] 1 Ch. 881, 888.

[141] *See supra* Part 2.

[142] Alchian & Demsetz, *supra* note 52.

their contractual rights and not according to the kind of input they supplied to the firm. Capital providers did not necessarily have supremacy in the nexus in institutional economics. Further, the constituents in the nexus all arguably have some "proprietary" power[143] that allows them to participate in certain aspects of governance or allocation decisions in the firm, because they are part of a team supplying input into a company,[144] and provisions in mandatory law, as discussed earlier, may protect their interests. Hence it is not correct to view the shareholders as being the only "owners" of certain superior property rights. The property rights thesis is simplistic and does not represent the theoretical or legal position of shareholders in the nexus of contracts constituting the company. "Property rights activism" pursued in the name of ownership should arguably be viewed with skepticism in the light of actually weak theoretical support. This form of shareholder activism also has the tendency to mislead the wider community into supporting the flawed property rights thesis upon which it is based, and a resort to property justifications often leads to a justified exclusion of others' interests, the essence of a proprietary right. This exclusion is likely to lock other shareholders' or stakeholders' interests out of dialogue as exclusion is characteristic of "property rights."

Further, such activism also raises an issue similar to the one raised earlier in respect of "open-ended contracting" activism, because such activism outside the legal framework has the potential to subvert the principles of democratic governance by voting, and the equal treatment of shareholders.[145] However, real evidence of practical benefit and actual support by other passive shareholders would mitigate such risk. Proponents of the "director primacy" model of corporate governance would likely be ready to accept the argument that some forms of minority shareholder activism in the name of ownership actually undermine the collective interests of shareholders and other constituents who make inputs into a firm, and disrupts the balancing and mediat-

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[143] Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory*, 10 J. ECON. LITERATURE 1137, 1148 (1972); Milhaupt, *supra* note 22, at 1151–52.

[144] Most firms, of course, adopt a conventional division of powers model as found in the Model Articles.

[145] This principle may arguably be manifested in cases such as Brown v. British Abrasive Wheel Co. [1919] 1 Ch. 290, 294; Dafen Tinplate Co. v. Llanelly Steel Co. [1920] 2 Ch 124, 133, the redress against minority expropriation that may now be found in § 994, although O'Neill v. Phillips (1999) 1 WLR 1092, 1102 has limited its application somewhat. See also Principle 1 of the General Principles of the Takeover Code, *available at* http://www.thetakeoverpanel.org.uk/new/codesars/DATA/code.pdf.

ing role that directors carry out as managers of the nexus of contracts.[146]

The legal framework at present does not support treating shareholders as direct interveners in issues that are reserved for management,[147] and even the power of ratification does not extend to that. The power to ratify is called upon after management has acted, and not to preempt or direct management before management has acted. Hence, shareholder activism in issues such as calling for share buybacks, and asking for firms to restructure their businesses or assets, is tantamount to a form of illegitimate co-governance with management in the management of the firm.[148] However, even though "property rights activism" is not arguably supported in theory and principle, it is unlikely to be regarded unfavorably in the present climate. Shareholders have been indifferent for far too long to their investee companies and hence activism is not regarded as a malaise.[149] Further, it is arguable that shareholder activism is not carried out on a large enough scale to threaten the unwinding of any institution.[150] Third, there may be regulator and industry support for such activism as an accompanying social benefit may be derived from activists' actions.

One should be wary of extremes and not regard selective activism as a cure for shareholder indifference that was the norm in the 1990s. Shareholder indifference is a different problem from shareholder activism, and activism does not cure the problems of indifference and generates problems of its own. Further, it is doubtful that shareholder activism is few and far in between to warrant attention, and we can expect to see more "legitimate" shareholder activism filling the vacuum in "regulating" corporate governance pending regulatory action. It is unlikely that shareholder activism is merely a rare and peripheral issue. Finally, shareholder activism of both types is supported by the regulator and industry.[151] Although regulators and the industry acknowledge that shareholder activists pursue their actions chiefly for private benefit, there is accompanying social benefit that

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[146] Stephen M. Bainbridge, *Shareholder Activism and Institutional Investors* (UCLA School of Law, Law and Econ. Research Paper No. 05-20, 2005), *available at* http://ssrn.com/abstract=796227.

[147] *See* Quin & Axtens v. Salmon, [1909] A.C. 442.

[148] Lori Verstagen Ryan, *Shareholders and the Atom of Property: Fission or Fusion?*, 39 BUS. & SOC'Y 49, 57 (2000), *available at* http://bas.sagepub.com/cgi/content/abstract/39/1/49.

[149] *See* Mitchell, *supra* note 92, at 1505.

[150] *See* Black, *supra* note 106, at 524–25.

[151] *See* Department of Work and Pensions, Consultation Paper, *Encouraging Shareholder Activism*, p. 4, ¶ 10, (2002), http://www.dwp.gov.uk/consultations/consult/2002/myners/shareact.pdf.

flows from the activism, and that the existence of such social benefits allows us to co-opt shareholder activists into the landscape of corporate governance, being a force for better corporate governance and better run companies. Regulators see shareholder activists as resourceful actors that generate disciplining effects and hence contribute to "regulatory action." However, in "property rights activism," there are possibly substantial private benefits to be gained, and such private benefits would be argued below to be unjustified from a theoretical perspective. Even if the extraction of private benefit by shareholder activists also produce certain social benefits in the network effects of collective shareholder gains, it will be argued that these are likely to be illusory and transient, and unlikely to be sustainable in the long run.

In the next Part, the article addresses the two questions: First, what sort of private benefits does shareholder activism generate and can these be justified? Second, how does the extraction of private benefit through shareholder activism compare with the social benefits of shareholder activism, and are shareholder activists therefore legitimately enrolled into the regulatory landscape?[152]

C. The Costs and Benefits of Shareholder Activism

This article has so far introduced a typology of shareholder activism, and argues that activism of the "open-ended contracting" type may be theoretically supported but may, from case to case, generate issues of unfairness and disproportionate appropriation of power by activist minority shareholders. However, shareholder activism of the "property rights activism" type is not theoretically supported, and also raises issues of concern. Is it that our theory and legal framework should be adapted and evolved in order to accommodate the private and social benefits generated by shareholder activism, or should we be skeptical of shareholder activism that is currently not well-supported in theory and principle? This Part delves into the private and social benefits generated by shareholder activism to ascertain whether there is a case that should be made to legitimize shareholder activism, especially of the "property rights" type, and that our theory and legal framework should be adapted in due course.

The motivations for private benefit extraction by activists who are institutional investors or hedge funds have been discussed by much existing academic literature. It has been argued that institutional investors who produce quarterly or half yearly results in investment management to their beneficiaries are often motivated to show

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[152] Julia Black, *Decentring Regulation*, CURRENT LEGAL PROBS. 103 (2001); Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation*, PUB. L. 63 (2003); Colin Scott, *Analyzing Regulatory Space: Fragmented Resources And Institutional Design*, PUB. L. 32 (2001).

the share price earnings on their portfolios, and may engage in activism[153] or vote with management[154] towards that end. Although some of these institutional investors may hold long positions of equity and need not be considering an exit with abnormal returns, the gains on paper are necessary to meet the obligations of these institutional investors to their fund beneficiaries. Hotchkiss, et al., also argue that institutional investors display extremely sensitive responses in market selling or buying around the periods where company earnings are reported every quarter (in the United States), and show that their preponderant concern is for share price earnings.[155] Investors such as hedge funds may hold shorter positions in equity with a mind towards exit, and activism is generally carried out to maximize the earnings on share price upon such exit.[156] Institutional investors as well as other alternative investment vehicles such as hedge funds are primarily concerned with the generation of abnormal returns based on increased earnings on share price, although it is also documented that some public pension funds engage in activism for other political reasons such as augmenting its profile,[157] or that some shareholder activists may have certain social or political issues they wish to drive in the corporation.[158]

This Part argues that the principal private benefit extracted by "property rights activists" is largely found in abnormal returns on share price, and this private benefit does not translate into a social benefit for the interest of the company, the real entity, and the other constituents in the nexus. The perception of social benefit ensuing from such activism is likely to be illusory, transient or unpredictable.

Commentators[159] suggested that shareholder value maximization in a company is tantamount to the maximization of utility for all concerned, a rather purist view of the aggregate good that individual capitalism will necessarily entail. The findings from empirical litera-

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[153] Hendry, *supra* note 95.

[154] Roy C. Smith & Ingo Walter, Governing the Modern Corporation 146–47 (Oxford 2006).

[155] Edith S. Hotchkiss et al., *Does Shareholder Composition Matter? Evidence from the Market Reaction to Corporate Earnings Announcement*, 58 J. Fin. 1469 (2003).

[156] Allaire, *supra* note 116; Boyson & Mooradian, *supra* note 116; Clifford, *supra* note 116.

[157] *See generally* Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 Colum. L. Rev. 795 (explaining that public pension funds face investment conflicts regarding that other investors do not which limits shareholder activism).

[158] *See generally* Lee, *supra* note 130 (discussing the relationship between shareholder responsibility and corporate social responsibility).

[159] Goldenberg, *supra* note 117, at 34; Friedman, *supra* note 117, at SM17.

ture seem to suggest that shareholder activism in general (not distinguishing between the two types) may result in some abnormal returns in share price at the announcement date of activism commencing[160] and when the activism objectives have been achieved.[161] However, there is also empirical evidence showing that abnormal earnings on share price as a result of activism are not significant.[162] A cursory meta-survey of empirical literature thus presents the result that shareholder activism often has some sort of effect on share price to generate abnormal earnings on share price, but these are not generally significant enough on a consistent basis and do not reflect in improved operating performance of companies. Indeed, empirical evidence shows that shareholder activism does not have a significant impact on the operating performance of the firm.[163] The firm's actual revenues, turnover, market share and profitability are possibly more important to the other constituents in the nexus, such as employees and management. The community in which the firm is operating, such as charities in the community may benefit more from the firm in a profitable year where donations may also be more generous, than from increases in shareholders' stock price earnings. Hence, the focus on abnormal share price increases in private benefit extraction by shareholder activists may obscure the fact that many firms do not fundamentally become more successful in the long run. If this is so, one should query whether the expense of activist resources and the costs incurred by targeted companies are socially wasteful, compared to the private gains made by activists on the share price earnings.

Fisch[164] also argues that it is narrow-minded for a firm to measure its value primarily in terms of shareholder gains, as stock price performance and gains in shareholder wealth do not show the actual operating performance or profitability of the firm itself. The value of the firm is not always reflected in its stock price,[165] and wealth trans-

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[160] Could be a Schedule 13D filing for activist shareholders acquiring more than 5% of equity with the view to influencing control of the issuer.

[161] Becht et al., *supra* note 110; Smith, *supra* note 131.

[162] Wahal, *supra* note 116; Karpoff, *supra* note 112.

[163] Becht et al., *supra* note 110 (finding no statistically significant increase in operating revenues; on hedge funds); Carleton, *supra* note 112; Smith, *supra* note 131; *see* Allaire, *supra* note 116; April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors* (2006) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913362. *But see* Boyson & Mooradian, *supra* note 116 (finding that improved long term performance of companies is reportedly achieved through some forms of hedge fund activism).

[164] *Jill E. Fisch, Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637 (2006).

[165] *See* Eugene F. Fama, *Efficient Markets: A Review of Theory and Practical Work*, 25 J. FIN. 383 (1970). Other models of share price behavior have since

fers of the firm to creditors and suppliers are completely ignored if one takes only stock price performance as an indication of firm value.[166] This raises the question of whether private benefit extraction by shareholder activists actually generate any wider social benefit for others if the success or sustainability of the company in the long run is not necessarily improved by the activism.

Further, it is also arguable whether, theoretically, the extraction of private benefits in the form of increased share price earnings subverts the nature of the open-ended relationship between the shareholder and the company in the nexus. As shareholders are a class of residual claimants in the firm under the theoretical models of institutional economics, if shareholders engage in activism in order to extract private benefits in the form of improved share price and then exit the company by selling the shares, such activism contributes to the shareholder's determination of its residual claimant status—since the shareholder is trying to realize the value of the shares in order to close the open-ended nature of his/her investment in the company.

This seems to give shareholders an unfair advantage in navigating the nexus of contracts that constitute the firm. Even where exit is not contemplated, and the activist shareholder is seeking to achieve a certain level of share price earnings in order to boost the value of its investment portfolio, it is also arguable that such behavior may go towards mitigating the residual claimant's risk in the long term by extracting short term benefits, again an unfair advantage over other residual claimants (although some managerial excesses may arguably also be similarly abusive in having a one-up against the rest of the nexus). Thus, it is imperative to study whether the extraction of private benefit in the short terms is effected at the expense of other residual claimants in an open-ended relationship within the nexus. Again, it is flawed to support the private benefit extraction by activist shareholders based on a property rights thesis giving shareholders supremacy over other constituents in the nexus. A property rights

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arisen, including the random walk theory. *See* J. Tobin, *On the Efficiency of the Financial System*, LLOYD'S BANK REV. 1 (1984). However, the Martingale model still continues to uphold efficient capital markets. *See* Stephen F. LeRoy, *Efficient Capital Markets and Martingales*, 27 J. ECON. LIT. 1583 (1989); Eugene F. Fama, *Efficient Capital Markets II*, 66 J. FIN. 1575 (1991). Behavioral finance has most recently attacked the theory, and has many followers. *See* Stephen M. Bainbridge, *Mandatory Disclosure—A Behavioural Analysis*, (2000) 68 U. CIN. L REV. 1023; ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (Broadway 2001); Robert Prentice, *Whither Securities Regulation? Some Behavioural Observations Regarding Proposals for Its Future*, 51 DUKE L. J. 1397 (2002).

[166] William W. Bratton Jr., *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002).

fabrication of "ownership" rights tends to exclude the other constituents in the nexus from asserting their countervailing interests.

Thus, the social benefit that accompanies private benefit extraction by property rights activists is illusory, as benefits based on improved share price earnings do not benefit many wider constituencies other than shareholders. Further, if we accept that activist private benefit extraction is a process that unfairly undermines the other residual claimants and constituents of the firm, then any perception of social benefit is also rather illusory. There are possibly some forms of wider social benefit generated in the "open-ended contracting" type of shareholder activism, for example, in asking for CEO turnover or for curbs on excessive executive pay. For this type of shareholder activism, empirical evidence reports mainly gains in share price earnings,[167] but some long term gains to the operating performance or long-term sustainability of the company as well.[168] Hence, there is some room to observe the social benefits of the "open-ended contracting" type of activism and perhaps allow such forms of activism to provide a form of self-regulation for long-term sustainability.

Hence, a better case may be made for "open-ended contracting" activism and its legitimacy as such activism may have resulted in institutional reforms in the governance of the company to include more non-executive directors and performance-related pay, that are more acceptable to the other constituents in the nexus and the wider public community, making the company "better-run" or "better-governed."

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[167] Becht et al., *supra note* 110; Smith, *supra note* 131, Carlos Alves & Victor Mendes, *Corporate Governance Policy and Company Performance: The Portuguese Case*, 2(3) CORP. GOVERNANCE 290 (2004) (relating to where activists call for companies to adhere to the best practices code of corporate governance).

[168] *See* Kenneth J. Martin & Randall S. Thomas, *The Effect of Shareholder Proposals on Executive Compensation*, 67 U. CIN. L. REV. 1021 (1999), Lawrence D. Brown & Marcus L. Caylor, *Corporate Governance and Firm Operating Performance* (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=814205 (arguing that certain corporate governance changes do result in longer term returns such as improved operating performance and returns on assets); J. Harold Mulherin & Annette B. Poulsen, *Proxy Contests, Shareholder Wealth and Operating Performance: An Analysis in the 1980s* (1999), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=5423 (arguing that removal of takeover defenses in the US and changes in management secured positive results for operating performance of sampled companies). *But see* Wei Ling Song et al., *Does Coordinated Institutional Investor Activism Reverse the Fortunes of Underperforming Firms?*, 38 J. FIN. Q. ANALYSIS 317 (1999); Sanjai Bhagat & Bernard S. Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999) (relating to where shareholder activism may pertain to changing the Board composition); Victor Dulewiscz & Peter Herbert, *Does the Composition and Practice of Boards of Directors Bear Any Relationship to the Performance of their Companies?*, 12 CORP. GOVERNANCE 263 (2004).

This may translate into quantifiable or qualitatively observable benefits to the company and the wider nexus and community, such as in improved operating performance, long term competitiveness, or a company's better image, reputation and appeal.[169]

Regulators thus far seem to be encouraging of shareholder activism generally, without making the distinction between the *two* types of activism. This is understandable, given that a large part of the legal framework regulating companies is enabling, and regulators see shareholders as naturally co-opted to provide a form of regulatory governance for companies they invest in. Regulators may not be able to prescribe myriad minutiae for governing the nexus of contracts that constitute the firm, and would naturally leverage on the contracting process itself for parties to come to positions that protect their interests.[170] Hence, regulators' benign disposition towards shareholder activists is understandable, and the actions of shareholder activists are at the moment unregulated, subject (voluntarily) to best practices in disclosure under the Institutional Shareholders Committee[171] or to the set of best practices developed by the Hedge Funds Standards Board, which are more concerned about preventing market abuse than the substance of the activism itself.[172] However, regulators should be wary of supporting shareholder activism just because shareholders are in a position to be enrolled into the regulatory landscape.

The mandatory law in the United Kingdom, for example, supports forms of reversion of governance to shareholders, as discussed

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[169] Salil Kumar Sen, *Societal, Environmental and Stakeholder Drivers of Competitive Advantage in International Firms* (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009991; *see* G.A. STEINER & J.F. STEINER, BUSINESS, GOVERNMENT, AND SOCIETY: A MANAGERIAL PERSPECTIVE, TEXT AND CASES (McGraw Hill/Irwin 2006) (showing that businesses that take into account a wider context of concerns generally tend to gain a competitive advantage in its market as well); W. Lazonick, *Investment in Innovation, Corporate Governance and Employment: Is Prosperity Sustainable in the United States*? (1998), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=114268; D. N. Rao, K. Shankariah & Ali Al-Hakmani, *Developing Customer Loyalty: A Case-study of National Bank of Oman* (2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=438601 (opining that good corporate governance contributes to a company developing customer loyalty and retention).

[170] The idea that regulation is de-centered and enabling where there are various parties in the landscape of a regulatory regime that may contribute towards self-regulation, setting of standards and best practices and contractual resolutions. *See* Scott, *supra* note 152, at 32; Black, supra note 152, at 103; Black, *supra* note 152, at 63.

[171] ISC, *The Responsibilities of Institutional Shareholders and Their Agent s-Statement of Principles* (June 2007), http://institutionalshareholderscommittee.org.uk/sitebuildercontent/sitebuilderfiles/ISCStatementofPrinciplesJun07.pdf.

[172] Hedge Funds Standards Board, The HFSB Standards, http://www.hfsb.org/sites/10109/files/best_standards.pdf (last visited Feb. 24, 2009).

earlier. Such mandatory governance is possibly motivated by the perception of social benefit, as there is comparatively little cost in submitting transactions to general meeting approval to gain the greater benefit of preventing managerial abuse which could lead to corporate demise.[173] If management indulges in self-dealing, for example, by selling their assets to the firm at a high price, or by buying firm assets for their own use at a below-market price, value from the firm is extracted to benefit managers, and such a value reduction in the firm affects the share and residual value of the firm, hence affecting shareholders, but may also affect the profitability of the firm, hence affecting decisions with respect to employees and other stakeholders such as suppliers. Over the long term, unchecked managerial abuse can snowball into an irreparable hole in the company's finances and cause company demise. The prevention of management self-dealing is more effective than cure by shareholder or regulator litigation. Shareholder litigation may suffer from a free riding problem, since the value reduction in the firm affects many other constituents, and which shareholder would take the initiative to litigate amongst the lot? Regulator litigation would mean that public money is used to subsidize the value loss suffered by private parties in the nexus of contracts in the firm. Hence, crafting mandatory governance by co-opting a particular group of constituents to check and approve of management behavior in potential conflict of interest situations may accord with those constituents' interest, but may also achieve a wider social benefit for others not co-opted in the governance.[174]

Regrettably, with management scandals from Enron in 2002 to the failure of several large investment banks such as Lehman Brothers in 2008, the tide has so revolted against the managerial class so that monitoring the manager is seen as absolutely necessary. Further, much trust is increasingly being reposed in shareholders, especially activist ones, to play that role,[175] extending beyond the mandate of mandatory law. However, this should not extend to an unconditional support for shareholder activism. Regulators should examine carefully the types of shareholder activism that are being mounted and to consider carefully if theoretical support is tenable for the type of shareholder activism carried out. Regulators then have to consider how the private benefits extracted by shareholder activists may be compared to any social benefit. The existence of some social benefit flowing from

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[173] For example, in the case of Parmalat in 2003.

[174] *See generally* Becht et al., *supra* note 110 (demonstrating some general readings on "co-opting" private parties to participate in governance behavior that may have wider social benefits).

[175] Editorial, FIN. TIMES, Sept. 22, 2008 ("The first line of defence . . . remains the shareholders of financial companies. They have done too little so far, and they have suffered more than most as a result. Expect more diligence in future.")

the "open-ended contracting" type of activism should also not extend to a wholesale endorsement of the more questionable "property rights activism." The costs incurred by companies in meeting activist demands will have to be balanced against the possibility that activists may be able to exit early and terminate in fact, their residual risk-bearing status. Companies targeted for short term disposal of non-core assets may entail constituency losses in terms of lost jobs or supply contracts, and such short term losses have to be weighed up against any longer term effects on the company and the community concerned. Although it is arguable that reform in the United Kingdom law on directors' duties compels directors to take a long term view of the corporation and the impact of their decisions on stakeholders,[176] the new provision is subject to interpretation, and many commentators have warned[177] that the provision will still allow shareholders' interests to trump any other concern. Besides, I have earlier argued that controls imposed upon directors or penalizing directors are not likely to be constructive in addressing aggressive shareholder activism of the "property rights" type. Ultimately, regulators should not automatically see shareholder activism as a complementary regulatory force or as a substitute for regulation,[178] but should discern what aspects of shareholder activism are desirable market characteristics that perpetuate self-regulatory behavior and what aspects may result in losses and externalities, and may warrant some form of regulatory control instead.[179]

The article is aware of the merits of various proposals already suggested by academics to control certain shareholder behavior, although it is not ready to take a position on any of the suggestions. For instance, Anabtawi and Stout[180] argue that activist shareholders should be subject to fiduciary duties similar to those imposed on directors, as activist shareholders may also have self-serving tendencies in their activist behavior that conflicts with the company's interests. Activist shareholders may hold investments in the company in the form

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[176] *See* Companies Act, 2006.

[177] Daniel Attenborough, *The Company Law Reform Bill: an Analysis of Directors' Duties and the Objective of the Company*, COMPANY LAW. 162 (2006); Mary Arden, *Reforming the Companies Acts—the Way Ahead*, J. BUS. L. 579 (2002); Andrew Keay, *Section 172(1) of the Companies Act 2006: an Interpretation and Assessment*, COMPANY LAW. 106 (2007).

[178] Neil Fligstein & Robert Feeland, *Theoretical and Comparative Perspectives on Corporate Governance*, 21 ANN. REV. OF SOC. 21 (1995) (noting regulatory intervention as a "leftover" response to patch up what may be missing from shareholder actions).

[179] There is existing literature discussing forms of control or restraint to be imposed on activist behavior, but recommending a particular measure of control or restraint is beyond the scope of this paper.

[180] Anabtawi & Stout, *supra* note 126, at 1255.

of equity, bonds, hybrid instruments, and derivatives of these investments, and certain actions affecting the company's assets may trigger gains in the particular instrument the investor holds. Further, hedge funds have engaged in empty voting, i.e. holding onto voting rights without a concern for economic rights that are being hedged away, and it is queried as to whether empty voting is done with motivations that may benefit the company and other stakeholders. Activist shareholders may also push for CEO removal if the CEO is not in favor of pursuing policies that may confer private benefits on certain shareholders—for example, pension fund shareholders may push for management friendly to unions. In light of such potentially self-serving behavior that may be allowed as shareholders are not regulated to owe "duties" to the corporation or fellow shareholders, Anabtawi and Stout suggest that it is apt to impose fiduciary duties on such shareholders. However, they acknowledge that some of the problems of this proposal are that shareholder activism is generally influential in nature and how it precipitates certain management action is uncertain. Hence, there is a "causation" issue in connecting up the activism to the ultimate corporate decision that is made that may be influenced or pursuant to the activism. The degree of "control" a shareholder activist has is not necessarily dependent on voting power, or percentage of stake, and difficulties may abound in showing the causation between the activism and the corporate outcome.[181]

Another possible instrument of control that may be imposed on activist shareholders is disclosure, such as a Schedule 13D filing in the United States, but may be expanded to declare intentions of activism, the structure of the shareholder stake including how voting rights, cash flow rights, and other rights such as liquidation or dividend rights are structured, so that other shareholders may have some scrutiny on how the activist shareholder is behaving. This form of control is less prescriptive and relies on other shareholders to resist activism that they consider adverse, but whether such resisting shareholder action may also be motivated by other self-serving concerns is another concern.

At the moment, this article argues that it is imperative to recognize that "property rights activism" is theoretically and legally disconcerting and we should address our minds to this, and not just when adverse consequences are actually seen.

IV. CONCLUSION

It is imperative that shareholder activism be analyzed in the typologies suggested in this article in order to discern the issues that

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[181] Deborah Demott, *The Mechanisms of Control*, 13 CONN. J. INT'L L. 233, 246 (1993).

need to be addressed. This article has, however, refrained from any premature suggestion that one policy or another may resolve the concern. This article first examines the theoretical and legal conception of being a shareholder in a company. It argues that, by critically examining the internal and external dimension of proprietary ownership in a share, and the legal framework in the United Kingdom surrounding the aforementioned two dimensions, "shareholdership" does not, strictly speaking, amount to "ownership" of any part or the whole of a company. However, the unique position of the shareholder in the governance of a company under the law is shaped by three sets of sometimes competing theoretical frameworks: the real entity of the company, the recognition in the law for the competing interests in the nexus of contracts constituting the company, and mandatory law that seems to treat shareholders as the primary group of residual claimants in the company. These have given rise to an aggregate framework that significantly co-opts shareholders into the governance process of a company. Hence, although U.K. law does not unequivocally accept share ownership as "ownership" in relation to a company, there is a fairly generous regime of rights and powers for shareholders and a climate of rather benign perception of minority shareholder activism in widely-held public companies.

The above examination lays the foundation for our study into shareholder activists' activities, and how these may be accommodated within the theoretical and legal frameworks fabricating "shareholdership" in the United Kingdom. The article examines the types of activism carried out and categorizes two main types of activism: first, activism in relation to modifying and defining open-ended terms in the contractual relationship between shareholders and the company as part of the nexus of contracts, and, second, activism that amounts to a form of co-governance with management, influencing the making of certain decisions over the allocation of company property. The first type of activism, termed as "open-ended contracting," is largely supported by the theoretical conception of shareholders as part of the nexus of contracts and under the enabling legal framework of company law. However, the manner in which the activism may be carried out may have to be considered and examined further, if such activism is based on a fabrication of "ownership" rights that are not theoretically or legally supported. This article also examines the private and social benefits that ensue from this type of activism, and calls for a generally more comprehensive and long term assessment of cost-benefit in allowing or encouraging such activism.

As for the second type of activism termed as "property rights activism," such activism is of a different nature, and is arguably tantamount to co-governance with management. Co-governance by shareholders in issues traditionally reserved for management, and that may

have allocational economic effects on corporate property, is unlikely to be theoretically supported. Further, such activism may bring about the permanent undermining of stakeholders' interests, and this article argues why those critics who are of the view that shareholder activism and maximization of shareholder interests would benefit stakeholders are mistaken. The extraction of private benefit by "property rights" activism may not be outweighed by any ensuing "social benefit," at worse, any social benefit may arguably be illusory or transient. An appeal to social benefit in supporting this type of activism is likely to be misplaced. The view taken in this article is that there should be more skepticism regarding "property rights" activism.

The theoretical approach taken in this article allows us to distinguish two different types of shareholder activism and discuss in detail whether these activities can be supported within the theoretical and legal frameworks. This is in order to discern not only the foundational soundness of such activities but also the costs and benefits that follow from such activities. This approach will hopefully become a platform for future discussions on shareholder activism, and the social and legal approaches taken towards it.

LAMBS INTO LIONS: THE UTILIZATION OF CHILD SOLDIERS IN THE WAR IN IRAQ AND WHY INTERNATIONAL AND IRAQI LAWS ARE FAILING TO PROTECT THE INNOCENT

*Anna-Liisa Jacobson*****

I. INTRODUCTION

Children are often the unintended victims of armed conflicts worldwide, and end up suffering far more than those participants in armed conflicts who are fully-grown. They see tragedy at a very young age and their lives are forever shaped by the catastrophic worldview that they develop as children. "In the last decade of warfare, more than two million children have been killed, a rate of more than 500 a day, or one every three minutes, for a full 10 years."[1] Additionally, twenty-three percent of armed forces worldwide—eighty-four out of three hundred sixty-six total—use children aged fifteen and under in combat.[2] Eighteen percent of the total armed forces worldwide use children aged twelve and under.[3]

Although the use of child soldiers in armed conflicts has become a recognized issue throughout the world in recent decades,[4] much of the focus on child soldiers is centered on African nations. Tragically, the use of child soldiers is occurring in an armed conflict that is hitting much closer to home; the conflict in Iraq. Although more media attention is being devoted to the plight of Iraqi child soldiers, much of their struggle to survive and the appalling consequences of this situation are relatively unknown, and often ignored.

In 2006, CNN issued a news article detailing the report of the United Nations Assistance Mission for Iraq on the use of child soldiers

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[1] P. W. Singer, *Child Soldiers: The New Faces of War*, AM. EDUCATOR, Winter 2005-2006, at 30, *available at* http://www.brookings.edu/views/articles/fellows/singer20051215.pdf.

[2] *Id.*

[3] *Id.*

[4] *See id.*

in Iraq.[5] The results of the report are positively shocking, and absolutely heartbreaking. "A boy said to be aged between 10 and 13 years allegedly carried out a suicide bombing targeting the police commander in the city of Kirkuk. Later that month, two boys aged 12 and 13 years reportedly carried out attacks against [U.S.-led forces] in Fallujah and Hweeja, respectively."[6] The report further estimated that twenty percent of the civilian deaths in Iraq were of women and children.[7]

This article discusses the current situation in Iraq regarding the use of child soldiers in armed combat, and provides an analysis of why international and Iraqi laws are failing to protect Iraqi children. The next section addresses the current use of child soldiers in Iraq and provides background on the conflict in Iraq and the prior use of child soldiers in the Iran-Iraq war. The third section discusses the current conditions in Iraq and the effect that these conditions are having on children. The fourth section discusses the Islamic laws providing protection for children and details the development of this area of law. The fifth section addresses the relevant international law provisions protecting children, such as the Convention on the Rights of the Child and the Optional Protocol to this Convention. The final section provides an analysis of why these international provisions are failing to protect Iraqi children from becoming child soldiers, and what can be done to save them.

II. SADDAM'S LION CUBS: CHILD SOLDIERS IN IRAQ

Although much of the attention regarding child soldiers in Iraq is currently focused on the present conflict in Iraq, the use of child soldiers by Iraqi militants has existed for decades. The first modern use of child soldiers in the Middle East actually took place during the Iran-Iraq war in the 1980s.[8] Today in the Middle East, "[c]hildren are engaged in fighting in Algeria, Azerbaijan, Egypt, Iran (as part of rebel groups now fighting against the regime), Iraq, Lebanon, Sudan, Tajikistan, and Yemen."[9] Children, often younger than fifteen years old, are involved in the fighting among a number of radical Islamic groups.[10] In Palestine, young teens are at the center of the fighting, comprising seventy percent of the participants in the *intifada*.[11]

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[5] *UN Reports Children Used as Combatants in Iraq*, CNN.COM, Jan. 19, 2006, http://www.cnn.com/2006/WORLD/meast/01/18/iraq.rights/index.html.

[6] *Id.* (alterations in original).

[7] *Id.*

[8] Singer, *supra* note 1, at 32.

[9] *Id.*

[10] *Id.*

[11] *Id.*

A. The Iran-Iraq War

Iranian law, based on the Qur'anic *shari'ah*, "forbids the recruitment of children under 16 into the armed forces."[12] Several years into the conflict between Iran and Iraq however, the Iranian regime began to weaken.[13] The Iranians opted to forgo their Qur'anic law, and in 1984 Iranian President Ali-Akbar Rafsanjani pronounced that, "all Iranians from 12 to 72 should volunteer for the Holy War."[14] As a result, thousands of children were forced out of their schools, "indoctrinated in the glory of martyrdom, and sent to the front lines only lightly armed with one or two grenades or a gun with one magazine of ammunition."[15] Keys were placed around their necks, which were to symbolize their imminent entrance into heaven. These children comprised the first waves of attackers used to clear paths through the minefields with their bodies and "overwhelm Iraqi defenses."[16] Ayatollah Khomeini, Iran's spiritual leader during this conflict, asserted that these children were helping Iran to achieve "a situation which we cannot describe in any way except to say that it is a divine country."[17]

Iraq responded to Iran's use of child soldiers by enrolling children in their own army.[18] Iraqi leader Saddam Hussein created an entire system orchestrated toward pulling children into military conflict.[19] As part of his plan, he developed the *Ashbal Saddam*, or Saddam's Lion Cubs.[20] Saddam's Lion Cubs was a paramilitary force comprised of boys between the ages of ten and fifteen, although some sources indicate that children as young as five years old were enrolled in this group.[21] Boys between the ages of twelve and seventeen were able to attend a month long military training camp during the summer holidays.[22] These children received training in the use of small arms and light infantry tactics.[23] They were also trained in hand-to-hand combat and learned how to rappel from helicopters.[24] More than 8000

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[12] *Id.*

[13] *Id.*

[14] Singer, *supra* note 1, at 32.

[15] *Id.*

[16] *Id.*

[17] *Id.* (quoting KAREN ARMSTRONG, THE BATTLE FOR GOD 327–28 (Knopf 2000)).

[18] *Id.*

[19] Singer, *supra* note 1, at 32.

[20] *Id.*

[21] *People's Army / Popular Army / People's Militia (Al Jaysh ash Shaabi)*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/iraq/militia.htm (last updated June 22, 2005) [hereinafter *Military*].

[22] *Id.*

[23] Singer, *supra* note 1, at 32.

[24] *Military*, supra note 21.

young Iraqis were members of Saddam's Lion Cubs in Baghdad alone.[25]

Senior military officers who supervised the camps noted that the children participating in the program were held under the "physical and psychological strain" of training sessions that lasted as long as fourteen hours per day.[26] At times there were not enough children to fill all of the vacancies in the camp, and as a result, families were threatened with the loss of food ration cards if they refused to enroll their children in the course.[27] Additionally, authorities reportedly withheld school examination results from children unless they registered with the military training camps.[28]

It is believed that Saddam's Lion Cubs were being trained as young volunteers for Saddam's *Fedayeen* fighters.[29] The paramilitary *Fedayeen Saddam*, or "Saddam's Men of Sacrifice," was founded by Saddam Hussein's son Uday in 1995.[30] The *Fedayeen* were reportedly composed of 18,000 to 40,000 troops; mainly young soldiers recruited from regions of Iraq loyal to Saddam Hussein.[31] Within the *Fedayeen* there was an elite group known as the "Death Squadron" who carried out executions, often in the homes of their victims. They operated completely outside of the law with a disregard for political and legal structures.[32]

B. Operation Iraqi Freedom

The United States' invasion and subsequent occupation of Iraq began on March 19, 2003, after a report indicated that Saddam Hussein was hoarding "weapons of mass destruction."[33] Specifically, on March 30, 2003 former Secretary of Defense, Donald Rumsfeld stated, "we know where [the weapons of mass destruction] are. They're in the area around Tikrit and Baghdad and east, west, south and north somewhat."[34] Relying on this perspective, the United States invaded Iraq.

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[25] Singer, *supra* note 1, at 32.

[26] *Military*, *supra* note 21.

[27] *Id.* The Supreme Council for the Islamic Revolution in Iraq confirmed in 1999 that families were being denied food cards if they failed to put their children in the training camps. *Id.*

[28] *Id.*

[29] *Id.*

[30] *Saddam's Martyrs ["Men of Sacrifice"]*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm (last updated April 26, 2005).

[31] *Id.*

[32] *Id.*

[33] *A Timeline of the Iraq War*, http://thinkprogress.org/iraq-timeline (last visited Feb. 20, 2009).

[34] *Id.* (alterations in original).

A pivotal moment for the United States government came on April 9, 2003 when the regime of Saddam Hussein was toppled.[35] On April 15, 2003, Iraqi representatives at a United States-brokered meeting agreed to work towards a new democratic Iraq. In July of 2003, the Iraqi Governing Council ("IGC") met for the first time, and consisted of twenty-five Iraqi nationals chosen by the United States-led coalition.[36] In August 2003, the United Nations' Baghdad Headquarters was destroyed in a bomb blast, which killed at least twenty people and injured around one hundred. As a result, a number of international agencies elected to remove their staff from Iraq's capital.[37]

On October 16, 2003, the United Nations Security Council voted unanimously in favor of a revised United States text laying out Iraq's political future.[38] The resolution maintained the dominant role of the United States administration but asserted that there should be a transfer of both Iraqi sovereignty and government back to the people of Iraq.[39] On November 15, the IGC announced that the United States-led coalition would hand over power to the Iraqi transitional government by June of 2004.[40] One of the responsibilities of this transitional government would be to prepare for a completely sovereign Iraqi government to be developed by 2005, following a general election.[41] On December 30, 2003, Saddam Hussein was captured after hiding in an underground cellar.[42]

In March 2004, the interim Iraqi constitution was agreed upon by the IGC, and included a bill of rights, and recognized Islam as a source of legislation.[43] On May 28, 2004, the IGC named Iyad Allawi Prime Minister of the interim government. After he chose his cabinet, the IGC was dissolved.[44] The United Nations Security Council unanimously approved the resolution to end the formal occupation of Iraq on

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[35] *Timeline: Iraq After Saddam*, http://news.bbc.co.uk/2/hi/middle_east/4192189.stm (last visited Feb. 20, 2009).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* Several days later a number of international organizations pledged donations to the "new Iraq." This two day meeting involved eighty nations and $13 billion in donations was pledged. *Id.* The United Nations and the World Bank stated that Iraq would need $56 billion over the next four years. *Id.*

[40] *Id.*

[41] *Timeline: Iraq After Saddam*, http://news.bbc.co.uk/2/hi/middle_east/4192189.stm (last visited Feb. 20, 2009).

[42] *Id.* The tribunal that would eventually try Saddam Hussein and other members of the Ba'athist government was set up on April 20, 2004. *Id.*

[43] *Id.* The signing of the document was delayed several days due to Shi'a objections. *Id.*

[44] *Id.*

June 30, 2004, and transfer sovereignty to an interim Iraqi administration.[45] One month later the Iraqi National Conference selected a one hundred seat national assembly to oversee the interim government until the national elections.[46] The elections were held on January 30, 2005, and marked the country's first multi-national party election in over fifty years.[47] In April 2005, the Iraqi Parliament ended weeks of gridlock by electing Kurdish Jalal Talabani as the Iraqi interim President.[48]

On August 28, 2005, the Iraqi draft constitution was approved by Kurdish and Shi'a negotiators, however the Iraqi Sunni leaders rejected the constitution and called upon the United Nations and the League of Arab States to intervene.[49] The constitution was put to a vote on October 15, 2005, and was subsequently voted on, and adopted, by millions of people.[50] Although the Sunni Arabs boycotted the elections in January of 2005, they participated in the December elections for the full-term government in large numbers.[51] The Shi'a-led United Iraqi Alliance was announced as the winner of the election even though they failed to garner an absolute majority, taking 128 out of the 275 seats, which was just ten seats short of a majority.[52] On April 22, 2006, President Jalal Talabani solicited Shi'a politician Nouri Maliki to form the government, following months of political deadlock and with the hope of ending "violent sectarian divisions."[53]

In August of 2006, Saddam Hussein and his cousin Ali Hassan al-Majid, also known as "Chemical Ali" went on trial for their role in a military campaign against the Kurds in northern Iraq in the 1980s,

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[45] *Id.*

[46] *Id.* This national assembly had the power to veto legislation and approve the 2005 budget. *Id.*

[47] *Timeline: Iraq After Saddam*, http://news.bbc.co.uk/2/hi/middle_east/4192189.stm (last visited Feb. 20, 2009).

[48] *Id.* The election of Talabani was seen as a tremendous victory for the Iraqi Kurdish community which had suffered immensely under the regime of Saddam. *Id.* In June of 2005 Massoud Barzani was sworn in as the regional president of Iraqi Kurdistan. *Id.*

[49] *Id.* The League of Arab States is a voluntary association of twenty-two member states which work together to strengthen ties between the member states in the Middle East. For more information on this organization and its founding, see http://news.bbc.co.uk/2/hi/middle_east/country_profiles/1550797.stm (last visited Feb. 20, 2009).

[50] *Timeline: Iraq After Saddam*, http://news.bbc.co.uk/2/hi/middle_east/4192189.stm (last visited Feb. 20, 2009).

[51] *Id.*

[52] *Id.* Kurdish parties won fifty-three seats and the main Sunni Arab bloc took forty-four. *Id.*

[53] *Id.*

killing over 180,000 people.[54] In September the United States announced that it was handing over some control over the Iraqi naval and air force, and United Kingdom and Italian forces handed over control of the Dhi Qar province.[55] Saddam Hussein was sentenced to death by hanging on November 5, 2006, after being convicted of crimes against humanity. His sentence was carried out on December 31, 2006.[56] Although the handover of power has been initiated, the United States in the early part of 2007 approved more United States troops to be sent to Iraq.[57]

Although the United States invasion and occupation of Iraq led to the downfall of Saddam Hussein's regime, the use of child soldiers by militant Islamic groups has not ceased.[58] Reports from soldiers participating in the occupancy, as well as reports from journalists reporting in Iraq, indicate that child soldiers are active participants in the current conflict.[59]

C. Child Soldiers in the Current Iraq War

In the current conflict in Iraq, American forces have encountered Iraqi child soldiers in armed conflicts in at least three cities; Nasariya, Karbala and Kirkuk.[60] This is in addition to the multitudes of children that were used as human shields by Saddam loyalists during the conflict. As the insurgency gained momentum in the spring of 2003, the rebel leaders aspired to mobilize this "cohort of trained and indoctrinated young fighters."[61] During the months following the flare up of the insurgency, incidents between United States forces and armed Iraqi children became more prevalent. There have been reports of child snipers as well as an incident where a fifteen-year-old threw a grenade into an American truck, resulting in an American Army soldier's leg being blown off.[62] Additionally, it has been reported that the Iraqi *Fedayeen* paramilitaries used children as human shields during battle.[63] A commander from the Royal Scots Dragoon Guards "witnessed at least four or five children, aged between five and eight, being grabbed by the scruff of the neck and held by Iraqi fighters as they

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[54] *Id.*
[55] *Id.*
[56] Singer, *supra* note 1, at 32.
[57] *Id.*
[58] *See id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Singer, *supra* note 1, at 32.
[63] Martin Bethman, *Fedayeen Use Children as Shield*, TELEGRAPH, Apr. 2, 2003, *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/04/02/wfeyad02.xml.

crossed a road in front of his tank."[64] The commander stated that the *Fedayeen* were using the children as human shields, and he was forced to cease fire as he was concerned about striking the children.[65]

As the fighting gained momentum in the spring of 2004, child soldiers were serving not only Saddam Hussein's loyalist forces, but radical Shi'a and Sunni insurgent groups as well.[66] In the battle to retake the city of Fallujah in November 2004, U.S. Marines recounted numerous instances of being "fired upon by 12 year old children with assault rifles."[67] As a result of children being used by rebel insurgent fighters, British forces in 2005 had detained more than sixty juveniles during their operations in Iraq.[68] U.S. forces captured more than 107 Iraqi children determined to be "high risk security threats."[69] Most of these juveniles were detained at Abu Ghraib prison.[70]

In 2006 the United Nations reported on the disturbing trend of child combatants fighting in the war in Iraq.[71] The report stated that, "[a] boy said to be aged between 10 and 13 years allegedly carried out a suicide bombing targeting the police commander in the city of Kirkuk."[72] The report also documented an incident which occurred later that same month, where two boys aged twelve and thirteen carried out attacks against U.S.-led forces in Fallujah and Hawija.[73] In addition, the report also focused on general violence against children, estimating that twenty percent of all civilian deaths in the Iraq war are of women and children, and that Iraqi children "are gravely affected by the ongoing violence."[74]

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[64] *Id.*

[65] *Id.*

[66] Singer, *supra* note 1, at 32.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 32–33.

[70] *Id.* at 33. Abu Ghraib prison was the location of the now infamous torture of Iraqi prisoners. For more information on the controversy surrounding Abu Ghraib see Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2005, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

[71] *UN Reports Children Used as Combatants in Iraq*, CNN.COM, Jan. 19, 2006, http://www.cnn.com/2006/WORLD/meast/01/18/iraq.rights/index.html.

[72] *Id.*

[73] *Id.*

[74] *Id.* ("Scores of children have been killed in indiscriminate bombings and by indirect fire . . . . Some surveys suggest that a large number of children in Iraq have lost one or both parents as well as close family members to violence.").

D. Turning Lambs into Lions: The Transformation from "Child" to "Child Soldier"

Although it has been well documented that child soldiers are engaged in battlefields worldwide, including in Iraq, the process on how a child becomes a child soldier varies, with many factors coming into play. International law defines a child soldier as "any person under the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists."[75] Child soldiers perform a variety of tasks ranging from "participation in combat, laying mines and explosives, scouting, spying, acting as decoys, couriers or guards, training, drill or other preparation, logistics and support functions, portering, cooking and domestic labor, and sexual slavery and recruitment for sexual purposes."[76]

The above examples of the activities child soldiers engage in are the by-product of becoming a child soldier, and the road leading to this destination can take a variety of paths. The transformation of a child into a combatant "begins with recruitment, either through abduction or 'voluntary' means."[77] "Recruitment is rapidly followed by cruel but straightforward methods of training and conversion."[78] Violence is often utilized within each stage of the transformation, with the ultimate aim of the process being the fostering of a child's dependence on the armed organization, which inhibits their escape. Generally the recruiters are provided with "conscription targets" that change according to the group's needs and objectives.[79] The decision to carry out the recruitment operations is also based on efforts to maximize recruitment efforts. The normal targets are secondary schools or even orphanages, where children can be collected out of the reach of their parents.[80]

Some children "choose" to become child soldiers, and as a result the groups that they join will claim that since the decision was voluntary no moral codes were broken.[81] It is estimated that nearly two out of every three child soldiers worldwide "have some sort of initiative in

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[75] *Questions and Answers*, COALITION TO STOP THE USE OF CHILD SOLDIERS, http://www.child-soldiers.org/childsoldiers/questions-and-answers (last visited Feb. 20, 2009).

[76] *Id.*

[77] Singer, *supra* note 1, at 35 ("Case studies indicate that in the majority of conflicts, a widely used method of recruitment of children is some form of abduction.").

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

their own recruitment."[82] The classification of this voluntary recruitment is deceptive, however, as most children join armed groups because they are driven to do so by forces that are outside the realm of their control.[83]

Economic motives are especially strong, since hunger and poverty are often rampant in conflict zones.[84] "Children, particularly those orphaned or disconnected from civil society, may volunteer to join any group if they believe that this is the only way to guarantee regular meals, clothing, or medical attention."[85] Children may also join armed forces for a sense of protection, because they believe they would be safer in a conflict group with guns of their own rather than trying to survive while being surrounded by violence and chaos.[86] Children in conflict zones also "may have personally experienced or been witness to the furthest extremes of violence, including massacres, summary executions, ethnic cleansing, death squad killings, bombings, torture, sexual abuse, and destruction of home or property . . . thus vengeance can also be a particularly powerful impetus to join the conflict."[87] Other times, deceit and false promises are used to goad children into joining armed forces. Finally, some armed groups prey on the fact that adolescents are often at a stage in life when they are seeking to define who they are, and conflict groups can offer them the idea of heroism and also a place of membership or acceptance in a group.[88] This is especially enticing in areas where children feel defenseless or victimized.[89]

The current economic, social, and political environment in Iraq is providing a fertile atmosphere for children to become drafted into insurgent groups.[90] Children are living in desolate conditions with little opportunity to obtain essential necessities.[91] For these children, insurgent groups provide shelter, food, and supplies.[92] Unfortunately,

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[82] *Id.* at 35–36 ("For example, estimates are that 40 percent of the FARC's child soldiers are forced into service, and 60 percent joined of their own volition. Another survey in East Asia found that 57 percent of the children had volunteered. Finally, a survey of child soldiers in four African countries found that 64 percent joined under no threat of violence.").

[83] Singer, *supra* note 1, at 36.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] Singer, *supra* note 1, at 36.

[90] *Id.*

[91] *See id.*

[92] *See id.* at 36.

this comes at the very high cost of participating in an armed group at such a young age.

III. IRAQ'S WASTELAND

One of the most unfortunate by-products of war is the utter devastation that is wreaked upon the invaded country, in social, political, economic, and physical terms. Iraqis are facing distressing living conditions, such as a lack of adequate water, medical care, education, and housing.[93] According to an July 2007 Oxfam International report, the living conditions in Iraq have "deteriorated significantly since the U.S.-led invasion in 2003, leaving nearly one-third of the population in need of emergency aid . . . ."[94] In fact, seventy percent of Iraqis lack adequate water supplies compared with fifty percent in 2003.[95] Additionally, more than four million people have been displaced, with women and children comprising the majority of displaced individuals.[96] Further compounding the crisis, the funding for humanitarian aid to Iraq has decreased "from $453 million in 2005 to $95 million in 2006."[97] "Iraq's civilians are suffering from a denial of fundamental human rights in the form of chronic poverty, malnutrition, illness, lack of access to basic services, and destruction of homes, vital facilities, and infrastructure, as well as injury and death."[98] In terms of the destruction of life, it is estimated that as many as 83,783 Iraqi civilians have died since the U.S. occupation of Iraq.[99]

As more Iraqi civilians become physical casualties of the war, the chance for medical care becomes increasingly scarce. Health care facilities are barely able to cope with the mass casualties that pour

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[93] *See* Megan Greenwell, *A Dismal Picture of Life in Iraq: Nearly a Third of Population Needs Emergency Aid, Report Says*, WASH. POST, July 31, 2007, at A14, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/30/AR2007073001708.html.

[94] *Id.*

[95] *Id.*

[96] *Id.* In addition to the displacement of individuals, two million people have fled their homes for other parts of Iraq, while an additional two million had fled to other countries like Syria and Jordan. *Id.* This issue is particularly problematic among professional workers as it is estimated that "more than 40 percent of doctors, engineers and other highly skilled workers have left the country." *Id.*

[97] *Id.*

[98] *Id.* ("Basic indicators of humanitarian need in Iraq show that the slide into poverty and deprivation since the coalition forces entered the country in 2003 has been dramatic, and a deep trauma for the Iraqi people.").

[99] FACTBOX-*Military and civilian deaths in Iraq*, Reuters, Nov. 19, 2007, *available at* http://www.reuters.com/article/topNews/idUSL1967916220071119 (estimating between 76,895 and 83,783 civilian deaths since March 2003).

into their facilities on a daily basis.[100] Even when medical facilities are available, many people will not go out of fear, because patients and medical staff are frequently threatened and targeted.[101] In addition to the medical crisis, there are also food shortages coupled with unemployment and rising poverty levels.[102] As a result, families are forced to rely on government food distributions to cover their needs, as a reported one third of the population lives in poverty, with over five percent in extreme poverty.[103] The impoverishment of families is often self-inflicted out of fear as families are afraid to leave their homes to look for work or send their children to school, as random violence and kidnapping for ransom are constant threats.[104]

When children are left without resources and are abandoned into destitution, they look for outlets for help. When beneficial outlets are in short supply, children can be easily drawn towards paramilitary groups, as discussed in the previous section of this article.[105] "In Iraq, children as young as 3 are out in the streets, shining shoes, washing cars, collecting garbage and selling sweets, water, ice, cigarettes—anything to make some money."[106] This places children at "immense risk of becoming delinquent, bitter and falling in with extremist organizations for lack of hope or anything to do."[107] "Children are uniquely vulnerable to military recruitment and manipulation into violence because they are innocent and impressionable."[108] Whether these children are forced to join armed groups or merely enticed, the fact remains that they are victims and the consequences are incomprehensible.[109] Subjected to abuse and witnesses to death and murder, the long-term psychological consequences are often irreparable.[110]

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[100] INTERNATIONAL COMMITTEE OF THE RED CROSS, CIVILIANS WITHOUT PROTECTION: THE EVER-WORSENING HUMANITARIAN CRISIS IN IRAQ 4 (2007), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/iraq-report-110407/$File/Iraq-report-icrc.pdf.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *See supra* Section II.

[106] Megha Bahree, *The Child Soldiers: Returning the Youngest Warriors to Normalcy*, NEWSDAY, Jan. 5, 2004, *available at* http://journalism.nyu.edu/portfolio/bestof/2004/001427.html.

[107] *Id.*

[108] Office of the Special Representative of the Secretary-General for Children and Armed Conflict, http://www.un.org/children/conflict/english/childsoldiers21.html (last visited Feb. 20, 2009).

[109] *Id.*

[110] *Id.*

A. The Lost Age of Innocence: The Tragic Effects Armed Conflict has on Children

Although the physical damage done to children who are caught in the crossfire of armed conflicts is traumatic, it is often the mental and psychological wounds which are hardest to heal. "Iraq's conflict is exacting an immense and largely unnoticed psychological toll on children and youth that will have long-term consequences. . . ."[111] Many children are murdered in locations that are normally regarded as safe havens for children such as playgrounds, soccer fields, and schools.[112] "Violence has orphaned tens of thousands."[113]

Haider Abdul Muhsin is one of a very few psychiatrists in Iraq who recently began focusing on children after the invasion of Iraq.[114] In a span of six months he treated 280 children and teenagers for a range of psychological problems, and in the span of a year he saw more than 650 patients.[115] Many of these children exhibit symptoms similar to children in other war zones such as Lebanon, Sudan, and the Palestinian territories.[116] They suffer from anxiety, depression, have recurring nightmares, wet their beds, and have problems learning in school.[117]

A World Health Organization survey of 600 children aged three to ten in Baghdad reported that forty-seven percent had been exposed to a "major traumatic event over the past two years."[118] Additionally, fourteen percent of the group surveyed exhibited symptoms of post-traumatic stress disorder.[119] Complicating the situation further is the stigma surrounding psychiatrists that is present in Iraq.[120] Those who have overcome the stigma and seek help, however, are often unable to get it as they might live in remote or dangerous areas with no access to Baghdad.[121]

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[111] Sudarsan Raghavan, *Iraqi Youth Face Lasting Scars of War: Conflict's Psychological Impact on Children is Immense, Experts Say*, WASH. POST, June 26, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501952.html.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* (noting that most of the children range in age from six to sixteen).

[116] *Id.*

[117] Raghavan, *supra* note 111.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* As many as 250 children arrive at Sadr General Hospital every day, with only the first twenty children receiving treatment before the medicine runs out. *Id.*

An integral factor playing into the mental health crisis of Iraqi children is the unfortunate fact that many of them have been orphaned or abandoned by parents who can no longer afford to care for them.[122] The United Nations Children's Fund ("UNICEF") estimated that in the past year, tens of thousands of children lost either one parent or both parents to the conflict.[123] "The tragedy is that there's an upswing in number of children who are losing parents, but you see a decrease in the ability of the government, the community and even the family to care for separated and orphaned children because of violence, insecurity, displacement, stress and economic hardship."[124] Children who are orphaned or abandoned are at the highest risk of becoming conscripted into armed insurgent groups.

As the Iraqi government and the allied forces work to develop Iraq's infrastructure and combat many of the debilitating social, political, and economic issues, their progress is consistently marred by the unrelenting efforts of insurgent groups. As will be discussed below, the insurgents are not only infiltrating the minds of adults, they are also having a strong impact on the minds of children.

B. Uncontrollable Lions: The Insurgency

Much of the destruction occurring in Iraq is not only the result of foreign occupation, but also the much larger issue of inadequate internal security.[125] "The societal forces defining the security environment in Iraq today are enormously diverse, complex, and violent and they directly affect the stability of the broader Middle East."[126] The conflicts in Iraq stem from "differences over religion, from historical divides, and from disputes in Iraqi society that were unleashed following the invasion of Iraq in 2003."[127] The security crisis occurring in Iraq has been caused by the uprising of militant or insurgent armed groups.[128]

The insurgency began in Iraq after the U.S. invasion and the downfall of Saddam Hussein's regime, and was started by the hardline Arab Sunni Ba-athists.[129] These Sunni insurgents targeted Coalition forces, Iraqi forces, governmental personnel and sympathizers,

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[122] *Id.*

[123] Raghavan, *supra* note 111.

[124] *Id.*

[125] *See* Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CAL. L. REV. 2295, 2319–20 (2007).

[126] James L. Jones, THE REPORT OF THE INDEPENDENT COMMISSION ON THE SECURITY FORCES OF IRAQ 25 (2007), *available at* http://media.csis.org/isf.pdf.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 28.

Shi'a Iraqis, and militia members.[130] The 1920 Revolution Brigades, the Islamic Front of Iraqi Resistance, and the Mujahideen Army are currently the main insurgent groups operating in Iraq and are believed to be responsible for seventy percent of all insurgent attacks.[131] These groups are composed of former soldiers and Sunni Arab civilians led by former Iraqi military officers.[132] The Sunni insurgent groups have one main goal, which is to restore Sunni rule in Iraq.[133]

On the opposite side of the insurgency are the Shi'a militias, which contain approximately 80,000 members in Iraq.[134] Although they were in existence under the Ba'athist regime, they grew rapidly in number after the Coalition invasion of Iraq, "in part to fill the security vacuum left by the sudden collapse of Saddam Hussein's regime, and also to ensure that the Ba'athists would not rise again."[135] Although the Shi'a make up the majority in Iraq, they remain uncertain about their future role in Iraq.[136]

Approximately 60,000 of the militia members belong to Jaysh al-Madhi, 15,000 belong to the Badr Brigades, and 5000 belong to smaller organizations.[137] Jaysh al-Madhi controls Sadr City, which is a slum in Baghdad containing over 2.5 million Iraqis, and this group is also increasingly more active in southern Iraq.[138] Although this group is a critic of the Coalition forces, their leadership has encouraged them to avoid direct confrontation with Coalition forces.[139] Unfortunately they are struggling to retain control of all of their factions, and increasing Iranian influence over the militant arm is developing.[140] The Badr Brigade is the Iranian-trained military wing of the Supreme Islamic Iraqi Council, which is the largest Shi'a political party.[141] This group controls most of the seats in the Iraqi Parliament and governing coalition, and is led by Hadi al-Amiri who is a member of the Iraqi Parliament.[142]

Both of these groups are believed to have infiltrated the Iraqi government's ministries and military forces.[143] In addition, Iran is be-

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[130] *Id.* at 28–29.
[131] *Id.* at 29.
[132] Jones, *supra* note 126, at 29.
[133] *Id.*
[134] *Id.* at 30.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Jones, *supra* note 126, at 30.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

lieved to be furthering the insurgency by providing "funding, weapons, ammunition, training, and other forms of support to militia in Iraq . . . ."[144] "Iraqi society is being convulsed by sectarianism that if not swiftly and significantly curtailed could contribute to the rapid deterioration of Iraq, with 'grave humanitarian, political, and security consequences.'"[145]

Children caught in the middle of the insurgency are learning to define themselves along divisive lines. "Now, the young students when they enter the school, they ask their classmates whether they are Sunni or Shi'a . . . ."[146] Children on the playground engage in play based upon different armed groups. "The child would say: I'll get the Mahdi Army to take revenge . . . [t]he other kid would say back: My uncle is from the [Sunni] resistance and he'll take revenge against you."[147] As children begin defining their identity on such divided lines, they are taught to further the sectarian chasm that is tearing Iraq in two. They are being pulled into the conflict at a dangerously young age, and the damage to them both physical and mentally is irreparable.

IV. ISLAMIC LAW AND JURISPRUDENCE

The effects of the conflict in Iraq on the lives of children are devastating. There are a number of available protections for children however, which can be found in Islamic Law. There are four main sources of Islamic law and jurisprudence: the Qur'an, the *sunnah*, the *ijtihad*, and the *ijma*.[148] The Qur'an is considered the most important of these doctrines, and is the vital starting point for a discussion on Islamic law and jurisprudence.

The Qur'an "is the literal word of God revealed to the Prophet Muhammad over a period of twenty-two years (610 A.D.- 632 A.D.) in Arabic, through the Angel Gabriel."[149] The Qur'an is taken as the word of God, and therefore is indisputable. In fact, since the revelation of the Qur'an, its text has not been changed "even in the minutest detail."[150] The Qur'an consists of various elements including parables, ethical pronouncements, general and specific legal rules, and spiritual

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[144] *Id.* at 31.

[145] Jones, *supra* note 126, at 34.

[146] Raghavan, *supra* note 111.

[147] *Id.*

[148] Azizah Y. al-Hibri & Raja' M. El Habti, *Islam*, *in* SEX, MARRIAGE, & FAMILY WORLD RELIGIONS, 152–154 (Don S. Browning et al. eds., 2006).

[149] Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 1 (1992), *available at* http://www.karamah.org/docs/azizah_islamic_constitutionalism.pdf.

[150] *Id.* at 3.

guidance.[151] The Qur'an consists of *surahs*, which are essentially chapters, and the *surahs* are in turn comprised of *ayahs*, which are comparable to verses.[152] "The Qur'an contains two types of rules, general and specific; the general rules are far more numerous."[153] The specific rules relate to matters of worship, the family, and commercial or criminal law.[154] Matters in the realm of constitutional law are governed by general rules.[155] General rules require interpretation before they can be applied to a specific context, and as a result are more flexible and open to broader interpretation.[156]

A second source of Islamic law is the *sunnah* of the Prophet Muhammad.[157] The *sunnah* encompasses the *hadith*, which are reported sayings of the Prophet, and also his reported actions, and is used to supplement Qur'anic laws, and also help interpret them.[158] The *sunnah* is considered the second most important of the Islamic doctrines.[159] In the early days of the Qur'an, the Prophet forbade the recording of the *sunnah* in order to underline the status of the Qur'an as the only source of divine law. As a result, a significant part of the *sunnah* was not recorded until the ninth and tenth centuries.[160] "For this reason, it became necessary for Muslim scholars to develop, in connection with the *sunnah*, a sophisticated science of attribution in order to minimize the problems associated with hearsay."[161]

Consequently, claims concerning the behavior or sayings of the Prophet were partitioned into numerous categories "including claims that were judged to be false, weak, truthful or completely trustworthy."[162] All of these claims were gathered into books, which conversed in detail why each claim was judged as it was, and the final decision on these matters was left to the reader.[163] "The fact that Muslim scholars, while stating their reasoned opinion, left the final decision regarding the *sunnah* to the Muslim reader is a manifestation of the Islamic belief that each Muslim is responsible directly to God for her or his

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[151] al-Hibri & El Habti, *supra* note 148, at 152.

[152] al-Hibri, *supra* note 149, at 3.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 3–4.

[156] *Id.* at 4.

[157] *Id.* at 4.

[158] al-Hibri, *supra* note 149, at 4.

[159] al-Hibri & El Habti, *supra* note 148, at 153.

[160] al-Hibri, *supra* note 149, at 4. This recording took place during the 'Abbasid rule. *See id.*

[161] *Id.*

[162] *Id.* at 4–5.

[163] *Id.* at 5.

own decisions and actions."[164] Islam, as a result of this notion of personal responsibility, has no clergy mediating the relationship between God and humans, and instead only has *mujtahids.* Additionally the field of *ijtihad*, based on serious scholarship, is open to all Muslims.[165]

Sunnah is not composed of all actions or utterances by the Prophet, as some of these were the actions and utterances of a mere layman.[166] "The Prophet was clear about that distinction and pointed it out on more than one occasion . . . in situations requiring nonreligious expertise, he readily deferred to the experts."[167] Additionally, some of the *sunnah* dealt only with specific situations relating to the Prophet's time and society and were applicable only within that narrow framework.[168] Other portions of the *sunnah* were general and as a result were applicable to all times and places, as is the case with many of the Qur'anic rules.[169] The failure to draw this distinction can lead to an interpretation that is unnecessarily rigid. The Prophet's encouragement of scholarship has led to a multitude of religious interpretations, which indicate that each Muslim can adopt the jurisprudence that is best suited to his or her circumstances.[170]

The third source of Islamic law and jurisprudence is *ijtihad*, which is subordinate to both the Qur'an and the *sunnah. Ijtihad* means "to exert an effort" and is used generally to refer to the jurisprudential activity engaged in by scholars when they seek to interpret the Qur'an and the *sunnah.*[171] In essence, a Muslim seeking answers to modern day dilemmas must "refer to the relevant general principles in the Qur'an and relevant incidents or sayings in the *sunnah* that could, perhaps by the use of analogical reasoning, shed light on the issue."[172] Muslims have been engaging in extensive *ijtihad* for centuries and have accumulated a rich tradition as a result. During the life of the Prophet, this behavior was encouraged as long as it was based on "serious and objective effort."[173]

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[164] *Id.* "A Muslim may rely on the analysis of a scholar, or may discuss the matter at length with other Muslims, but in the final analysis, a Muslim has to take personal responsibility for her or his own actions." *Id.*

[165] *Id.* For more information on *mujtahids* and *ijtihad*, see United States Institute of Peace, http://www.usip.org/pubs/specialreports/sr125.html#work (last visited Feb. 20, 2009).

[166] al-Hibri, *supra* note 149, at 5.

[167] *Id.*

[168] *Id.* at 5–6.

[169] *Id.* at 6.

[170] *Id.*

[171] al-Hibri & El Habti, *supra* note 148, at 153.

[172] *Id.* at 154.

[173] *Id.*

The fourth source of Islamic law is *ijma* or consensus. Other sources of Islamic law listed in treatises are sources of *shari'ah*, although not all Muslims recognize these as legitimate.[174] The two most established sources are *Ijma* and reasoning by analogy (*Qiyas*).[175] Muslim jurists have reached agreement on a number of basic principles of *shari'ah*. The first principle is that laws may change with the passage of time and the change of place or circumstances.[176] "Properly understood, this principle permits a *mujtahid* to examine a specific *ayah* in light of both the attendant circumstances of its revelation as well as its meaning to determine the scope and significance of the *ayah* in general, or with respect to a specific situation at hand."[177] Essentially, a change in law is permitted whenever a custom on which the law is based changes.

The second principle that has been accepted is the principle of necessity/avoidance of harm. "This principle has also been stated in terms of choosing the lesser of two evils."[178] Several Qur'anic *ayahs*, as well as the *hadith*, allow for things that are prohibited out of necessity or in order to avoid harm.[179] The third principle that has been accepted is the principle of cessation of cause.[180] In situations where an Islamic law applies to specific factual situations, the existence of the law itself is reliant on the existence of that factual situation.[181] The final principle agreed upon is the notion of public interest. Specifically, Islamic laws must accord with public interest, and if they fail to do so they must be reexamined and reformulated. If the public interest changes, then Islamic laws ought to change accordingly.[182]

A. *Islamic Law and the Family*

Islam sees childhood as an important stage of life, as "progeny" are seen as a gift from God according to the Qur'an.[183] The *shari'ah*

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[174] al-Hibri, *supra* note 149, at 7. "*Shari'ah* means the body of Islamic law. Originally, it referred only to Qur'anic, then *hadith*-based laws. Now it is also used to refer to laws developed by Islamic jurisprudence on the basis of at least two additional sources, namely, consensus and reasoning by analogy." *Id.* at n.26.

[175] *Id.* at 7.

[176] *Id.* at 8.

[177] *Id.*

[178] *Id.*

[179] *Id.* "Some *ayahs* state that God will forgive anyone who breaks the law under duress." *Id.*

[180] al-Hibri, *supra* note 149, at 9.

[181] *Id.*

[182] *Id.*

[183] *Children in Islam: Their Care, Development and Protection*, UNICEF 2, *available at* http://www.unicef.org/egypt/Egy-homepage-Childreninislamengsum(1).pdf (last visited Feb. 20, 2009) [hereinafter *Children in Islam*].

focuses on guaranteeing a wholesome psychological climate for children, and Islam affirms that children should be given a right to health and life; a right to family, kindred, name, property and inheritance; a right to healthcare and proper nutrition; a right to education and acquisition of talents; a right to live in security and peace, and enjoy human dignity and protection under the responsibility of the parents.[184]

"Islam places kindness to parents next to the worship of God."[185] Parenthood is seen as an extension of the Qur'anic view of ideal marital relations. Parenthood is a relationship that should be based on "mercy, affection, and tranquility" and as a result will develop into a cooperative and not hierarchical family life.[186] Children are to be raised by both parents, however emphasis is placed on the role of the mother as caregiver.[187] Many of the legal obligations of parents are rooted in Islamic custom, and in modern society the limitations placed on women have started to be reevaluated. Additionally, a child is entitled to financial support, and is also entitled to a "good name," meaning that a criminal violates not only societal norms, but also the child's right to have a good name.[188]

Islam also provides that children should be given a protective environment, and inclusive in this environment is the right to have sufficient parental care, the right to have education, the right to healthcare, and the freedom of expression and thought.[189] Additionally, children should have the right to lead a dignified and secured life, with the father carrying the responsibility for maintaining the financial requirements necessary to guarantee the care and safety of children.[190] Children who lack parental guidance are to be protected through sponsorship provided by people acting in the role of parents. *Shari'ah* encourages Muslims to take up sponsorship of a child in need.[191]

In terms of education, the Qur'an asserts that both men and women should seek education and knowledge.[192] "Once children reach the age of comprehension and learning, parents must provide knowledge that may develop their offspring's intellectual capabilities."[193]

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[184] *Id.*
[185] al-Hibri & El Habti, *supra* note 148, at 212.
[186] *Id.*
[187] *Id.*
[188] *Id.* at 212–213.
[189] *Children in Islam*, *supra* note 183, at 8.
[190] *Id.*
[191] *Id.* It is stated that the Prophet himself advocated the rights of orphaned children. *See id.*
[192] al-Hibri & El Habti, *supra* note 148, at 218.
[193] *Children in Islam*, *supra* note 183, at 10.

Because seeking knowledge is a religious duty in Islam, parents are expected to provide education to their children, and failure to do so compromises the parental responsibility. Failure to lay this early foundation for children can derail the further education and prosperity of children.[194] Additionally, education is obligatory for both males and females. Islam also regards teachers as "the pillars of the educational process and highlights the significance of their roles and influence over children."[195]

Although these rights are set forth through the Qur'an and *shari'ah* law, it is the state's role to support and protect the rights of children.[196] Although parents are the main foundation in place to protect children, the state has to make laws guarding children against dangerous hazards such as violence and exploitation, and also must make laws protecting education and caring for those children who have become orphaned.[197]

B. The New Iraqi Constitution

Although protections for children can be found within the general provisions of Islam, it is also important to address the rights given to individuals, including children, through the new Iraqi Constitution developed after the United States occupation of Iraq. One of the positive byproducts of the United States' invasion and subsequent occupation of Iraq was the development of a new Iraqi Constitution. The constitution was voted on, and approved, by the Iraqi people on October 15, 2005.

Article 1 of the Constitution states that "the Republic of Iraq is a single, independent federal state with full sovereignty. Its system of government is republican, representative Parliamentary and democratic. This Constitution is a guarantor of its unity."[198] Article 2 establishes Islam as the official religion of the State and asserts that Islam is the fundamental source of legislation. Furthermore, it declares that, "no law that contradicts the established provisions of Islam may be established."[199] Additionally, it is stated that no law can be established which contradicts principles of democracy or which contradicts the rights and basic freedoms stipulated in the Constitution.[200] Although these first two articles lay down the foundation of

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[194] *Id.*

[195] *Id.* at 11.

[196] *Id.*

[197] *Id.*

[198] IRAQ CONST., art. 1, *available at* http://www.msnbc.msn.com/id/9719734/.

[199] *Id.* art. 2.

[200] *Id.*

the governing principles of Islam, there are additional provisions through which protection for children can be gleaned.

The first relevant provision can be found in Article 15, which states, "every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority."[201]

Article 29 provides that "family is the foundation of society . . . and the state guarantees the protection of motherhood, childhood and old age[,] and shall care for children and youth and provide them with the appropriate conditions to further their talents and abilities."[202] This article also prohibits the economic exploitation of children; and all forms of violence and abuse in the family, at school and in society, are also forbidden.[203]

The next article, Article 30, asserts that the state must guarantee to both the individual and the family, particularly women and children, social and health security and the "basic requirements for leading a free and dignified life."[204] This article also accounts for those who are orphaned and states that "the state guarantees the social and health security to Iraqis in cases of . . . orphanage . . . and shall work to protect them from ignorance, fear and poverty . . . [t]he state shall provide them with housing and special programs of care and rehabilitation . . . organized by law."[205]

Education is also accounted for in Article 34, which provides that "[e]ducation is a fundamental factor in the progress of society and is a right guaranteed by the state. Primary education is mandatory and the state guarantees to eradicate illiteracy."[206] Free education is also to be guaranteed for all Iraqis at all stages of life, and private and public education shall be regulated by law.[207]

In terms of children living in conflict zones, specifically the current situation in Iraq, Article 33 is especially relevant as it provides that "[e]ach individual has the right to live in a safe environment."[208] Moreover, Article 35 also contains provisions which are relevant to children in conflict zones, and also to children who have become child soldiers in armed conflict. Article 35 generally asserts that "[t]he liberty and dignity of man are safeguarded." More specifically, the arti-

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[201] *Id.* art. 15.
[202] *Id.* art. 29.
[203] *Id.*
[204] IRAQ CONST., art. 30., *available at* http://www.msnbc.msn.com/id/9719734/.
[205] *Id.*
[206] *Id.* art. 34.
[207] *Id.*
[208] *Id.* art. 33.

cle also provides that "[a]ll forms of psychological and physical torture and inhumane treatment shall be prohibited. Any confession coerced by force, threat, or torture shall be prohibited."[209] This article also provides that the state is the guarantor of protections of individuals from intellectual, political and religious coercion. Furthermore, "[c]ompulsory service (unpaid labor), serfdom, slave trade (slavery), trafficking of women and children, and the sex trade is prohibited."[210] Finally, Article 37 states that it "is prohibited to force any person to join any party, society or political entity or force him to continue his membership in it."[211]

These provisions of the new Iraqi Constitution provide safeguards that are outstanding in terms of protecting children from the consequences of living in war-torn conflict zones and also in preventing the drafting of children as child soldiers. The fact remains however, that although these protections are in place, there seems to be a disconnect in actually enforcing them against those who are abusing these newly established freedoms.

V. INTERNATIONAL LAW PROTECTIONS

A. *The Development of the Convention on the Rights of the Child*

While specific Islamic law provisions protecting the rights of children have been addressed above, it is imperative to look at the doctrines within the larger international law community, as there are a number of very important documents providing fundamental human rights to all individuals generally, and also to children specifically. The first international instrument recognizing the rights of children was the Declaration of the Rights of the Child, which was unanimously adopted by the League of Nations in 1924.[212] This document, which was also commonly known as the Declaration of Geneva, stated that, "mankind owes to the child the best that it has to give."[213] The five main principles of this doctrine would later serve as the groundwork for all future international human rights documents pertaining to children's rights. The five provisions are as follows:

> I. The child must be given the means requisite for its normal development, both materially and spiritually; II. The child that is hungry must be fed, the child that is

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[209] *Id.*

[210] IRAQ CONST., art. 33., *available at* http://www.msnbc.msn.com/id/9719734/.

[211] *Id.* art. 37.

[212] DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROGRESS 41 (3rd ed.). This document was drafted by the Save the Children International Union with the goal of improving the plight of children worldwide. *Id.*

[213] *Id.*

> sick must be helped: the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; III. The child must be the first to receive relief in times of distress; IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation; V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.[214]

In 1959 the United Nations Declaration of the Rights of the Child recognized that the rights and special needs of children are valid in both times of peace and conflict.[215] Additionally this new document, consisting of ten principles, asserted that the rights of children need to be protected against discrimination based on race, color, sex, language, religion, national, or social origin, property and status.[216] This document also introduced the right of the child to "name and nationality and to social security legislation."[217] Although the above revisions were made, the changes failed to incorporate any protections against engaging children in armed conflict.[218]

In 1978, which was declared the International Year of the Child, Poland began working on the development of a draft of children's rights to be incorporated into a treaty. Initially the Polish drafts gathered little or no support, particularly by western nations which viewed the draft as "an Eastern Bloc project focusing mostly on economic, social and cultural rights; rights which are considered by many governments as not beings rights at all but merely 'good social policy.'"[219] The Working Group, established in 1979 to craft a convention on the rights of the child, reported in 1985 on the progress of the drafting.[220] Although the Polish draft did not contain any provisions relating to child soldiers, a proposal of the governments of the Netherlands, Belgium, Sweden, Finland, Peru, and Senegal was created dealing with child soldiers, however this document was not among the fifteen documents discussed by the Working Group.[221] The relevant provisions which were omitted from the Working Group's discussions are as follows:

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[214] INTERNATIONAL DOCUMENTS ON CHILDREN 3 (Geraldine Van Buren, ed., 1993).
[215] WEISSBRODT ET AL., *supra* note 212, at 42.
[216] *Id.*
[217] Declaration of the Rights of the Child, G.A. Res 1386 (XIV) (Nov. 20, 1959).
[218] WEISSBRODT ET AL., *supra* note 212, at 42.
[219] *Id.*
[220] *Id.*
[221] *Id.*

> 1. States Parties to the present Convention undertake to respect and to ensure respect for rules of international humanitarian law applicable in armed conflicts which are relevant to children. 2. In order to implement these obligations States Parties to the present Convention shall, in conformity with the relevant rules of international humanitarian law, refrain in particular from recruiting children into the armed forces and shall take all feasible measures to ensure that children do not take part in hostilities.[222]

The Working Group created to draft the convention on the rights of the child was open-ended in that it was open to states and non-state actors such as international governmental organizations ("IGOs") and also non-governmental organizations ("NGOs").[223] Agreement was reached through consensus rather than formal vote-taking procedures. The most controversial topic debated at the Working Group meetings was how much, if any, protection should be afforded to children in cases of armed conflict. Two of the governments that actually submitted proposals were the Islamic Republic of Iran and Iraq, both of whom were engaged in war in which young boys were used in battle.[224]

The Iraqi proposal focused narrowly on children and affirmed that "the protection of children must be ensured by the parties to the armed conflicts; that the parties must take every possible measure to ensure that children do not participate directly in hostilities and are not sent to combat areas."[225] Additionally it was stated that if children were captured by adversaries they should continue to enjoy the rights affirmed by the convention, and be separated from adult prisoners.[226] Eventually in 1986, an accord was reached regarding Article 38 of the convention, which provides:

> 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into the armed forces. In recruiting among those persons who

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[222] *Id.* at 43.
[223] *Id.*
[224] WEISSBRODT ET AL., *supra* note 212, at 45.
[225] *Id.*
[226] *Id.* at 45–46.

> have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.[227]

Although the age limit is set at fifteen in Article 38, there was much discourse during the Working Group sessions on what the appropriate age limit should be. Many nation states believed that the convention would adhere to the definition in Article 1 of the convention, which states that a child is a person below the age of eighteen.[228] Some nation states were not pleased with the decision to make the age fifteen and worked to raise the age limit.[229]

Interestingly, all Muslim countries have embraced the Convention on the Rights of the Child.[230] By ratifying this human rights instrument, countries are held to a code of obligations for children. The rights of children are placed at the forefront of the global struggle for human rights, "to be ensured [by] adult society as a matter of legal obligation, moral imperative, and development priority."[231]

B. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts

Many children's rights advocates were dissatisfied with Article 38 of the Convention on the Rights of the Child, and petitioned for a higher minimum age of recruitment and participation in armed conflict. Specifically, they wanted the minimum age to be raised from fifteen to eighteen years.[232] At the second session of the Committee on the Rights of the Child in 1992, the Committee proposed to draft an Optional Protocol to the Convention to further restrict the participation of children in hostilities.[233]

In 1993, one of the Committee members was appointed to prepare a preliminary draft Optional Protocol raising the minimum age to

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[227] *Id.* at 46.
[228] *Id.*
[229] *Id.*
[230] *Investing in the Children of the Islamic World*, UNICEF, *available at* http://www.unicef.org/publications/files/Investing_Children_Islamic_World_full_E.pdf.
[231] *Id.*
[232] TINY VANDEWIELE, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: OPTIONAL PROTOCOL—THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS 19 (Martinus Nijhoff Publishers 2006).
[233] *Id.*

eighteen. A year later in 1994, the Commission on Human Rights formed an open-ended working group to negotiate an optional protocol. The working group concluded its work in 2000, and the United Nations formally adopted the Optional Protocol on May 25, 2000.[234]

On February 12, 2002 the Protocol received its first ten ratifications, which were necessary in order to make the document legally binding.[235] As of September 4, 2004, seventy-seven states were parties to the Protocol.[236] As of December 1, 2006, 122 countries were signatories to the Optional Protocol, however Iraq is not among those nations.[237] The Islamic Republic of Iran ratified the Optional Protocol on September 26, 2007.[238]

Despite the Protocol's good intentions, the age of eighteen has not been set as a minimum threshold for all recruitment and deployment practices. States can still recruit children under the age of eighteen when they voluntarily join the armed forces, so the notion of a "straight-eighteen rule" has yet to be fully accomplished.[239] Although the "straight-eighteen rule" has not been incorporated into the Optional Protocol, there are many relevant provisions that protect against children becoming child soldiers.

The Optional Protocol has thirteen articles, all of which center around preventing the compulsory involvement of children in armed conflicts. The most relevant articles in terms of protecting children in conflict zones are presented as follows. Article 1 asserts that, "States Parties shall take all feasible measures to ensure that members of their armed forces who have not reached the age of 18 years do not take direct part in hostilities."[240] Article 2, which is extremely pertinent to the situation in Iraq, asserts that, "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces."[241]

Additionally, section 1 of Article 4 deals with armed groups falling outside the classification of a State's armed forces and states that, "[a]rmed groups that are distinct from the armed forces of a State

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[234] *Id.*

[235] *Id.* at 19–20.

[236] *Id.* at 20.

[237] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263 (May 25, 2000), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=3ae6b39518 [hereinafter G.A. Res. 54/263].

[238] Office of the United Nation's High Commissioner for Human Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=136&chapter=4&lang=en (last visited Feb. 20, 2009).

[239] VANDEWIELE, *supra* note 233, at 20.

[240] G.A. Res. 54/263, *supra* note 237.

[241] *Id.* art. 2.

should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years."[242] Section 2 of Article 4 places the responsibility of preventing recruitment of children into these armed groups on the State and indicates that it might be necessary to adopt legal measures that would "prohibit and criminalize such practices."[243]

Under Article 6, section 1, States are also responsible for the general implementation of the provisions of the Optional Protocol through any necessary "legal, administrative and other measures."[244] Section 2 of Article 6 takes a step further and asserts that States have to "make the principles and provisions of the present Protocol widely known and promoted by appropriate means to adults and children alike."[245] Most importantly, section 3 of Article 6 provides that, "States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service."[246] This section also places the responsibility of providing assistance for the physical and psychological recovery and social reintegration of children who have been involved in armed conflicts, on the State.[247] Article 7 presents several means through which support can be provided to former child soldiers, such as multilateral or bilateral programs or through a voluntary fund established in accordance with General Assembly rules.[248]

Although these articles are extremely beneficial to the protection of children involved in armed conflict, they are only advantageous if actually employed. Although Iran signed the Optional Protocol in September of 2007, Iraq has yet to follow their lead and become a signatory. As Iraq strives to develop its new democratic government, it should consider becoming a signatory to the Protocol, especially in light of the situation occurring within its borders involving child soldiers in armed conflict.

C. Universal Declaration of Human Rights

The Universal Declaration of Human Rights ("UDHR") was adopted by the United Nations General Assembly in 1948, and articulated the "importance of rights which were placed at risk during the decade of the 1940s: the rights to life, liberty, and security of person;

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[242] *Id.* art. 4 § 1.
[243] *Id.* art. 4 § 2.
[244] *Id.* art. 6 § 1.
[245] *Id.* art. 6 § 2.
[246] G.A. Res. 54/263, *supra* note 237, art. 6 § 3.
[247] *Id.*
[248] *Id.* art. 7 § 2.

freedoms of expression, peaceful assembly, association, religious belief, and movement; and protections from slavery, arbitrary arrest, imprisonment without fair trial, and invasion of privacy."[249] The UDHR also includes provisions protecting social, economic and cultural rights.[250] The force of the UDHR is limited however, due to broad exclusions and the "omission of monitoring and enforcement provisions."[251] Despite some of its shortcomings, the UDHR is effective in laying out the essential rights that human beings worldwide should be guaranteed.

The UDHR has several provisions that are relevant to the issue of child soldiers in Iraq, and the denial of the rights contained in these provisions is the denial of fundamental human rights. Article 3 provides that, "[e]veryone has the right to life, liberty and the security of the person."[252] Arguably, children who are compelled to be child soldiers are denied their right to liberty, and often their right to life, as many child soldiers are killed at a very young age.

Article 20, section 2 further speaks to the issue of child soldiers by stating that, "[n]o one may be compelled to belong to an association."[253] Additionally, in terms of the situation present in the current Iraq conflict zone, Article 25, section 1 provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[254]

Article 26 also advocates the necessity of education and declares that, "[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory . . . ."[255] The necessity of providing education in war-torn countries is vital to protect children from being conscripted as child soldiers.[256] Education is also crucial in ensuring that children are given a future, and this becomes especially important in conflict zones as opportunities for advancement become scarce.

Because Iraq is a United Nations member state, and has been since 1945, they are bound by the UDHR, which is recognized as being customary international law.[257] As Iraq continues its transition into a

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[249] WEISSBRODT ET AL., *supra* note 212, at 9.
[250] *Id.*
[251] *Id.*
[252] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *See supra* Section II.
[257] WEISSBRODT ET AL., *supra* note 212, at 9.

democratic state, it is important that it adheres to the UDHR, especially in light of the devastating living conditions, and lack of basic fundamental services, that Iraqi citizens are facing.

D. Islamic Response to the Universal Declaration of Human Rights

Although the Universal Declaration of Human Rights was intended to apply "universally," members of the Islamic community felt that the provisions were defined in a manner that was strictly "western."[258] The rights and morals set forth by the UDHR were written with western culture in mind, and as a result, Islamic nations believed an additional declaration was necessary.[259] In 1981, at the thirty-sixth session of the United Nations General Assembly, the Iranian representative asserted that "the Universal Declaration of Human Rights represented a secular interpretation of the Judeo-Christian tradition, which could not be implemented by Muslims; if a choice had to be made, he said, between its stipulations and 'the divine law of the country,' Iran would always choose Islamic law."[260] Iran has been one of the leading countries advocating for reform of the UDHR.[261]

In addition to the efforts of Iran, the Organization of the Islamic Conference ("OIC") has also worked towards developing international human rights doctrines utilizing an Islamic perspective. The OIC, which was established in 1969, is an intergovernmental organization composed of fifty-seven states whose goal is to "speak with one voice to safeguard the interest and ensure the progress and well-being of their peoples and those of other Muslims in the world over."[262] In response to the concerns of a lack of Islamic perspective in the UDHR, the Universal Islamic Declaration of Human Rights ("UIDHR") was proclaimed in 1981 at the United Nations Educational, Scientific and Cultural Organization ("UNESCO").[263] The UIDHR Preamble establishes that the human rights contained in the document are defined by the tenets of Islam.[264] The UIDHR sets forth a variety of rights in twenty-two articles, and contains provisions regarding the right to life, right to freedom, protection against torture, and the right to free asso-

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[258] *Id.*

[259] *Id.*

[260] David G. Littman, *Human Rights and Human Wrongs: Sharia Can't Be an Exception to International Human-Rights Norms*, Jan. 19, 2003, http://www.nationalreview.com/comment/comment-littman011903.asp.

[261] *Id.*

[262] *OIC in Brief*, ORG. OF THE ISLAMIC CONF., http://www.oic-oci.org/.

[263] Littman, *supra* note 260. For more information on UNESCO, see http://portal.unesco.org/en/ev.php-URL_ID=29008&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Feb. 20, 2009).

[264] WILLIAM M. SULLIVAN & WILL KYMLICA, THE GLOBALIZATION OF ETHICS 247 (Cambridge Univ. Press 2007).

ciation, among many others.[265] In addition to the UIDHR, the OIC in 1990 developed the Cairo Declaration on Human Rights in Islam ("CDHRI").[266] The CDHRI contains twenty-five articles, which set forth, in similar fashion to the UIDHR, a set of fundamental human rights under Islam, which are to be interpreted according to Islamic *shari'ah*.[267] Specifically, the CDHRI protects the rights to life, human dignity, freedom, family, and education.[268]

In addition to the above general human rights doctrines protecting individuals of all ages, the OIC also developed a Covenant on the Rights of the Child in Islam.[269] This doctrine was developed with the goal of continuing the advancement of protections for children set in motion by the United Nations Convention on the Rights of the Child in 1989.[270] This doctrine contains twenty-six articles and among many other provisions, advocates equality, life, personal freedom, education and child protection (including protecting children from becoming involved in armed conflict), as well as justice.[271]

One of the introductory provisions of this doctrine states, "that children, as part of the vulnerable sector of society, bear the burden on the greater suffering as a result of natural and man-made disasters leading to tragic consequences, such as orphanage, homelessness, and exploitation of children in military, harsh, hazardous, or illegitimate labor . . . ."[272] This provision further states that states parties must consider, "the suffering of refugee children and those living under the yoke of occupation or languishing or displaced as a result of armed conflicts and famines thus fostering the spread of violence among children and increasing the number of physically, mentally, and socially disabled children."[273] These provisions acutely speak to the issue of children who are left in poverty as a result of armed conflicts, like the situation in Iraq. Although these Islamic human rights doctrines exist, and protect individuals using Islamic religious standards, they are ineffectual at protecting children involved in armed conflicts if they

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[265] *Id.* at 250–51, 253.

[266] Littman, *supra* note 260.

[267] *See* Cairo Declaration on Human Rights in Islam, U.N. GAOR, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1993), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=RSDLEGAL&page=research&id=3ae6b3822c.

[268] *Id.*

[269] Covenant Organization of the Islamic Conference, *Covenant on the Rights of the Child in Islam*, OIC/9-IGGE/HRI/2004/Rep.Final (June 2005), *available at* http://www.unhcr.org/refworld/docid/44eaf0e4a.html.

[270] *See id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

are not utilized. As mentioned above, as Iraq works towards its new democracy it should seek to incorporate enforcement measures to give these international human rights documents stronger effect.

VI. ANALYSIS: WHAT CAN BE DONE TO PROTECT THE LAMBS?

The crisis of child soldiers engaging in combat in Iraq is not the result of a failure of tangible written documents protecting the rights of children. Scores of documents exist; even documents developed by Iraq and other Islamic organizations, which provide protection for children. The problem lies instead in the realm of enforcement of these documents and in the physical situation facing Iraqi children living in the conflict zone.

While multiple international doctrines have been examined in this article, it is clear that doctrines existing without enforcement are mere skeletons lacking the strength to protect the innocent. Although this article is not intended to be a political discourse on how to solve the situation in Iraq, it is important to discuss the failure of the new Iraqi government, and its many international allies, to control the situation in Iraq. The Iraqi government is floundering not only because of the rising insurgency but also because of political gridlock. In fact, military commanders have recently announced that the key threat facing U.S. efforts in Iraq is the Iraqi Shiite-dominated government, and not al-Qaeda terrorists, Sunni insurgents or Iranian-backed militias.[274] Part of this concern stems from the failure of Iraq's government to "capitalize on sharp declines in attacks against U.S. troops and Iraqi civilians."[275] Additionally, Iraqi politicians are criticized for being out of touch with everyday citizens, because "[t]hey don't know what the hell is going on on the ground."[276]

One solution that has been proposed to crack the deadlock of the Iraqi government is to hold provincial elections, which could either cause the situation to become more turbulent or provide the various ethnic factions with a voice.[277] As Coalition forces plan for a rapid decline in numbers over the coming months, the pressure will be on Iraq security forces and the Iraqi government to take control of the country, which has been an unsuccessful effort thus far.[278] In terms of

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[274] Thomas E. Ricks, *Iraqis Wasting an Opportunity, U.S. Officers Say; With Attacks Ebbing, Government Is Urged to Reach Out to Opponents*, WASH. POST, Nov. 15, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/14/AR2007111402524.html.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

protecting the citizens, and especially the vulnerable children of Iraq, the Iraqi government needs to take control.

Specifically, the Iraqi government needs to focus more attention on the societal issues plaguing the country in conjunction with strengthening security. If the focus is only on battling armed insurgents and not on building and protecting the infrastructure for municipal services, what will remain is simply more death and destruction, with no outlets for safety, health, and hope. Schools are needed along with medical care and safe-havens and orphanages for children who are at risk of being pulled into insurgent groups or simply killed in the crossfire. The children of Iraq are the future of the newly developed democratic state, and if they are not protected and given a chance at adulthood, then what hope is there for Iraq? The unfortunate truth of the situation is that the divide between the Sunni and Shi'a only worsens the government's inability to take control, as it is impossible to unite towards a common cause with so much division in thought. Additionally, the strife between these groups also undermines national unity. For positive change to come in Iraq, the Iraqi government needs to provide a more equal voice for both groups in order for the country's citizens to thrive.

The inability of Iraq's government, and the allied forces, to take control of the dire situation in Iraq is tragic, as the consequences are felt worst by those who have the least power; the children. The situation has become so grave that the International Crisis Group has classified Iraq as a failed state, as it is a "country whose institutions, and with them, any semblance of national cohesion, have been obliterated."[279] The violence is simply breeding more violence, not necessarily out of political or religious conviction, but out of necessity.

In the midst of all this destruction however, there is an opportunity for international organizations to band together to provide humanitarian aid to Iraq. UNICEF has already established a fund for emergency aid to benefit the children of Iraq by providing clean water, sanitation, immunization, and educational opportunities.[280] Additionally, the European Commission, USAID, the United Nations, the International Rescue Committee, and many other international organizations are providing funding and resources to aid the Iraqi people living in the crisis zone, and the refugees who have fled Iraq. The continuance of this humanitarian aid is an absolute necessity, as the

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[279] International Crisis Group, *Middle East Report No. 67* (June 25, 2005), *available at* http://www.crisisgroup.org/home/index.cfm?id=4914&l=1.

[280] *See* UNICEF, UNICEF IRAQ: UPDATE FOR PARTNERS ON THE SITUATION OF CHILDREN IN IRAQ (2008), *available at* http://www.unicef.org/infobycountry/files/Iraq_Update_for_Partners_First_Quarter_08.pdf.

people of Iraq, especially the children, are struggling to survive in a country that is falling apart before their eyes.

VII. CONCLUSION

Although a significant number of international, Islamic, and even Iraqi doctrines exist to protect the fundamental human rights of children in Iraq, these doctrines are mere pieces of paper without government enforcement. Iraq is the only country that can truly bring about change within its borders, and as difficult as the road ahead is for Iraq, the Iraqi government must break through the gridlock and take action. It must reach out to both sides of the insurgency and search for common ground, otherwise the only future for Iraqi children is to grow up alone and impoverished in a brutally dangerous and permanently damaging war zone. These children are suffering and will continue to do so, unless change can save them from a future lifetime of violence, despair and hopelessness. Providing humanitarian aid, although it will not fix the political, economic, and social problems in Iraq, is essential to protect the people of Iraq and provide Iraqi children with the chance to have a future.