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COMMENTS

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THE BATTLE AGAINST GEO-BLOCKING: THE CONSUMER STRIKES BACK

Sabrina Earle

I. Introduction

A person can access any number of websites from varying countries within a matter of seconds while sitting comfortably from any place in the world that has Internet access. The advancement and growth of the Internet has helped create and enhance a globalized economy in which ideas are shared and items are sold almost instantaneously. On one hand, the Internet has created a place where collaboration and exchange can be done easily on international scale. On the other hand, however, industries attempt to hinder the viewing of copyrighted materials based solely on the geographical location of the potential viewer.

The quick and relatively easy access to information has led users to generally expect instant gratification of obtaining the information that they seek. The market of exchange provided by the World Wide Web allows users to access millions of blogs, newspaper articles, songs, and other various copyrightable materials almost literally at their fingertips. This access occurs not only at the user's place of choice, but also in a near-instantaneous fashion. Because of the convenience and speed of obtaining information and sources that the internet has provided, users are now accustomed to a market place that provides "no holds barred" access to everything from a 1980's newspaper article to last night's Law and Order episode.

However, the entertainment industry (hereinafter "Industry") has somewhat ironically both embraced and attempted to hinder the quick access to copyrighted information. The Industry has embraced this quick access by recognizing a growing preference for streaming television shows. This recognition has led to an increase in the availability of network programs with episodes that can be viewed or streamed the day after they air on traditional cable television. Conversely, region locks still occur on DVD versions of media and similarly on streamed television programs available in the UK, but not in the United States (and vice-versa). These "precautions" that the Industry has taken have become an antiquated and superfluous hindrance to the use of media files. Rather than allowing a person who presumably legally obtained access to the copyrighted material, these "locks" frustrate the viewer and inspire them to find another route. The conflicting goals of the Industry have led users to find alternative means of

accessing information that they have become accustomed to quickly acquiring.

The first part of this article will focus on the background of copyright law and its expansion in the digital age. The development of copyright law in the United States will be discussed along with a focus on current case law that has applied copyright law to the Internet and advancing technologies. Part I will also look into the expansion of copyright protection to an international level, including the creation of WIPO and the WIPO Copyright Treaty. Finally, Part I will discuss the popular trend of how consumers use the Internet to access digital copyrightable material.

The second part of this article will focus on one hand how television networks (Networks), as copyright holders, use the rising popularity of Internet streaming to their benefit. Alternatively, it will also focus on how these Networks also hinder themselves in the precautions that they set forth, such as region locking (also called "geo-blocking") and delayed viewing for certain areas of the world. Due to the "precautions" used, this part will also highlight how these methods hurt, rather than help, these copyright holders. This section will discuss arguments for and against geo-blocking. Additionally, the section will consider the legality and rationality of geo-blocking and the use of circumvention measures.

Finally, the third part of this article will discuss how the Industry should change to keep up with social change. Industry change would achieve two main goals. The first goal is to keep up to date with changing technology and the way that people use the Internet. The second goal is to reduce the amount of piracy that occurs. This will in turn help copyright holders reclaim lost profits in both advertisement revenue and the purchasing of television programs. This section will also discuss how some of this change is already occurring with international organizations.

II. Copyright Law and Consumer Activity

A. Law in the United States

Since the foundation of the United States, the government has been concerned with protecting the rights of creators. Modern day copyright law, based on the rights defined by Article I, Section 8 of the United States Constitution, can be found in Title 17 of the United States Code (the Copyright Act). The statute provides that copyright protection is applied to original works created in "any tangible medium of expression."[1] The protection extends to works of literature, musical work, dramatic works, choreography, graphics, sound record-

[1] 17 U.S.C. § 101 (2012).

ing, architecture, motion pictures, "and other audiovisual works."[2] The last of that list provides part of the foundation for this paper.

An owner of a copyright holds the exclusive right to do or authorize a number of things with their creative works. Specifically, the copyright holder has the right to reproduce copies, distribute copies by sale or "other transfer,"[3] and the right to transmit through digital audio.[4] The right of a copyright holder to determine when to first distribute or make available audiovisual works provides the basis for the opposing argument in this paper. This right, although widely agreed upon, does have some limitations.

Basic copyright protection for digital media was expanded in 1998 with the Digital Millennium Copyright Act (DMCA).[5] This act is composed of two main sections. The first section pertains to prohibiting the circumvention of access controls placed on digital media.[6] The second section provides safe harbor provisions meant to protect service providers from being held liable for any infringement committed by their users.[7] The purpose of the anti-circumvention provisions is to help put a stop to copyright pirates. Essentially, the act prohibits individuals from getting around content access restrictions of copyrighted works. Such digital rights management (DRM) techniques are meant to restrict access to copyrighted materials either by requiring a password or restricting use after the material has been purchased. Other access restrictions include "zone locking" or "geo-blocking" copyrighted material. If a viewer's physical location is not within the designated geographical zone of the digital media, then they will be unable to view the copyrighted material. This became common with DVDs and is now occurring with online-streamed media, such as television shows posted on Hulu, Netflix, and iTV. As the law stands now, copyright holders have the unlimited right to control when and where a person may stream online content.

The main limitations to copyright protection include the "fair use" doctrine and the "first-sale" doctrine.[8] The "fair use" doctrine is generally applied when part or all of the material is used either in a

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[2] 17 U.S.C. § 102 (2012).

[3] "Other transfer" includes renting, leasing, or lending the copyrighted material. 17 U.S.C. § 106(3) (2012)

[4] 17 U.S.C. § 106 (2012).

[5] The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

[6] U.S. COPYRIGHT OFFICE SUMMARY: THE DIGITAL MILLENNIUM COPY RIGHT ACT OF 1998, at 2 (1998) *available at* http://www.copyright.gov/legislation/dmca.pdf (last visited Nov. 10, 2015).

[7] *Id.* at 8.

[8] 17 USC §§ 106 – 07 (2012).

review of the work or for educational purposes.[9] However, application of this doctrine is always fact dependent.[10]

The other implicated limitation is that the copyright owner may only control the first distribution, or "first sale" of the copyrighted material. This limitation is often referred to as the "first sale" doctrine. In the 2013 case *Kirtsaeng v. John Wiley & Sons*, the Supreme Court held that the "first sale" doctrine extended to copies of copyrighted works "lawfully made abroad" and protected the reselling of textbooks purchased overseas.[11] The suit originated when, Kirtsaeng, a citizen of Thailand, moved to the United States to obtain an undergraduate degree and doctorate in mathematics.[12] While in the United States, his family shipped him foreign edition textbooks (printed in English) that were sold in Thailand for lower prices than in the United States.[13] Kirtsaeng then resold the textbooks the profit.[14] Wiley brought suit against Kirtsaeng for copyright infringement, citing § 602(a) of the Copyright Act, which has an import prohibition.[15]

The Court sided with Kirtsaeng, finding that geography had no effect on the protections and exceptions created by the Copyright Act.[16] This means that the protection offered by the Copyright Act applies to any copies legally made worldwide ("lawfully under this title"), whether inside the United States or in a foreign country.[17] The Court felt that Congress would not intend to harm commercial and consumer activities by creating a geographical limitation. Additionally, the Court noted that another section of the Copyright Act supports this non-geographical interpretation.[18] Section 104 states that works protected under the Copyright Act include unpublished works "without regard to nationality or domicile of the author."[19] Furthermore, there is no evidence to show that Congress ever had geography in mind when creating the Copyright Act.[20]

The holding in *Kirtsaeng* is in direct opposition to § 602 of the Copyright Act. That section explicitly prohibits the importation of copyrighted materials without the author's permission for the purpose

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[9] 17 U.S.C. § 107 (2012).
[10] *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, last updated Nov. 15, 2015,, *available at* http://www.copyright.gov/fls/fl102.html.
[11] Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1355-56 (2013).
[12] *Id.* at 1356.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1357.
[16] *See id.* at 1358.
[17] *Id.*
[18] *See id.* at 1359.
[19] 17 U.S.C. § 104(a), (2012).
[20] *See* Kirtsaeng 133 S. Ct. at 1360.

of distribution.[21] Now, under *Kirtsaeng*, an individual has the right to import lawfully obtained copies of copyrighted materials, even if those materials are imported for resell.[22] The Court's expansion of the "first sale" doctrine could possibly be a preview of the next direction that copyright law will take. Most importantly, *Kirtsaeng* showed a legal recognition of (1) an increase in consumer rights over legally obtained copyrighted material; and (2) how copyright material is accessible and used on a global basis.[23]

B. International Law

In order to help adapt Intellectual Property laws on a global basis, over 180 countries have become members of the Worldwide Intellectual Property Organization (WIPO).[24] The WIPO is an agency of the United Nations (UN) that is dedicated to providing IP laws that continue to protect the rights of the authors and also adapt to the interconnected global society of today.[25] The WIPO has numerous treaties concerning Intellectual Property laws on a global scale. This includes the WIPO Copyright Act (WCT)[26] and the WIPO Performances and Phonograms Treaty (WPPT).[27] Both were implemented into US law through the DMCA in 1998. Notably, both the WPPT and the WCT recognize the "first sale" ; doctrine. However, the WIPO left open how the "first sale" doctrine was to apply.[28]

The subject of this article relates strongly to Article 11 of the WCT. Article 11 prohibits the circumvention of technological measures that are used by authors to "control their rights."[29] These rights include an author's inherent right to control the distribution of his or

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[21] 17 U.S.C. § 602(a)(1) (2012).

[22] *See* Kirtsaeng, 113 S. Ct. at 1355-56 (holding that the "first sale" doctrine applies to copyrighted works lawfully obtained abroad).

[23] *See id* at 1365-67.

[24] *What is WIPO?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Nov 12, 2015, 8:15 PM, http://www.wipo.int/about-wipo/en/#what.

[25] *See* Convention Establishing the World Intellectual Property Organization, art. 3, July 14, 1967, 21 U.T.S 1749, 828 U.N.T.S. 11846.

[26] WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S 121, 36 I.L.M. 65 (addressing the rights of authors of digital works, more specifically computer programs and databases as recognized by the Berne Convention).

[27] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203, 36 I.L.M. 76 (addressing the rights of performers and producers of phonograms, focusing on those in the digital environment).

[28] WIPO Performance and Phonograms Treaty art. 5 ¶ 2, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT]; WIPO Copyright Treaty art. 6 ¶ 2, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65 (1997) [hereinafter WCT].

[29] WCT, *supra* note 28, at art. 11.

her work. The argument here is whether an author should maintain the right to keep a person from viewing a copyrighted work when it is viewed from a computer in Germany, when that same person would not be prohibited from viewing that same material if he or she was in England.

The basis of the United Kingdom's (UK) copyright law closely mirrors the categories and rights granted in the United States. Recent revisions of the UK's Copyright, Designs, and Patents Act (UK Copyright Act) have included new technological language such as "downloading" and "streaming."[30] Additionally, the UK has also recognized the right for an individual to make a personal copy of legally-obtained copyrighted material. In 2014, the UK amended its copyright act to expand an individual's rights when privately using copyrighted material.[31] These rights include allowing individuals to make back up copies and change the format of a legally obtained copy of copyrighted material.[32] This expansion of consumers' right to use is an excellent example of the law reflecting the way society is behaving and societal expectations.

The last part the UK Copyright Act incorporates the electronic rights management provisions created by the WIPO. Sections 296ZA and 296ZB prohibit the distribution or possession of a "device, product, or component" that is primarily used to circumvent technological measures.[33] Interestingly, part of the UK Copyright Act excludes the British Broadcasting Corporation (BBC) from infringement when the actions of the BBC are for the "purpose of maintaining supervision and control," including the use of adding the material to any on-demand program service.[34] So, although the act gives consumers some leeway in their actions, it also provides for additional leeway for the BBC.

C. Consumer Activity and Market Division

There are six models in which television shows can be viewed. Traditionally, shows are viewed in what is sometimes referred to as the "linear TV" model.[35] In this instance, shows are aired at a certain time that is specified by the network that hosts them. The second model is the "time displacement" model. This occurs when a show is

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[30] Copyright, Designs and Patents Act, 1988, c. 1, § 28B (Eng.).
[31] The Copyright (Public Administration) Regulations, 2014, c. 2, § 2 (Eng.).
[32] Copyright, Designs and Patents Act, 1988, c. 1, § 28B(5) (Eng.).
[33] *Id.* at § 296ZF(1) (defining "technological measures" as "any technology" designed to protect a copyright work through controlling access to the copyrighted material.).
[34] Copyright, Designs and Patents Act, 1988, c. 1 § 96 (Eng.).
[35] *Netflix View: Internet TV is replacing linear TV*, IR OVERVIEW (July 15, 2015), http://ir.netflix.com/long-term-view.cfm.

recorded during its linear TV spot and then watched later at the convenience of the viewer. A recent addition to time displacement is viewing shows via an eight-day displacement, in which an episode is available for streaming eight days after it is originally aired on linear TV. Finally, the last models of viewing are through different methods of Internet streaming. There are three ways in which episodes are viewed via the Internet. A show can be viewed with commercials (Hulu), on a pay-per-view basis (iTunes and Amazon), or on a streaming service with a monthly/yearly flat rate (Amazon Prime and Netflix).

The model that a viewer uses determines the limitations on viewing. For instance, linear TV requires the viewer to be at the television set at a pre-determined time outside the control of the viewer. Time displacement requires the viewer to have a device to record the linear TV spot, and also requires the viewer to have access to linear TV. Viewing streamed media online can require a viewer to have an ISP log on, a subscription to a media service, and most likely will keep the view zone locked, limiting how and where the material can be viewed.

The reason that the final limitation of zone locking Internet accessed media still exists is because it is still allowed by contract and copyright law. When an owner of copyrighted material, such as a movie, contracts with a provider for Internet streamed media, like Netflix, the contract often includes the limitation that the movie can only be streamed in certain geographical locations. In Sony's contract with Netflix, Netflix is obligated to use "standard geolocation service[s]" to verify the location of the Netflix customer and Netflix must also use software to detect circumvention techniques.[36] If Netflix were to actively allow their subscribers to circumvent geo-blocking and access Netflix with circumvention techniques, then Netflix would not only be liable for contributing to infringement, but also for breach of contract. In a possible attempt to change the marketplace, Netflix has begun creating its own shows, such as "House of Cards," and releasing them on the same day around the world.[37] HBO as since followed suit with the same release date for the fifth season of "Game of Thrones."[38]

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[36] Ernesto, *Netflix Cracks Down on VPN and Proxy "Pirates,"* TORRENTFREAK (Jan. 3, 2015), https://torrentfreak.com/netflix-cracks-down-on-vpn-and-proxy-pirates-150103/.

[37] NETFLIX ORIGINALS PREMIERE DATES, https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10571&contentGroup=premiere%20Dates (last visited Nov. 10, 2015).

[38] Aaron Couch, *'Game of Thrones' Season 5 Set for Global Day-Date Release*, HOLLYWOOD REPORTER (Mar. 10, 2015, 11:01 AM), http://www.hollywoodreporter.com/live-feed/game-thrones-season-5-set-780377.

III. Company Enforced Geo-Blocking and the Battle Against Consumers

A. Television in the Internet Age

Television networks (Networks), although in direct competition with online services such as Netflix, still make use of the Internet to increase coverage and publicity of their shows. Episode previews are hosted on YouTube;[39] Twitter is used to determine the current week's most popular show;[40] and social media is used to gain feedback on episodes after they have aired.[41] Despite Internet websites competing for viewers with traditional television, networks hosted on television still find a way to use the Internet to their benefit.

In addition to gaining marketing information, Networks are also tapping into the steady rise of streaming television shows via the Internet.[42] Most networks have made recently aired episodes available to stream on their website. These episodes are generally subject to two main restrictions. Commonly, episodes are streamed with commercials spliced in similar areas as when commercials appeared during the linear TV spot. In a growing trend, Networks are now also starting to require viewers to sign-on through their ISP in order to access available episodes.

The use of advertisements provides a large source of additional income for Networks. To begin with, websites often display advertisements on the webpage in the form of banners that are displayed across the top, bottom, or sides of an individual webpage. According to eMarketer, spending on ads for digital webpages will surpass ad spending for traditional TV by 2018.[43] Currently, eMarketer expects ad spending for digital media for 2015 to increase by eight billion dollars from 2014. This will be fifteen billion dollars more than what was

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[39] The CW Television Network Channel, YouTube, https://www.youtube.com/channel/UCPWQWav6BpPvtanCtloXkiw; Fox Channel, YouTube, https://www.youtube.com/channel/UCDiPds0v60wueil5B8w3fPQ.

[40] Nielsen, *Weekly Top Ten Series Specials* Nielsen Social (updated weekly), http://www.nielsensocial.com/nielsentwittertvratings/weekly/#SeriesSpecials (last visited Nov. 9, 2015).

[41] John Jannarone, *When Twitter Fans Steer TV: Viewer Feedback is Louder, Faster than Ever, Influencing Scripts of Some Shows*, Washington Street J. (Sept. 17, 2012), http://www.wsj.com/articles/SB10000872396390444772804577623444273016770.

[42] Felix Richter, *How TV Watching Has Evolved Over the Past 8 Years*, Statista (July 23, 2014), http://www.statista.com/chart/2484/tv-watching-habits/.

[43] *US Total Media Ad Spending, 2012-2018,* eMarketer, (Mar. 2015), http://www.emarketer.com/public_media/docs/eMarketer_iMedia_Agency_US_Ad_Spend.pdf

spent in 2013.[44] Comparatively, spending for TV ads is only expected to increase by four billion dollars over the same period.[45]

In addition to advertisements placed directly on webpages, advertisements are also placed within the streamed content. As with linear TV, these commercial spots generate revenue for the Network that is streaming the episode online. Studies by eMarket project that spending for digital video as will go above seven billions dollars.[46] In 2013, only 3.8 billion dollars was spent on digital video ads.[47] It is projected that almost thirteen billion dollars will be spent on these types of ads by 2018.[48] CBS reportedly makes more money per streaming viewer than per linear viewer. According to David Poltrack, Chief Research Officer of CBS Entertainment, CBS makes up to 20% more ad revenue from online viewers.[49]

Despite the increased revenue source of streaming videos, Networks often require a second aspect in the video streaming. Many Networks require viewers to sign-in with their "TV Provider" (ISP) in order to view recent episodes that have already been aired via linear TV.[50] This sign-on requirement serves two purposes. First, it allows Networks to control who has access to the television shows. Second, it prevents fans of shows from "cord cutting." Cord cutting refers to the cancellation of traditional television services, generally meaning cable subscriptions, and these cord cutters instead depend on video streaming via the Internet.[51] This allows members of the public to stop paying high costs for cable television and still watch shows via streaming. However, networks combat this by requiring TV provider sign-on accounts, which requires viewers to keep their cable subscription.

Alternatively, there has been a rise in subscription services in lieu of linear TV. Services such as Hulu Plus and Amazon Prime allow viewers to watch currently aired television shows. Hulu Plus has customers pay a flat monthly rate and Amazon Prime allows viewers to

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Todd Spangler, *CBS Makes Up to 20% More Revenue Online than TV Per Viewer: Research Chief,* VARIETY (July 1, 2014), http://variety.com/2014/digital/news/cbs-makes-up-to-20-more-ad-revenue-online-than-tv-per-viewer-research-chief-1201256077/.
[50] *See, e.g.*, *Watch ABC Overview*, ABC, http://abc.go.com/watchabc-overview (last visited Nov. 21, 2015); *FAQ*, ABC FAMILY, http://abcfamily.go.com/faq (last visited Nov. 21, 2015); *Help Center*, FOX, https://ask.fox.com/hc/en-us/articles/205613424-What-can-I-watch-if-I-don-t-have-a-TV-provider- (last visited Nov. 21, 2015).
[51] *What is Cord Cutting?*, TECHOPEDIA, http://www.techopedia.com/definition/28547/cord-cutting (last visited Nov. 19, 2015).

either pay-per-episode or buy a season pass and Netflix is now available in 190 countries.[52] Noticing the steadily increasing shift of viewers to use Internet streaming, CBS became the first major Network to offer an Internet TV service in 2014.[53] This coincided with HBO announcing that in 2015 they will be offering a subscription service of their own that will allow viewers to "cut the cord" on television subscriptions.[54]

B. The Battle For and Against Geo-blocking

In a final stance to control who views streamed content, Networks and subscription services also make use of zone locking content. Hulu can only be accessed in the United States, regardless of if you pay for a subscription account in the United States and try to access it while traveling abroad.[55] Netflix is only available in about 80 countries, with varying content depending on which country, or "market", in which you subscribe.[56] BBC's ITV Network does not allow streaming outside of the United Kingdom.[57]

With online advertisements providing additional revenue and sign-on requirements preventing "cord cutting," it is difficult to understand the reasoning behind geo-blocking. The terms and conditions for iTV, a popular television network in the United Kingdom, explain that geo-blocking is used to comply with the licensing agreements that were signed in order to provide content to their viewers in the first place. The issue, however, is that these licensing restrictions are far behind the times. With individuals having the ability to access any website from any place around the world, it does not seem prudent for copyright holders to restrict access of material purely on the basis of physical location. Networks could still maintain control over who views licensed copyrighted content by continuing to require sign-ons or through a subscription service. The physical location of a viewer of

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[52] *See About Hulu*, HULU, http://www.hulu.com/press/about (last visited Nov. 19, 2015); Marshall Honorof, *What is Amazon Prime?*, TOM'S GUIDE (Nov. 10, 2015, 2:30 PM), http://www.tomsguide.com/us/what-is-amazon-prime,news-18041.html.

[53] Jacob Kastrenakes, *CBS Becomes First Major Network to Launch Internet TV Service*, THE VERGE (Oct. 16, 2014, 10:09 AM), http://www.theverge.com/2014/10/16/6987543/cbs-all-access-streaming-service-no-cable-required-launches.

[54] Ryan Waniata, *HBO Breaks Free of Cable, Will Offer Online-Only Subscriptions in 2015*, DIGITAL TRENDS (Oct. 15, 2014), http://www.digitaltrends.com/home-theater/hbo-go-break-free-cable-chains-2015/.

[55] *Terms of Use*, HULU (June 16, 2015), www.hulu.com/terms.

[56] *See Where is Netflix Available*?, NETFLIX, https://help.netflix.com/en/node/14164 (last visited Nov. 19, 2015).

[57] *ITV Services - Terms and Conditions of Use*, ITV (Feb. 18, 2014, 4:30 PM), www.itv.com/terms (explaining that geo-blocking measures prevent users from accessing the ITV platform and services outside of the United Kingdom).

streamed media does not play any rational role in the allowance of viewing online content, especially when accessed through legal means.

When otherwise legally streamed content is blocked from being viewed by such an asinine reason as geographic location, individuals attempt to find another way. This creates a situation in which people who would have, and even attempted to, follow the law look for an alternative route that is not necessarily legal. Viewers can illegally obtain streamed content by pirating it from another source. The closest route to still obtaining streamed content legally is by using a virtual private network (VPN) to access websites and content that is otherwise blocked. VPN's allow users to virtually fake where their computer is located. This allows a viewer in France to pretend they are in the United States in order to access Hulu.

New Zealand provided a fantastic example on the use of VPNs and the direction in which ISPs, Networks, and copyright holders need to go. Up until this year, Netflix was not available in Australia and New Zealand.[58] With its reputation as an incredible and popular service, hundreds of thousands of Aussies used VPNs to gain access to the American website in order to purchase a subscription and use the service.[59] Despite the fact that these "VPN pirates" pay for a subscription for a legal service, their actions are still considered illegal as the use of VPNs likely violates terms of service agreements for either the ISP or the streaming service.[60]

In an unprecedented acceptance of such actions, Slingshot, an ISP in New Zealand, offered users a service they aptly named "Global Mode."[61] This service was released in June of 2013 and allowed users to access any website from anywhere in the world without being geo-blocked.[62] Global Mode was offered to all Slingshot customers at no additional cost.[63] Initially, Slingshot claimed to be offering the service for foreign visitors trying to access their usual websites.[64] However, Slingshot later dropped that pretense and announced that the service

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[58] Ernesto, *Netflix Wants to Make VPN Piracy Obsolete*, TORRENT FREAK (Mar. 25, 2015), http://torrentfreak.com/netflix-wants-to-make-vpn-piracy-obsolete-150325.

[59] Andy, *VPN Users 'Pirating' Netflix Scare TV Networks*, TORRENT FREAK (Mar. 3, 2014), https://torrentfreak.com/vpn-users-pirating-netflix-scare-tv-networks-140303.

[60] *See* Nic Healey, *New Zealand ISP's 'Global Mode' Gives Users Access to Netflix and More*, CNET (Jul. 7, 2014, 6:38 PM), www.cnet.com/news/new-zealand-isps-global-mode-gives-users-access-to-netflix-and-more.

[61] *See id.*

[62] *See Slingshot Grants Global Access*, SCOOP (June 19, 2013, 3:56 PM), http://www.scoop.co.nz/stories/BU1306/S00666/slingshot-grants-global-access.htm.

[63] *Id*.

[64] *Id*.

was made available to all Slingshot users as a way to combat piracy.[65] Slingshot fully believes that it is "bizarre" that a website's content is blocked simply because the person attempting to access the content is in New Zealand.[66] To support the company's position, Hamilton argues, "We know people want to pay for content, this lets them do so."[67] Following in Slingshot's steps, a newly formed Australian ISP, cleverly named "Yournet," was launched in August 2015.[68] Rather than providing customers with the option to use a VPN, like Global Mode, Yournet automatically bypasses geo-block measures for its customers.[69] Raj Bhuva, the founder of Yournet, shares the same sentiment as Slingshot, arguing that Yournet is "an anti-piracy ISP" meant to give its customers "the option to pay for content" rather than resorting to piracy.[70]

Netflix, despite its geographical licensing agreements, is starting to be more open about believing in Slingshot and Yournet's sentiments. Reed Hastings, CEO of Netflix, believes that VPN piracy is not the real issue with which the industry needs to be concerned.[71] The root cause of content piracy and VPN piracy is that the viewer is unable to access desired content.[72] For VPN pirates, this issue is easy to fix because, unlike content pirates, VPN pirates are willing to pay for content that is blocked by some artificial barrier.[73]

The lack of access to content legally available elsewhere in the world is not the only incentive for finding other means. Generally if content is available elsewhere it will eventually be available in the geo-blocked viewer's region. However, this creates a situation in which the subject matter of the content is revealed, or "spoiled," by individuals posting on the Internet. Although an argument can be made that viewers should just avoid reading about television shows they are waiting to gain access to, it is not as simple as that.

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[65] Graeme Philipson, *Kiwi ISP Gets Around Geoblocking*, ITWIRE (Jul. 14, 2014), http://www.itwire.com/your-it-news/entertainment/64724-kiwi-isp-gets-around-geoblocking.

[66] Josh Taylor, *NZ Media Companies Order ISPs to Stop 'Global Mode' Access*, ZDNET (Apr. 2, 2015, 8:59 PM), http://www.zdnet.com/article/nz-media-companies-challenge-global-mode-access/.

[67] *Supra* note 65.

[68] Adam Turner, *'Global Mode' to Offer US Netflix and HBO Now as Aussie ISP Fights Geo-blocking*, THE SYDNEY MORNING HERALD (July 8, 2015, 1:18 PM), http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/global-mode-to-offer-us-netflix-and-hbo-now-as-aussie-isp-fights-geoblocking-20150707-gi79ti.html.

[69] *Id.*

[70] *Id.*

[71] Ernesto, *supra* note 58.

[72] *Id.*

[73] *See id.*

"Spoilers" can appear in all the various forms of social media such as angry tweets by fans to the show's official twitter; screen shots taken by Instagram viewers or the Network; or blog posts discussing a recent episode in detail. In addition to the thousands of posts, tweets, and pictures placed on the Internet about the geo-blocked content, Internet browsers now focus advertisements and suggestions based on viewing history. Just a few searches for the US airing date of BBC's Downton Abbey will inevitably lead an Internet viewer to some spoiling content. So, rather than eventually having the surprising twist in the story line spoiled by the Internet, viewers who have to wait a delayed period for content, purely based on geographical location, have a higher reason to find alternative means to view the content.

Those in favor of geo-blocking argue that it allows copyright holders to freely decide and contract (1) who distributes their material and (2) where the license allows this material to be distributed.[74] This includes charging higher prices for their material if it is accessible in more places.[75] For example, Sony has different contracts with Netflix depending on where the content is to be aired (be it Canada, Mexico, or the UK).[76] An additional argument is that websites hosting streamed digital media suffer from a lack of infrastructure to support worldwide viewing.[77] A year later, Netflix backed its public stance by announcing the use of technology that will block users who are using proxy devices from accessing the service as if they were in a different country.[78] But it should be noted that it is highly unlikely that all of the world viewers would create a need for a dramatic increase in infrastructure. Due to the nature of human habits and time zones, the millions of additional viewers would be accessing the content at the same time. Furthermore, advocates for geo-blocking also claim that there is a lack of demand to make any real changes. However, if this were the case, then they would not be so concerned with the circumvention of geo-blocking measures.

Alternatively, charging more to view content based on the geographical location of the viewer is seen as unfair and a form of discrim-

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[74] *See, e.g.*, Elise Dalley, *Who Wants to But Online for Less?*, CHOICE (Aug. 13, 2014), https://www.choice.com.au/electronics-and-technology/internet/internet-privacy-and-safety/articles/bypass-geo-blocking.

[75] *See id.*

[76] *See* Ernesto, *supra* note 58.

[77] *See* SOPHIE DE VINCK ET AL., EUR. COMM'N, FRAGMENTATION OF THE SINGLE MARKET FOR ON-LINE VIDEO-ON-DEMAND SERVICES: POINT OF VIEW OF CONTENT PROVIDERS 34 (2014), http://kreatywna-europa.eu/media/wp-content/uploads/2014/08/Fragmentation-of-the-Single-Market-for-on-line-VoD-services.pdf.

[78] *Evolving Proxy Detection as a Global Service*, NETFLIX MEDIA CENTER (Jan. 14, 2016), https://media.netflix.com/en/company-blog/evolving-proxy-detection-as-a-global-service.

ination.[79] This geographical discrimination is reminiscent of that attempted by booksellers in *Kirtsaeng*. Although the basis of that decision dealt with the first sale doctrine, the concept of the right to require a higher price for an identical copyrighted item based off of geographical locations is starkly mirrored in video streaming.[80] Even with Netflix's proxy detection announcement, the company still made a point of saying that there would be no need for this if they were able to offer the same content globally.[81] Another argument against geo-blocking and the allowance of VPNs is that the circumvention of geo-blocks in order to pay for a legal service is seen as a parallel import. A parallel import occurs when something is imported without the permission of the copyright owner.[82] This is what occurred, and approved by, in *Kirtsaeng*.

C. Legality and Rationality for Geo-Blocking and VPNs

Article 11 of the WIPO Copyright Treaty of 1996 made the use of a VPN illegal when it is used to circumvent "protective" measures like geo-blocking. Article 11 obligates parties to provide legal protection and remedies against the use of technologies that circumvent measures taken to protect rights granted under WIPO and by the Berne Convention.[83] The main right implicated by this legislation is the copyright holder's right to distribution. Member States of WIPO were required to adopt the treaty into their laws. The United States adoption of circumvention protection is found under § 1201 of Title 17, which states, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[84] Interestingly, both Australia and New Zealand are member states of WIPO.[85] Accordingly these countries are supposed to follow the internationally accepted policies of copyright protection, however some companies in Australia and New Zealand, as discussed earlier, seem to

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[79] *See* Andrus Ansip, Eur. Comm'n, Building a Digital Space for Europe – the Challenges Ahead: Speech by Vice-President Ansip at the #Digital4EU Stakeholder Forum (Feb. 23, 2015), https://ec.europa.eu/commission/content/building-digital-space-europe-challenges-ahead-speech-vice-president-ansip-digital4eu_en.

[80] *See* Kirtsaeng, *supra* note 11, at 1355.

[81] *Supra* note 78.

[82] Parallel Imports, WORLD TRADE ORGANIZATION GLOSSARY, https://www.wto.org/english/thewto_e/glossary_e/parallel_imports_e.htm.

[83] WIPO Copyright Treaty art. 11, WIPO Doc. CRNR/DC/94 (adopted on Dec. 20, 1996), http://www.wipo.int/treaties/en/text.jsp?file_id=295166#P87_12240.

[84] *See* 17 U.S.C. § 1201(a)(1)(A) (1998).

[85] *See Information by Country: Australia*, WIPO, http://www.wipo.int/members/en/details.jsp?country_id=10 (last visited Nov. 21, 2015); *Information by Country: New Zealand*, WIPO, http://www.wipo.int/members/en/details.jsp?country_id=134 (last visited Nov. 21, 2015).

welcome the use of VPN to circumvent "protection" that is offered by geo-blocking. However, four media companies were not as welcoming to the circumvention methods offered by ISPs. In April of 2015, Sky Television, Television New Zealand, Lightbox, and Mediaworks threatened Slingshot and Bypass Network Services Limited with a lawsuit over Global Mode, claiming copyright infringement.[86] Rather than attempting to change New Zealand and international law, Slingshot and Bypass gave in to the media giants.[87] The settlement between the parties required that Global Mode could no longer be provided after September 1, 2015.[88]

The argument here has nothing to do with whether Copyright holders have the right to determine whom, when, and how their protected content gets viewed. Rather, the argument is that geo-blocking is more detrimental than it is beneficial. As previously mentioned, geo-blocking content only provides an incentive and a reason for attempted viewers to find alternative means for streaming the content. Whether the alternative means is through a VPN or by pirating the content depends on the user.

Piracy is what copyright holders really want to prevent. Pirates are the ones stealing the potential money from the copyright holders. This potential revenue includes gains from advertisements and gains from paying for either subscription services, pay-per-episode, or payments for the ISP. When a copyrighted work is pirated, it is downloaded without any permission or general knowledge of the copyright owner. Generally nothing is paid for the download, and therefore the copyright holder receives no profit or gains.

VPN users, instead, are attempting to gain access to websites that legally host the content. As shown in New Zealand, they are even willing, and do, pay for the content, unlike normal IP pirates. When accessing host cites that use a commercial model, such as Hulu, VPN users also have to sit through the commercials that provide billions of dollars of income each year.[89] Although copyright holders certainly have a right to make sure that their content is viewed through legal

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[86] *See Internet Provider Stands by Global Mode*, RADIO NEW ZEALAND (April 16, 2015, 8:55 AM), http://www.radionz.co.nz/news/national/271316/internet-provider-stands-by-global-mode.

[87] *See*, *Global Mode Dropped After Legal Action*, RADIO NEW ZEALAND (June 24, 2015, 8:52 PM) http://www.radionz.co.nz/news/national/277042/global-mode-dropped-after-legal-action.

[88] *See id.*

[89] *See, e.g.*, Todd Spangler, *Digital-Video Advertising in U.S. to Hit $6 Bil in 2014, But It's Not Displacing TV Dollars*, VARIETY (June 12, 2014, 6:30 AM), http://variety.com/2014/digital/news/digital-video-advertising-in-u-s-to-hit-6-bil-in-2014-but-its-not-displacing-tv-dollars-1201219027/.

means, should they have a right to require geo-blocking simply to exploit money from more remote areas?

IV. New Laws for a New Age

A. Social Beliefs and Companies

In order for a solution to occur, the law will have to change in a way that prevents geo-blocking or allows for viewers to use VPNs to work around geo-blocks. Unfortunately, the law rarely changes before public policy and social norms change. Once companies start wanting to change and the public begins to demand a change, the law will catch up. Fortunately, public policy is in the midst of changing. Companies are changing their policies and laws are in the works to prevent geo-blocking. Not only is this change good for the consumer, but it is necessary in order for the law to keep up with the realities of how consumers are using technology. The Internet is used to access information from all over the world, not simply from the country the user is located. This same ideal should match the way media is licensed to stream.

Slingshot has helped by being part of the forefront of social change. The company's implementation of Global Mode was filled with foresight and understanding not only regarding how individuals are using the internet on a global scale, but also regarding how laws need to be changed to match technology and the usage. Although the legality, under WIPO, of Slingshot's Global Mode is certainly debatable, the ISP has provided a way for its users to pay for streaming subscriptions as opposed to pirating the shows. The potential lawsuit against Slingshot could be the first determination that either explicitly grants or denies the use of VPNs or geo-blocking.

In line with Global Mode, Netflix has also had a change in attitude towards geo-blocking. Netflix, as a company, has certainly considered expanding its subscribers. To better enhance its global business, Netflix is expanding from being available in 81 countries to around 200 within the next year and a half.[90] Currently, this is the only option available to Netflix that doesn't break pre-existing contracts. As recently as January 2015, Netflix has reiterated that potential customers should not attempt to subscribe to its content via a

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[90] *See, e.g.*, Todd Spangler, *Netflix Wants the World: Can It Really Expand to 200 Countries in 2 Years?*, Variety (Jan. 22, 2015, 11:27 AM), http://variety.com/2015/digital/news/netflix-wants-the-world-can-it-really-expand-to-200-countries-in-2-years-1201411740/; *see also Help Center: Where is Netflix Available?*, Netflix, https://help.netflix.com/en/node/14164 (last visited Nov. 22, 2015).

circumvention service.[91] Individuals generally circumvent geo-blocked Netflix either because Netflix subscriptions are unavailable in their country or they are trying to obtain content available on a different country's Netflix subscription. Although disapproving of circumvention is Netflix's official stance, Reed Hastings, the CEO of Netflix, feels that VPN 'piracy' is not the real issue because those going through that route are willing to pay, but are being blocked.[92] In line with globalizing their product, Netflix is also breaking ground by providing global premieres in multiple countries on the same day, like with the show "Orange is the New Black".[93] HBO is also planning on globalizing with a new stand-alone application, which will include live airing of new shows such as the popular "Game of Thrones" series.[94]

Companies could change on their own as a solution. Rather than requiring multiple contracts for multiple locations, copyright holders could just charge a greater price for one single contract and do away with multiple contracts, as more money would be gained from ad revenue if more people were able to legally stream the media online. There would most likely be a large drop in piracy caused by a lack of access due to geographical locations, as Hastings asserted in stating that "the basic solution is for Netflix to get global and have its content be the same all around the world so there's no incentive to [use a VPN]."[95]

In a surprising shift, it appears that Netflix is not the only business to start implementing changes. For over forty years, England's BBC and the United States' PBS have had a partnership in which certain shows are aired in both the US, through Masterpiece PBS, and in the UK, through BBC, though generally they aired at separate times.[96] However, this is starting to change. It has been announced

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[91] *See, e.g.*, *Netflix Upholds Geoblocking Rules Amid Reports of Crackdown*, CBC NEWS: BUSINESS, http://www.cbc.ca/news/business/netflix-upholds-geoblocking-rules-amid-reports-of-crackdown-1.2889895 (last updated Jan. 5, 2015, 5:06 PM).

[92] *See* Luke Hopewell, *Netflix CEO Reed Hastings on the NBN, Piracy and Launching in Australia*, GIZMODO AUSTL. (Mar. 19, 2015, 8:00 AM), http://www.gizmodo.com.au/2015/03/netflix-ceo-reed-hastings-on-the-nbn-piracy-and-launching-in-australia/.

[93] *See Netflix to Launch in Australia on 24 March from $8.99 a Month*, NETFLIX MEDIA CENTER (Mar. 23, 2015), https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=2011.

[94] *See* Ryan Waniata, *Cord Cutting 101: How to Quit Cable for Online Streaming Video*, DIGITAL TRENDS (Feb. 5, 2015), http://www.digitaltrends.com/home-theater/how-to-quit-cable-for-online-streaming-video/.

[95] Hopewell, *supra* note 90.

[96] *See BBC Worldwide and Masterpiece Announce Co-Production Deal for The Paradise and The Lady Vanishes*, BBC WORLDWIDE PRESS ROOM (Oct. 9, 2012), http://www.bbcwpressroom.com/sales-and-co-productions/press/bbc-worldwide-

that on January 1, 2016, *Sherlock*, one of the partnership's more popular shows, will premiere in the US and the UK on the same day.[97] The simultaneous premiere of such a popular show provides promising evidence that Networks are recognizing the issues caused by geo-blocking and are willing to change.

B. Change in Law

Following the change of social beliefs, it appears that the law might not be that far behind, as can be seen by the recent announcements by the European Commission (Commission). Some of the Commission's main goals are to propose legislation to the European Parliament, enforce law implemented by the EU, and implement EU policies.[98] The Commission has named "Digital Single Market" as one of its top ten priorities.[99] Part of the goal is to make it so that all EU countries have the same rules for IP law. Additionally, the Commission hopes to modify the law so that it reflects the current status of technology and how technology is used.[100]

To support the Commission's goals, it has released a fact sheet to show just how much the Internet is a global economy. According to the fact sheet, 315 million Europeans use the Internet on a daily basis.[101] Of this global economy, US-based online websites make up 54% of the market.[102] Importantly, content such as films and games are the most popular activities for Internet users. Additionally, the Commission estimates that one out of every five Europeans wishes to stream digital content from other countries. Although the fact sheet focuses on online shopping for goods, as opposed to Netflix-type services, the document does bring up the importance of having faster broadband services available.

One ideal behind the Digital Single Market is the focus of this paper. The Commission wants to provide the ability to enjoy the same online content and services regardless of which EU country one is

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and-masterpiece-announce-co-production-deal-for-the-paradise-and-the-lady-vanishes/.

[97] *Sherlock Special Premieres Jan. 1, 2016*, PBS (Oct. 24, 2015), http://www.pbs.org/wgbh/masterpiece/programs/features/news/sherlock-special-premiere-january-2016/.

[98] *About the European Commission*, EUR. COMM'N, http://ec.europa.eu/about/index_en.htm (last visited Nov. 22, 2015).

[99] *Priorities*, EUR. COMM'N, http://ec.europa.eu/priorities/index_en.htm (last visited Nov. 22, 2015).

[100] *See Digital Single Market*, EUR. COMM'N, http://ec.europa.eu/priorities/digital-single-market/index_en.htm (last visited Nov. 18, 2015).

[101] *Why We Need a Digital Single Market*, EUR. COMM'N, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-factsheet_en.pdf (last visited Nov. 18, 2015).

[102] *Id.*

in.[103] Part of this ability to view the same content despite the geo-location is the idea that there needs to be simple rules for copyrightable content.[104] If copyright law internationally reflects the type of copyright treaties that the United States sets up with foreign countries, then copyrights will be recognized on a larger international basis.[105] As it stands, many countries offer protection for foreign copyrights only if they meet certain criteria. The international organizations and groups like the Berne Convention and WIPO help international cooperation for copyright and other IP protection as well as cohesion in laws. For example, all of the WIPO member countries have worked WIPO's copyright directive into each countries respective laws.[106]

By looking at examples of recently implemented laws passed through by WIPO and the current direction of the Commission, it is hopeful that geo-blocking will soon be a thing of the past. On May 6, 2015, the Commission released sixteen initiatives to begin creating a Digital Single Market.[107] Of these sixteen initiatives, seven of them are focused on issues surrounding geo-blocking measures and the arguments against them.[108] The forefront of the seven directives calls out geo-blocking as an unjustified "discriminatory practice" that is used to advance commercial success at the detriment of the consumer. The other six are aimed at fixing the potential problems that arise with geo-blocking and could arise when geo-blocking is no longer allowed. This includes setting up an anti-trust inquiry into cross border "barriers" that impair e-commerce competition.[109] Additionally, the Commission hopes to create one universal and updated copyright law, unifying protection of copyrightable material across Europe as well as access to it no matter where the consumer is located. Finally, the Commission hopes to determine how broadcasters can increase their transmissions and determine what is needed to in order to bring telecom rules and infrastructure into the 21st century.[110]

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[103] *Citizens' Dialogue: Vice-President Ansip "Goes Digital" in Sofia*, EUR. COMM'N (Apr. 17, 2015), http://europa.eu/rapid/press-release_IP-15-4790_en.htm.

[104] *Id.*

[105] *See, e.g.*, U.S. COPYRIGHT OFFICE, 38A.0915, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES (2014), http://www.copyright.gov/circs/circ38a.pdf.

[106] *See infra* Parts I-II.

[107] *A Digital Single Market for Europe: Commission Sets Out 16 Initiatives to Make It Happen*, EUR. COMM'N (May 6, 2015), http://europa.eu/rapid/press-release_IP-15-4919_en.htm.

[108] *Id.*

[109] *See Antitrust: Commission Launches E-Commerce Sector Inquiry*, EUR. COMM'N(May 6, 2015), http://europa.eu/rapid/press-release_IP-15-4921_en.htm.

[110] *See supra* note 99.

The Commission's recognition of geo-blocking as a discriminatory practice is a good sign that a change in the law is no longer unattainable. Hopefully the same countries that accepted the WIPO treaty will also understand the benefits of doing away with such an arbitrary barrier. A legislative change will help companies, such as Netflix, to be able to have contracts for content that are not based on the physical location of the viewer, but rather on the amount of content that is viewed. In turn, this will allow companies to lose less ad revenue and allow individuals to access an infinite amount of new ideas, shows, and content. Deleting geo-blocking from streamed media is the only legitimate solution that will simultaneously open up the Internet to its full potential and reduce the harm caused by IP pirates.

CHINESE "WORKERS WITHOUT BENEFITS"*

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I. Introduction

Millions of workers in China are not afforded the rights and benefits of its labor and employment laws and thus are not "workers with benefits." China's labor reforms and worker "safety net" have come so far in the past 30 years, producing "workers with benefits." Why are there still millions of *workers* in the urban sector who do not have the protections of these labor and employment law reforms, who are the "workers *without* benefits," falling outside the labor safety net? They have been called precarious,[1] atypical, irregular, contingent, and include casual, temporary, part-time, dispatch, and workers called subcontractors and independent contractors, which may include construction workers, students, domestic workers, and the many other workers in informal employment relationships. They fall outside the legal protections of the labor laws; or, they may be covered, but excluded or exempted or misclassified. This situation of precarious workers occurs not only in China, but globally, and it has not gone unnoticed by the International Labour Organization (ILO).[2]

Labor laws in China began in earnest in 1994 with the Labor Law, which defined labor rights and obligations in somewhat general terms, with local regulations sometimes more specifically supplementing them. This was followed in subsequent years with more specific labor rights and benefit laws, including for workers health and safety, work-related injuries, unemployment insurance, and other social security benefit laws. These laws are tied into and for the benefit of workers in the employment relationship of a *labor contract.* Outside this relationship is a *contract for labor services*, which is not eligible for the benefits of the labor laws, but rather is dealt with under the contract law, as a contract of employment, such as an independent con-

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* Presented in modified form at the European China Law Society Conference in Cologne on September 25-26, 2015.

[1] *See* Russell Sage Foundation, Rethinking Workplace Regulation: Beyond the Standard Contract of Employment (Katherine V.W. Stone & Harry Arthurs eds., 2013).

[2] *See* International Labour Organization, Policies and Regulations to Combat Precarious Employment (2011), http://www.ilo.org/wcmsp5/groups/public/—-ed_dialogue/-/—-actrav/documents/meetingdocument/wcms_164286.pdf [hereinafter ILO Policies].

tractor might have. There are legal definitions and issues arising under the various labor laws, national and local, as to how to categorize workers that this paper undertakes to explicate. The differences in consequences are the availability of the rights and benefits of the labor laws, as well as the right to resolve labor disputes under the Labor Mediation and Labor Arbitration Dispute Law.

Because as employers understand they can lower labor costs by hiring and/or classifying workers as contractors for services, there are a number of these worker categories for which legal interpretations will be discussed to test the language and the application of the law. These results will be compared with relevant ILO conventions and labor standards to evaluate how China's laws fit with those standards and identify any areas that might benefit from reform. In the end analysis, it is proposed some clarity will be provided on the issue of which worker in China should be an "employee with benefits."

II. WHO ARE THE "EMPLOYEES WITHOUT BENEFITS?"

A. Precarious work

One scholar has identified the issue of precarious work as follows:

> Although precarious work was relatively rare in China until the 1980s, it has experienced rapid growth over the past two decades. The factors underlying the diffusion of precarious work are varied and interrelated, notably reflecting the impact of changes in the structure of industry, occupations, urbanization, state policies, and labor market institutions, as well as employers' manpower strategies. Although the spread of precarious work is sometimes advocated as an effective means of generating employment and increasing labor market flexibility, substantial evidence shows that such work is plagued by a series of problems, including low pay, low skill, high work intensity, poor working conditions, and lack of employment protection.[3]

The work arrangements that encompass the precarious workers are categorized into contractual limitations on duration (short or fixed term, temporary, casual, or day labor) and the nature of the employment relationship itself – triangular, ambiguous, misclassified or disguised employment relationships.[4] The working conditions often include low wages, poor occupational health and safety protections,

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[3] Ying Zhou, *The State of Precarious Work in China*, 57 AMERICAN BEHAVIORAL SCIENTIST 354 (2013), http://abs.sagepub.com/content/57/3/354.abstract.

[4] *See* ILO POLICIES, *supra* note 2, at 7.

and lack of rights or benefits.[5] Subcontracting is often used by primary employers as a means of shifting risk by outsourcing more dangerous jobs to subcontracted and agency workers. This forces precarious workers to undertake the more dangerous and risky jobs.[6] Other adverse effects of precarious work include a disproportionate impact on women. It also threatens trade union membership in that precarious workers are in an unstable position. Even if they are being exploited, few feel confident enough to organize and bargain collectively at the risk of losing their jobs.[7]

Precarious work arises from a combination of forces, including run-away profit-seeking, changing production schedules, global capital mobility, and ineffective labor protection laws, all resulting in increased competition. "In this context, precarious employment is as much a consequence of increased competition as it is a powerful driver of increasing competition."[8]

It is reported that at least one-fifth of China's 300 million urban workers held temporary jobs at the end of 2010, up more than twofold since 2008.[9] China's traditional model of long-term employment has been changing due to increased reliance on nonrenewable fixed-term and temporary agency employment contracts. In a recent study that pre-dates amendments to the Labor Contract Law, which regulated and limited the use of dispatch workers,[10] it was suggested that managers tend to adopt contingent employment practices in the presence of weak labor institutions to retain powers such as termination at will and to promote their own interests when handling conflicting intra-organizational demands. "Despite recent legislative endeavors to promote continuous employment relationships as the norm, the proportion of workers on temporary agency contracts and

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[5] *See, e.g.*, John T. Addison & Christopher J. Surfield, *Atypical Work and Employment Continuity*, 48 INDUSTRIAL RELATIONS 655, 655 (2009); J. Benach & C. Muntaner, *Precarious Employment and Health: Developing a Research Agenda*, 61 J. EPIDEMIOLOGY CMTY. HEALTH 276, 276 (2007).

[6] *See* Michael Quinlan, *The Implication of Labour Market Restructuring in Industrialized Societies for Occupational Health and Safety*, 20 ECON. & INDUS. DEMOCRACY 427, 432-33 (1999).

[7] *See* María Menéndez, Joan Benach, Carles Muntaner, Marcelo Amable, & Patricia O'Campo, *Is Precarious Employment More Damaging to Women's Health than Men's?*, 64 SOCIAL SCI. & MED. 776, 777 (2007); *see, e.g.*, Enda Brophy, *System Error: Labour Precarity and Collective Organizing at Microsoft*, 31 CANADIAN J. COMMC'N 619 (2006).

[8] ILO POLICIES, *supra* note 2, at 2218.

[9] Xiangmin Liu, *How Institutional and Organizational Characteristics Explain the Growth of Contingent Work in China*, 68 INDUS. & LAB. REL. REV. 372, 372-73 (2015).

[10] *Id*. at 372.

nonrenewable fixed-term contracts in China has rapidly increased."[11] Some firms want to keep certain employment practices that promote their own self-interest, such as the right to fire and inconsistent laws and regulations, so "they deliberately adopt contingent work to shirk their responsibilities as employers and pass on the risks to workers."[12]

Some categories of workers in China suffer more than others in being "workers without benefits." A recent study found that "engaging in informal employment incurred a 44% wage penalty for urban workers and 33% for rural migrant workers" in China.[13] In addition, only 29% of migrant workers in formal employment and 2% of migrant workers in informal employment were entitled to statutory pensions compared with 82% of formal workers with urban residential status.[14]

This type of employment is further defined as follows:

> Informal employment (also known "non-standard employment" or "flexible employment") as a flexible labor strategy has been gaining increasing attention in China since the late 1990s as a result of the massive downsizing in the state sector, the rapid expansion of the private economy, and the migration of surplus rural labor en mass to urban areas.[15]

Workers engaging in 'informal employment' can be found in three types of organizations: 1) organizations operating in the formal sector; 2) organizations operating in the informal sector; and 3) loosely formed 'informal employment' organization.[16] Informal employment includes temporary, fixed-term, seasonal, casual work, hourly work, semi-self-employment in the form of subcontracting work, self-employment and those employed by self-employed businesses. There are no national statistics to accurately capture the size of 'informal employment' and the spread of its sub-categories. Existing figures are estimations calculated in different ways. For example, according to one report, "over 60 percent of the workforce was engaged in 'informal employment' by the mid-2000s."[17]

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[11] *Id.* at 391.
[12] *Id.*
[13] Zhou, *supra* note 4, at 10.
[14] *See id.*
[15] Fang Lee Cooke, *Labour Market Regulations and Informal Employment in China: To What Extent Are Workers Protected?*, 2 J. CHINESE HUM. RESOURCE MGMT 100, 102 (2011).
[16] *See* Ralf Hussmanns, *Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment* 2 (Int'l Labor Office, Working Paper No. 53, 2004).
[17] Fang Lee Cooke & Ronald Brown, *The Regulation of Non-Standard Forms of Employment in China, Japan, and The Republic of Korea*, at 20 (International Labour Office, Conditions of Work and Employment Series No. 64, 2015), http://

"Workers without benefits" include these various non-standard workers, as well as vocational students, construction workers, and domestic workers, all of which are discussed below.

B. Non-standard workers

The ILO has noted that:

> In the past, the standard employment relationship, providing a bundle of labor and social rights, ensured that employers shared some of the responsibility by offering job security despite market volatility, and reduced individual risk through collective social security provisions. In the precarious world of today, however, the flexibility burden has shifted from the enterprise or the state to the largely unprotected individual worker, resulting in precarious employment and increasingly precarious societies.[18]

The ILO states that *non-standard* work is commonly characterized by short and often unpredictable hours, as seen with temporary or fixed-term contracts, temporary agency or dispatched work, and self-employment.[19] Sometimes these new forms of contractual arrangement result in a blurring of the employment relationship, which makes it "difficult for workers to exercise their rights at work or gain access to social security benefits."[20]

Part-time employment in China is defined as work generally compensated on an hourly basis and that does not exceed an average of 24 hours per week or 4 hours per day for the same employer.[21] They need not be hired under a written contract and can be dismissed (or they can quit) at will without severance pay.[22] These hourly-paid workers may have to carry out several 'part-time' jobs to generate sufficient income. Part-time workers, by law, must be paid at least the local minimum wage, though not most other labor benefits,[23] and can-

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www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-travail/documents/publication/wcms_414584.pdf.

[18] ILO POLICIES, *supra* note 2, at 22.

[19] *See Non-Standard Forms of Employment*, INTERNATIONAL LABOUR ORGANIZATION (2016) (last visited April 20, 2016), http://www.ilo.org/global/topics/employment-security/non-standard-employment/lang—en/index.htm.

[20] *Id.*

[21] Labor Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l. People's Cong. June 29, 2007, effective Jan. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. art. 68 (China), http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm [hereinafter LCL].

[22] *Id*. arts. 69, 71.

[23] *Id.* art. 72.

not be subject to a probationary term.[24] Also, these workers, estimated to number about 60-70 million workers, are sometimes categorized as "casual employees" and fall largely outside the protection of the labor laws. They are distinguished in that they have no fixed time or labor contract.[25] While fixed-term employees must be provided labor contracts and are entitled to most of the same protections and benefits as open-term employees, it is unclear whether fixed term, part-time workers working between 24 and 40 hours per week must be provided a modified amount of benefits.[26]

By contrast, *probationary* employees may remain in that status for up to six months, have the right not to be terminated without cause[27]and must be paid at least the minimum wage or, at any rate, not less than eighty percent of the non-probationary rate.[28]

Independent contractors are not under the employer's direct control and thus are outside the employment relationship and the Labor Contract Law;[29] or they could be *de facto* employees where the employer lacks sufficient evidence of their independent status.[30] Instead, independent contractors fall under the Contract Law and are parties to a labor services contract; therefore "they have no right to labor benefits except as they may be 'employees' falling under the employment" of another employer.[31] They often need to be distinguished from self-employed individuals who are not dependent and controlled by an employer.

Dispatch Workers. Estimates by the All-China Federation of Trade Unions (ACFTU) suggest in 2011 that there were over 60 million dispatch workers in urban China,[32] with a concentration of dispatch workers in State-Owned-Enterprises (SOEs) and Foreign-Invested Enterprises (FIEs).[33] Labor dispatching units, or temporary agencies, are defined as an employing unit to the workers.[34] In 2013, the Chinese government tightened the regulation of agency employ-

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[24] *Id.* art. 70.

[25] *See id*. art. 71.

[26] *See id.* art. 68.

[27] *See id.* arts. 19, 21.

[28] *See id.* art. 20.

[29] *See, e.g.*, *id.* art. 2.

[30] *See id.*

[31] Cooke & Brown, *supra* note 18, at 32.

[32] *See* Virginia H. Ho & Huang Qiaoyan, *The Recursivity of Reform: China's Amended Labor Contract Law*, 37 FORDHAM INT'L L.J. 973, 982-83 (2014), http://ir.lawnet.fordham.edu/ilj/vol37/iss4/8.

[33] *Id*. at 984.

[34] LCL*, supra* note 23, art. 58.

ment and the agency industry.[35] Now, dispatched workers cannot comprise more than a specific percentage of a company's total workforce and workers can only be used in temporary positions (defined as 6 months or less), auxiliary positions, and substitute positions (e.g. to cover maternity leave, long-term sick leave, and study leave).[36]

Dispatch workers are to be hired by the dispatch agency for two years under a fixed-term labor contract period that cannot be part-time,[37] and a user-employer cannot separate a continuous term of labor use into two or more short-term dispatch agreements.[38] The dispatch agency is responsible for the wages and must provide pay equal to that of the standard workers of the user employer.[39] Dispatch workers may join the union of the user-employer or the temporary agency.[40]

Since the enactment of the amended Labor Contract Law and the Provisional Regulations on Labor Dispatch, labor strategy has displayed new characteristics in 2014. It revealed employers' strategic responses to the new regulations to be more diverse labor deployment practices, including turning non-standard positions into permanent positions, outsourcing, part-time work, intern placement, volunteer work. In particular, business outsourcing has been a popular strategy for large SOEs and foreign firms to cope with the new labor regulations. As a result, there was an evident reduction of dispatched workers even before new regulations were in effect. From 2011 to the end of 2013, the total number of dispatched workers in the four big banks in China had reduced from 172,900 to 142,600 workers.[41]

C. Vocational Students

Vocational schools have become a significant source of industrial and service labor.[42] China's Ministry of Education reported that

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[35] *See* Daniel S. S. Cairns, *New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law*, 24 Wash. Int'l L.J. 219, 242 (2015).

[36] *Id*. at 244.

[37] Regulation on the Implementation of the Employment Contract Law of the People's Republic of China (promulgated by the State Council, Sept. 18, 2008, effective Sept. 18, 2008) art. 30 (China), http://www.fdi.gov.cn/1800000121_39_521_0_7.html .

[38] *See* LCL, *supra* note 23, art. 59.

[39] *See id.* art. 63.

[40] *See id.* art. 64.

[41] *See The Big Four Banks Dispatching Workers Cut 84,300 People Last Year: A Drop Of More Than Seventy Percent,* LABOR DISPATCH INDUSTRY NETWORK (July 23, 2015), http://www.pqgjdk.com/En/NewsView.asp?ID=21 (last accessed Apr. 24, 2016).

[42] *See, e.g.*, Earl V. Brown, Jr. & Kyle A. deCant, *Exploiting Chinese Interns as Unprotected Industrial Labor*, 15 ASIAN-PAC. L. & POL'Y J. 149, 157 (2014).

in 2010, 42% of the 18.1 million Chinese students completing their nine years of compulsory education opted to enroll in vocational school.[43] Therefore, at least eight million student interns were working in commerce each year, with the internships running from three months to a year, depending on the school.[44] The numbers of students in the vocational programs are provided in the chart below.[45]

Classification	New Enrolment	Graduates
Primary School	16.9	19.3
Middle School	17.2	18.1
Academic High School	8.4	8.0
Secondary Vocational School	6.0	4.9
Technical School	1.6	1.2
Higher Vocational School	3.1	3.2
University (undergraduate)	3.5	2.6

The percentage of interns, just at Foxconn, has been estimated at being as high as thirty-three percent, or 430,000 of the company's 1.3 million factory laborers; however, Foxconn claims that only fifteen percent of its workforce is intern labor (180,000).[46]

A discussion of the social and legal dilemma of the employment of student interns, as "workers without benefits" in China is summarized below:

> Private employers in China rely increasingly on intern labor as a major component of their workforce. All over China, industrial and service sector student interns work full and overtime schedules performing unskilled labor alongside workers, who enjoy pay and benefits that comply with or exceed the standards set by Chinese labor law. However, the interns are paid below China's standard wages and benefits, and are barred from access to the judicial and other remedies for labor law abuses.

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[43] *The Mass Production of Labour: The Exploitation of Students in China's Vocational School System,* CHINA LABOUR BULLETIN 2 (Jan. 12, 2012), http://www.clb.org.hk/sites/default/files/archive/en/share/File/general/vocational_school_system.pdf [hereinafter *Mass Production*].

[44] *See* Eva Dou, *Chinese Tech Factories Use Student Labor,* THE AUSTRALIAN (Sept. 26, 2014, 12:00 AM), http://www.theaustralian.com.au/business/wall-street-journal/chinese-tech-factories-use-student-labour/news-story/4a6d9b2ec97cbfbca5debcc29c5969a1?=.

[45] *See Mass Production*, *supra* note 45, at 2.

[46] *See* Alex Pasternack, *Foxconn's Other Dirty Secret: The World's Largest 'Internship' Program,* VICE (Feb. 15, 2012, 10:45 AM), http://motherboard.vice.com/blog/foxconn-s-other-dirty-secret-the-world-s-largest-internship-program.

> These industrial and service "internships" are largely devoid of educational, technical or vocational content and often unrelated to the vocational aspirations of the students. Employers and business-friendly local authorities in China have adopted a self-interested interpretation of the labor laws and regulations that places interns outside the protections of the labor law and bars them from taking their disputes to the labor tribunals.[47]

It also has been argued that for many students, this is a "forced internship" because of the entrenched relationship between schools and businesses, a relationship actively encouraged by the Chinese government. It was not unusual for schools to deduct a "commission" from the interns' salary or get paid directly by factories for providing them with students as cheap labor.[48]

Two issues are raised in this area. First, reports show that many vocational students are assigned jobs unrelated to their area of study and may be assigned involuntarily under threat of having their diploma withheld. Second, their pay and working conditions are outside the protection of China's labor laws and often sub-standard, as they are classified as not having the requisite employment relationship despite performing the same work as standard employees receiving full wages and benefits.[49] These two issues raise questions of legality under China's labor laws and under ILO standards, discussed below.

Thus, many vocational student intern workers in China are a category of "workers without benefits."

In response to this situation, the Ministry of Education, the Ministry of Finance, the Ministry of Human Resources and Social Security, the State Administration of Work Safety and the China Insurance Regulatory Commission jointly issued the Regulations for the Management of Interns from Vocational Schools (the "Regulations") on 11 April 2016.[50] It replaced the 2007 regulations and expanded the scope from students at secondary schools to also include higher-level

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[47] *See* Brown & deCant, *supra* note 44, at 150-51.

[48] *See Mass Production*, *supra* note 45, at 4.

[49] *See id.* at 1.

[50] Circular of the Ministry of Education and Four Other Departments on Issuing the Administrative Provisions on the Internships of Vocational School Students (Apr. 11, 2016), https://hk.lexiscn.com/law/circular-of-the-ministry-of-education-and-four-other-departments-on-issuing-the-administrative-provisions-on-the-internships-of-vocational-school-students.html; *See* discussion in Grace Yang, *China Institutes New Student Intern Rules*, CHINA L. BLOG (May 7, 2016), http://www.chinalawblog.com/2016/05/china-institutes-new-student-intern-rules.html (discussing how the new regulations could impact businesses employing Chinese students); *See also* Pattie Walsh et al.,*Publication of Provisions on the Administration*

vocational schools. It is an important step forward and is aimed specifically at students of secondary vocational schools or advanced vocational schools hired as interns and employers engaged in manufacturing.[51] However, the scope of the regulation is somewhat narrow in that the new regulations are not applicable to full-time college students. Likewise, employers not engaged in manufacturing may hire students of secondary vocational schools or advanced vocational schools as interns and may handle internships as before, with both parties agreeing on their rights and obligations. The Regulations are unclear on enforcement and silent on penalties. Because the interns lack a labor contract, their legal recourse is in the courts and not arbitration.[52]

The obligations of the new regulations include: 1. A limitation of 10 percent of the employer's total workforce and 20 percent of similarly positioned workers; 2. Workers under 18 require guardian consent; 3. Overtime and night shift work are prohibited; 4. Wages must be 80 percent of probationary workers; 5. The duration of work cannot exceed six months; 6. The employer and school must obtain liability insurance for its interns and sign a three party agreement on rights and responsibilities.[53]

D. Construction workers

The construction industry, a pillar of China's economic development over the last thirty years, has become an important engine of China's economic development. The National Bureau of Statistics re-

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of Internships for Vocational School Students (May, 31, 2016), http://www.twobirds.com/en/news/articles/2016/china/china-employment-law-update-may.

[51] Jonathan M. Isaacs, et al., *New Regulations on Vocational School Interns,* CHINA EMPLOYMENT LAW UPDATE (June 2016), http://bakerxchange.com/rv/ff00288dc6dc759025f0886e0c41961ab1141d80/p=7426043 ("According to the 2016 Regulations, there are three types of vocational internships: 'observing internships' (where the intern learns through observing the work), 'guided internships' (where the intern performs work under close supervision), and 'independent internships' (where the intern performs the work independently with minimal or no supervision). Most of the updated restrictions only apply to the third type, i.e. independent internships, since such types of internships are the ones most often subject to abuse by companies").

[52] *See* Grace Yang, *China Institutes New Student Interns Rules,* CHINA L. BLOG (May 7, 2016), http://www.chinalawblog.com/2016/05/china-institutes-new-student-intern-rules.html. (stating that students under 16 cannot be hired as working interns. "The provincial/municipal education administrative departments and labor bureaus are expected to come up with detailed implementing rules pursuant to these Measures").

[53] *See id.*; *China to Better Protect Student Interns,* XINHUANET (Apr. 27, 2016), http://news.xinhuanet.com/english/2016-04/27/c_135317358.htm.

ported that in 2011, China's construction industry output value exceeded 10 trillion Yuan, becoming a driving force of China's economic development. While it is a thriving industry in China, many of these same workers suffer from inferior wages and many injuries, with fatal injuries ranking only second to the mining industry.[54] One study found that "[a]bout 30 per cent of all migrant workers from the countryside work in the industry."[55]

Despite the implementation of the Labour Contract Law more than six years ago, the majority of China's construction workers still do not have a labor contract with their employer. In fact, "[a] survey of 1,445 construction workers in five cities across China found that on average only 17.4 percent of workers had a written contract."[56]

As one article reports, the construction industry has experienced a remarkable boom:

> The Chinese construction industry has been consuming half of the world's concrete and a third of its steel and employing more than 40 million people, most of them rural workers coming from all over the country . . . . China has invested about 376 billion Yuan in construction each year. Construction is now the fourth largest industry in the country. At the turn of the 21st century, this industry accounted for 6.6 per cent of China's GDP; by the end of 2007, its total income had risen by 25.9 per cent to 5.1 trillion yuan, and gross profits had risen 42.2 per cent to 156 billion yuan. The total output value reached 2.27 trillion yuan in the first half of 2008, showing a further 24.4 per cent increase on the previous year.[57]

In the actual operation of the industry, it is reported that there has been a delinking of capital from industry, and of management from labor. In the production chain, top-tier contractors control construction projects through their relationships with property developers and the local state but outsource their work to low-tier subcontractors. The top-tier contractors seek to make a profit by transferring investment

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[54] Pan Yi Qian & Wu Qiongwen, *China's Labor Contract a Paper Dream,* UTOPIA NETWORK JOURNAL (February 21, 2014), http://www.wyzxwk.com/Article/gongnong/2014/02/314465.html.

[55] Pun Ngai & Lu Huilin, *A Culture of Violence: The Labor Subcontracting System and Collective Action by Construction Workers in Post-Socialist China*, 64 THE CHINA JOURNAL 143, 144 (July 2010).

[56] *China's Construction Workers Left Behind*, CHINA LABOR BULLETIN (Sept. 3, 2014), http://www.clb.org.hk/en/content/chinaâ€™s-construction-workers-left-behind [hereinafter *Left Behind*].

[57] Ngai & Huilin, *supra* note 53, at 144.

risks and labor recruitment to their subcontractors, mainly because "[t]hey don't bother to get their hands dirty."[58]

A typical scenario of a construction project in a Beijing migrant community, described below, illustrates the dilemma of how construction workers systemically fall largely outside the safety net of intended labor law protections and thus are "workers without protections.

> The subcontracting system began with a well-known property developer who was responsible for land reclamation and the design of a villa project. Responsibility for the construction was shifted down the chain through a bidding process to a state-owned construction company, which only took charge of the project management and equipment arrangement for its contractors. In turn, this company relied on three "big contractors" (*dabao* 大包) who came from Jiangsu, Hebei and Guangdong; these were responsible for providing raw materials and labor for the project. Two of them set up a labor service company to help recruit rural laborers, but in reality they relied on labor-supplier subcontractors (*xiaobao*小包 or *qingbao* 清包) to recruit the labor, manage the daily division of work and pay out wages on completion of the project. In return, these labor-supplier subcontractors further depended on labor-use facilitators (*daigong* 带工), usually relatives or co-villagers, to look for workers in their own or surrounding villages. Thus, for this building project, one thousand workers were organized into a number of small subcontracting teams that worked on the construction site. The number of workers in each subcontracting team ranged from a dozen to a hundred.[59]

Surveys also revealed that wage levels for construction workers were often significantly lower than reported in the Chinese media, as interviewees reported the "average daily rate varied from a low of 136 yuan in Zhengzhou to a high of 201 Yuan per day in Shenyang."[60]

Subcontracting is often often connected with a "*baogongtou*" contractor, who by custom in the industry is not a registered legal employer, who brings in a large number of workers to labor on the construction project.[61] As an illegal employer it cannot provide a standard

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[58] Ngai & Huilin, *supra* note 53, at 147.
[59] Ngai & Huilin, *supra* note 53, at 149.
[60] *Left Behind*, *supra* note 54.
[61] *See* Tingyu An, Towards the Sustainable Development of Construction Labor Market bn1in China: Through Cultivating Subcontractor's Role in the Labor Supply Business 26 (Sept. 2011) (unpublished Ph.D dissertation, Kochi University of

employment relationship and give workers a labor contract that falls under the protection and benefits of the labor laws. Rather, their relationship is a contract for labor services with the *baogongtou*, as a civil law employer, with enforcement for wages being under the civil contract law.[62]

E. Domestic workers

The ILO reports there about 20 million domestic workers in China, and approximately ninety percent are female between the ages of 30-40 years of age, coming from rural to urban areas.[63] They largely are care workers, but also may be "cleaners" doing laundry and housecleaning and while normally self-employed, may work for an agency that sends them to clients. As average income increases, the demand for domestic help continues to increase and it is estimated that some forty percent of urban Chinese families have a demand for domestic help, indicating an additional 15 million potential job opportunities.[64]

Domestic workers typically work long hours, maybe 10 hours per day, have little or no time off, and do not sign labor contracts.[65] The ILO reports:

> Many domestic workers endure long working hours. Thirty-five percent of domestic workers in Guangzhou and Beijing work about 10 hours per day; 28% of domestic workers in Chengdu and Guangzhou do not get weekends off. It is also well-known that households will not compensate overtime. The rate of contract coverage is low among domestic workers. More than 50% of domestic workers in Guangzhou and Chengdu, and 27% of domestic workers in Beijing did not sign a contract with either the domestic service agencies or the household.[66]

Further, it is reported that "[m]ore than 60% of domestic workers in Beijing and Chengdu have not joined any insurance scheme. Those who have are mostly laid-off workers rather than rural migrants."[67]

Technology), http://kutarr.lib.kochi-tech.ac.jp/dspace/bitstream/10173/773/1/1128003773.pdf.

[62] *See id*.

[63] INTERNATIONAL LABOUR ORGANIZATION, FACT SHEET: DOMESTIC WORKERS IN CHINA 1 (n.d.), http://www.ilo.org/wcmsp5/groups/public/—-asia/—-ro-bangkok/documents/publication/wcms_114256.pdf [hereinafter FACT SHEET].

[64] *Id.*

[65] Xinying Hu, *Paid Domestic Work as Precarious Work in China* 112, 127 (2010), http://summit.sfu.ca/item/9971.

[66] FACT SHEET, *supra* note 61, at 1-2.

[67] *Id.* at 2.

Workers actually formed a union in Xian, but as they are not recognized as employees, there is minimal legal effect.[68]

There are some domestic workers recruited by dispatch agencies for traditional domestic work, and for which the agency pays their social insurance, but this is reported to be a low percentage.[69]

For the most part, domestic workers are in the informal economy and are not regulated by China's labor laws due to a lack of "employment relationship" with a legally recognized employer ("working unit") and are often explicitly excluded from labor legislation. Thus, they too are "workers without benefits."

III. Legal Issues

A. Employment Relationships

The legality of denying workers benefits and labor protections is determined by legislation providing to whom rights and benefits are accorded and the level of government enforcement. Workers can be legislatively categorized as 1. *outside the included definitional coverage* of the required employment relationship, such as independent contractors; 2. *excluded*, such as domestic workers; 3. "*ambiguous" working relationships (or law ignored* and/or *not enforced*), such as workers without a labor contract or proof of employment, vocational students, construction workers, misclassified workers, or part-time and other contingent workers. Regarding the continuing difficulty of determining an employment relationship, the ILO has observed:

> The issue of who is or is not in an employment relationship – and what rights/protections flow from that status – has become problematic in recent decades as a result of major changes in work organization and the adequacy of legal regulation in adapting to those changes. Worldwide, there is increasing difficulty in establishing whether or not an employment relationship exists in situations where (1) the respective rights and obligations of the parties concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application.[70]

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[68] *See id.* at 1, 3.

[69] *See* International Labour Organiation, Situational Analysis of Domestic Work in China 5 (n.d.), http://www.ilo.org/wcmsp5/groups/public/—-asia/—-ro-bangkok/documents/publication/wcms_114261.pdf.

[70] International Labour Organization, The Employment Relationship: An Annotated Guide to ILO Recommendation No. 198 at 3 (2007), http://www.

1. Employment Relationships in China

In China, defining "employer" and "employee" and their employment relationship for the purposes of delineating legal rights and duties has become more important in recent years. The 1994 Labor Law sought inclusive language for "employees/workers," but workplace realities produced many categories, including dispatch workers, independent contractors, managers and supervisors, and migrant, temporary, part-time, and *de facto* workers. An issue facing China's drafters of new labor laws was how each subsequent labor law would be applied (or *not* applied) to these categories.

Defining the employment relationship for purposes of coverage under China's legal system often requires a two-step examination of the national and local laws to determine the proper "operating law" at the level of application. This is due to China's decentralized system, in which the central government passes broad, general legislation and leaves to local governments the responsibility of promulgating detailed implementing regulations to apply the national laws which may or may not always be fully consistent. Coverage by the labor laws has also been determined on a geographical basis rather than by the employment relationship. That is, the distinction between urban and rural may be determinative. Additionally, until legislative clarification in the 2000s, large numbers of migrant workers were unprotected. The 2008 Employment Promotion Law (EPL) clearly provides that rural workers who go to cities in search of employment shall enjoy labor rights equal to those of urban workers.[71]

China's continuing economic and social transition has transformed state workers, staff, and cadres of the "iron rice bowl era" to modern-day employees under individual and collective labor contracts. These employment relationships are regulated by new labor laws and regulations largely originating from the 1994 Labor Law.

Article 2 of the Labor Law specifies that the law is applied to laborers who form a "labor/employment relationship" or have a "labor contract."[72] Many interpretations over the years have attempted to clarify this language. The latest attempt came in 2008 with the Labor Contract Law, which confirmed the relationship and again required a written contract.[73]

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ilo.org/wcmsp5/groups/public/—-ed_dialogue/—-dialogue/documents/genericdocument/wcms_172417.pdf.

[71] *See* Law of the People's Republic of China on Promotion of Employment (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. art. 20 (China), http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm.

[72] *See id.* art. 2.

[73] *See* LCL, *supra* note 23, ch. 1.

Yet, even without a written contact, a *de facto* employment relationship can arise. In 1996, early guidance on the application of the 1994 Labor Law provided that within the territory of the People's Republic of China (PRC), as long as the employment relationship (including a *de facto* relationship) exists, the Labor Law applies. The key elements are that the worker (1) provides physical or mental labor for compensation and (2) becomes a member of the enterprise or entity. Even without a contract, a worker is a *de facto* employee if he or she is a member and is paid for labor. This *de facto* employment relationship also provides the right to access arbitration and litigation.

2. The Employee

Employees/workers were not explicitly defined in the 1994 Labor Law, but were subsequently referenced in the 2001 amendments to the Trade Union Law as "individuals who perform physical or mental work in enterprises, institutions and government authorities within the Chinese territory and who earn their living primarily from wages or salaries."

Under the 1994 Labor Law, employment relationship is intended as an inclusive phrase covering employees/workers. The 2003 Work-Related Injury Insurance Regulation defines it as "laborers who keep a labor relation with the employing entity in all forms of employment. . .." Documented foreign employees legally working in China generally are covered under the Labor Law.

Whether "contingent" workers are employees covered by the labor laws was to be resolved in 1996 by the then-Ministry of Labor. It formally abolished any legal distinction between contingent or temporary workers and formal employees; and they are to enjoy the same rights, unless provided otherwise.[74] Of course, that may depend, as this article explores.

Under most labor service contracts (*laowu hetong*), independent contractors lack a legal "employment relationship" with the "employer" in question. Typically, therefore, the daily performance by these workers is not under the direct control of the employer and there is no right of control. This distinction is significant in that many employer duties under the labor laws apply only to employees rather than to independent contractors, whose breaches are dealt with under the Contract Law, not the [Labor Contract Law (LCL)] and [Labor Mediation and Arbitration Act (LMA)].[75]

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[74] Brown, *supra* note 32, at 29-30.

[75] *Id*. at 30.

"Migrant workers, under new laws and regulations, have the right to labor contracts. . . and enjoy labor rights equal to those of urban workers."[76]

3. Exclusions

Exclusions from applicable legal obligations developed as the [specific labor laws after the 1994 Labor Law] sought a balance between promoting economic development and labor protections. Exclusions are found . . . in [ ] provisions excluding and exempting employee categories, such as independent contractors (not employees), civil servants [and domestic workers] (excluded), and managers (exempted from overtime).[77]

B. Legal Benefits and Protections

The following examines the legal issue of *workers without benefits* regarding entitlement to social insurance benefits and labor protections.

The Social Insurance Law (SIL) provides for five types of insurance for workers who qualify for the benefits: old-age (pension), medical, unemployment, maternity, and work-related injury.[78] For standard workers, typically there are shared costs between the employer and "*employee*" (except for work-related injury and maternity insurance that are paid solely by the employer), as illustrated below.[79]

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[76] *Id.* at 30.

[77] *Id*. at 31.

[78] Zhonghua Renmin Gongheguo She Hui Bao Xian Fa (中华人民共和国社会保险法) [Social Insurance Law (P.R.C.)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective July 1, 2011) art. 64 (China) http://en.hxlawyer.com/news_detail/newsId=225.html. [hereinafter *SIL*]; *See* Ronald C. Brown, *Measuring China's Social Insurance Law Under International Standards of International Labour Organization and Influences of Social Dimension Provisions of Free Trade Agreements and Bilateral Investment Treaties*, 45 HONG KONG LAW JOURNAL 651 (2015); *See also* Manuela Reintgen *The social security system in China*, ECOVIS (Jun. 27th, 2014), http://www.ecovis.com/focus-china/chinas-social-security-system/.

[79] Lesli Ligorner, Gordon Feng, & Mitchell Mosvick, *Social Insurance Law*, CHINA BUSINESS REVIEW (Jan. 1, 2012), http://www.chinabusinessreview.com/the-new-prc-social-insurance-law-and-expatriate-employees/.

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	Shanghai Employer	Shanghai Employees	Beijing Employer	Beijing Employees
Pension	22%	8%	20%	8%
Medical insurance	12%	2%	10%	2% + ¥3
*Work-related injury	0.5%	0%	0.2%	0%
Unemployment	1.7%	1%	1%	0.2%
Maternity insurance	0.8%	0%	0.8%	0%
Total	**37%**	**11%**	**32%**	**10.2% +¥3**
Maximum amount (¥)	4,325	1,286	4,033	1,289
Minimum amount (¥)	865	257	628	188

Source: Shanghai Bureau of Human Resources and Social Security; Beijing Bureau of Human Resources and Social Security

Under the Social Insurance Law, both "employers and full-time employees" must contribute to at least three and up to five social insurance programs.[81] *Part-time workers* are also covered, but are expected to self-enroll in the social insurance programs, as employers are not responsible for enrolling them or paying their premiums.[82]

1. Non-Standard Workers

a. Self-employed

China's Social Insurance Law allows workers who are *self-employed* to participate in *pensions*, but significantly, only if they pay their own contributions, rather than the employer paying, as in the case of standard workers. For a self-employed individual to receive a pension, they must contribute to the national pension fund for an *aggregate of 15 years*.[83] This requirement is the same for all non-stan-

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[80] *Id.*

[81] Reintgen, *supra* note 81, (" Employers and employees must pay monthly premiums into three of the funds").

[82] *Id.* ("[P]art-time employees who did not participate in the social security schemes through their employers. . . can participate in the pension and medical insurance schemes on merely a voluntary basis"); *SIL*, *supra* note 80, art. 10 ("Employees shall participate in the basic endowment insurance and the basic endowment insurance premiums shall be jointly paid by employers and employees. Individual industrial and commercial households without employees, part-time employees not participating in the basic endowment insurance through their employers and other persons in flexible employment may participate in the basic endowment insurance, but shall pay the basic endowment insurance premiums themselves").

[83] *Id.* at art. 16.

dard workers. Self-employed individuals may also participate in the basic medical insurance programs, work-related injuries, maternity insurance, and unemployment insurance,[84] but they must pay the premiums on their own.[85]

b. Independent Contractors

Independent contractors fall outside the scope of the employment relationship when they are not under the employer's direct control. Article 2 of the Labor Contract Law indicates that its scope applies only where there is a labor relationship.[86] Both labor law and the Labor Contract Law apply only to parties in a employment relationship, thus neither applies to independent contractors.[87] Independent contractors, like self-employed individuals, may qualify for pensions, medical insurance, work-related injury insurance, maternity insurance, and unemployment insurance; however, to do so, independent contractors must pay the entire premium.[88] An independent contractor becomes an employee when an employer exerts sufficient control over work activities. Construction workers deemed as independent contractors have recourse for wages under contract law, as discussed below.

c. Part-time Workers

Regarding "worker benefits," part-time workers are covered, but they are expected to self-enroll in social insurance programs, as employers are not responsible for enrolling them or paying their premiums.[89] In order for an employee, full-time or part-time, to qualify for a pension, he or she must reach mandatory retirement age and must also have contributed to the fund for an aggregate of fifteen years.[90]

Unemployment insurance is available to individuals who meet the following three requirements: (1) the employer and former employee have paid the unemployment insurance premiums for the year prior to the individual's unemployment; (2) the former employee has

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[84] *Id.* at arts. 33, 44, 53.
[85] *Id.* art. 23.
[86] LCL, *supra* note 21, art. 2.
[87] *See* Recursivity, *supra* note 32, at 1000.
[88] SIL, *supra* note 70, arts. 10, 23, 60, 64.
[89] *Id.* at art. 10, 23, 36, 53 ("Employees shall participate in the basic endowment insurance and the basic endowment insurance premiums shall be jointly paid by employers and employees. Individual industrial and commercial households without employees, part-time employees not participating in the basic endowment insurance through their employers and other persons in flexible employment may participate in the basic endowment insurance, but shall pay the basic endowment insurance premiums themselves").
[90] *Id.* art. 16.

been terminated; and (3) the former employee is capable and currently seeking employment elsewhere.[91]

As to "worker rights," the Labor Contract Law mandates that part-time employee salaries be no lower than the minimum standard wages prescribed by the local government;[92] "they need not be hired under a written contract; and, they may be dismissed (or quit) at will without severance pay."[93] Since part-time workers are defined as those working 24 hours or less during a fixed term[94], it is unclear whether part-time workers working between 24 and 40 hours per week should be provided a modified amount of benefits.

d. Dispatch Workers

Labor dispatch workers typically follow a trilateral agreement system. First, a worker signs a contract with a temporary agency, and in turn, the temporary agency contracts with a company to provide it with temporary workers. Under the LCL, "[T]he dispatch agreements shall stipulate . . . "the amounts and terms of payments of remunerations and social security premiums. . .."[95] The company receiving the dispatch workers ("receiving unit") is required to provide overtime pay, performance bonuses, and welfare benefits related to the job the dispatch workers will perform.[96]

In 2014, China's Ministry of Human Resources and Social Security promulgated the "Interim Regulations on Labor Dispatch."[97] The new regulations limit the numbers and scenarios in which a receiving firm may hire dispatch workers.[98] Under the Interim Regula-

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[91] *Id.* art. 45.

[92] LCL, *supra* note 21, art. 72.

[93] *Id*. arts. 69, 71; Cooke & Brown, *The Regulation of Non-Standard Forms of Employment in China, Japan and the Republic of Korea* CONDITIONS OF WORK AND EMPLOYMENT SERIES NO. 64, 31 (2015) ("The expression 'part-time employment' in China does not equate to the usage of the same term under the ILO Part-Time Work Convention, 1994 (No. 175), EU law or in other jurisdictions; this expression refers instead to essentially casual work that is paid by the hour, such as domestic workers who carry out household chores and those employed by enterprises carrying out auxiliary chores.").

[94] *Id.* at 31.

[95] LCL, *supra* note 21, art. 59.

[96] *Id.* art. 62(3).

[97] *China's New Labor Dispatch Rules to be Enforced March 1*, CHINA BRIEFING, (Feb. 28, 2014), http://www.china-briefing.com/news/2014/02/28/chinas-new-labor-dispatch-rules-to-be-enforced-march-1.html.

[98] *See id.*

tions, receiving firms may only hire dispatch workers for temporary, auxiliary, or replaceable positions.[99]

e. Vocational Students

In many cases, the current practice of compelling industrial interns to work at substandard wages as a condition of being certified for graduation arguably violates not only Chinese labor laws, but some would argue, also forced labor conventions under international law.[100] Legislative changes in 2016, as discussed earlier, have potentially ameliorated many of these issues.[101]

One of the primary legal issues for vocational students is whether they have an employment relationship with the employer.[102] Generally, vocational internships are negotiated between individual schools and the potential employers.[103] Therefore, there is no labor contract entered into. The 1996 Vocational Education Law expanded vocational training throughout China and promoted skill training to more students so as to modernize China's economy.[104] The law obliged enterprises to "accept students and teachers from vocational schools and vocational training organizations to perform internships," and provide appropriate work compensation.[105] Authors Brown and De-

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[99] Duncan Abate, et. al., *China Issues Interim Provisions on Labour Dispatch,* MAYERBROWN JSM 1; *See China's New Labor, supra* note 99 ("Temporary position: position with a duration of no more than six months; [a]uxiliary position: position that provides auxiliary services to the main or core business of the employer; [r]eplaceable positions: A position that can be performed by a dispatched employee in place of a permanent employee during the period when such employee is away from work for study, vacation, or other reasons").

[100] *See* INT'L LABOR ORG., COMM. OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS ("CEACR"), *General Survey Concerning the Forced Labour Convention*, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957, para. 57 (2007), http://ilo.org/public/libdoc/ilo/P/09661/09661%282007%291B.pdf; *See also* Brown, *supra* note 16, at 21.

[101] *See* Circular of the Ministry of Education and Four Other Departments on Issuing the Administrative Provisions on the Internships of Vocational School Students (Apr. 11, 2016), https://hk.lexiscn.com/law/circular-of-the-ministry-of-education-and-four-other-departments-on-issuing-the-administrative-provisions-on-the-internships-of-vocational-school-students.html.

[102] Brown, *supra* note 16, at 23.

[103] *Id.* at 181; *The Mass Production of Labour: The Exploitation of Students in China's Vocational School System,* COLUMBIA LIGHTHOUSE FOR THE BLIND (last visited Apr. 24, 2015). http://www.clb.org.hk/sites/default/files/archive/en/share/File/general/vocational_school_system.pdf.

[104] *The Mass Production of Labour*, *supra* note 104; Vocational Education Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Sept. 1, 1996), art 1.

[105] *Id.* art. 37.

cant argue that China codified the principle of "equal pay for equal work" under the Labor Law and Labor Contract Law;[106] and, under this principle, interns who work full and overtime as unskilled labor arguably should receive compensation equal to their standard employee co-workers.[107] However, the Labor Law and Labor Contract Law are not explicit on that point and it appears only to apply if the factual circumstances indicate that the work done by vocational students is done solely for the benefit of their employer, and does not afford any educational benefit on the student. In 2010, the Chinese Supreme Court rejected a contrary draft and declined to expressly exclude vocational students from labor protections, arguably leaving the door open for students to be afforded labor law protections under new interpretations.[108] In 2016, a new law regulating covered student interns from vocational schools provided for minimum wages of 80 percent of regular employees' probationary wages and other labor protections.[109]

f. Construction Workers

A common legal dilemma with migrant construction workers is that the "employer" does not provide labor contracts as required by law for standard employees;[110] and studies show that for whatever reason, it is often the case that constructions workers lack social insurance

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[106] Brown & Decant *supra* note 44 at 170. LCL, art. 63; *See also* Victoria Ding and Ron Cai, *Amendments to the Labor Contract Law on Labor Dispatch Services,* Davis, Wright, & Tremaine LLP (Jan. 13, 2013), http://www.dwt.com/Amendments-to-the-Labor-Contract-Law-on-Labor-Dispatch-Services-Take-Effect-July-1-2013-01-31-2013/.

[107] Brown, *supra* note 16, at n. 67-68.

[108] *Id.* at n. 49; Brown & Decant, *supra* note 44, at 177 (noting differences between the third draft and the final opinion); Pun Ngai & Lu Huilin, *A Culture of Violence: The Labor Subcontracting System and Collective Action by Constructive Workers in Post-Socialist China*, 64 THE CHINA JOURNAL 151 (2010) In the above scenario, none of the workers had a labor contract; and, "instead of payouts of a weekly or monthly wage, construction workers are usually paid an irregular *shenghuo fei* (生活费 living allowance) arranged by their subcontractors, until the completion of the project or the end of the year. The allowance ranges from a hundred to a few hundred yuan per month (about 10 to 20 per cent of their promised monthly income), depending on the subcontractor—barely enough to cover food and other daily expenses."

[109] *See China to Better Protect Student Interns,* XINHUANET (Apr. 27, 2016), http://news.xinhuanet.com/english/2016-04/27/c_135317358.htm.

[110] *China: Beijing's Migrant Construction Workers Abused,* HUMANRIGHTSWATCH, (Mar. 12, 2008), https://www.hrw.org/news/2008/03/12/china-beijings-migrant-construction-workers-abused.

coverage.[111] Another problem is that the "employer" is "not the labor-supplier subcontractor [who is dealing with the workers,] but the second- or third-level contractor who out-sourced the work."[112] The subcontractor, however, [is] the only one responsible for wage payment, because he recruited the workers, even though he was not the ["employer"] in a legal sense.[113] Inasmuch as "the labor supplier subcontractors do not have corporate status, [they] do not have the legal status to employ workers" and thus the employment arrangement that is either absent or ambiguous.[114]

On that point, it is reported that:

> In December 2013, the People's Court of Linmu County, Shandong Province, [ ] ruled that a de facto employment relationship existed between a construction company and the worker of a subcontractor who died on the construction company's project site.
>
> The local people's court affirmed the arbitration award and ruled that a de facto employment relationship did exist between [the worker] and the construction company because the construction company subcontracted construction work to individuals who were not licensed contractors. "Neither the subcontractor nor the sub-subcontractors had the legal capacity to hire employees."
>
> [Further, Baker & McKenzie noted that:]
>
> According to a notice issued by the Ministry of Human Resources and Social Security in 2005, if an entity, such as a construction or mining entity, contracts work to an unlicensed organization or individual who does not have the legal capacity to hire employees, then the construction or mining entity assumes employer responsibilities for any worker recruited by such organization or individual to complete the work."[115]

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[111] Left Behind, *supra* note 54. ("less than half of the construction workers surveyed had any kind of social insurance and, despite the high injury and accident rates on China's construction sites, the survey found that just seven percent of workers had work-related injury insurance.")

[112] Ngai, *supra* note 109, at 152.

[113] *Id.*

[114] *Id.* at n. 29.

[115] Baker and McKenzie, *Deceased Worker of Sub-contractor Held to Have De Facto Employment with Construction Company*, China Employment Law Update (Feb. 2014), http://bakerxchange.com/rv/ff0015b35e85a316207621f05541b7884bd6b9fa/p=8463984.

g. Domestic Workers

In China there are no specific legal provisions governing the working conditions of domestic workers.[116] In fact, in

> Article 2, Law of the Explanation of Certain Provisions of Labor Law issued by the Ministry of Labor . . . in 1994" it was expressly provided that the Labor Law was not applicable to domestic workers. A judicial interpretation by the People's Supreme Court stated that "'disputes between a family or [an] individual and a domestic worker' are not considered labor disputes" under the law.[117]

"Domestic work is regarded as informal employment and private individuals/families do not fulfill the definition of an 'employing unit'."[118] "Without legal employment status, most domestic workers cannot be guaranteed their wages, working hours, labor protection or social security and are workers without benefits."[119]

2. Other Relevant Workplace Laws

China's *Workplace Safety Law* applies to the "production operation units."[120] It grants safety rights to "employees" to be told of hazards, not have their rights waived, to make suggestions without reprisals, to stop work if lives are in danger, and if injured shall have social insurance according to their rights under the law.[121]

The *Prevention and Control of Occupational Diseases* is to prevent occupational diseases incurred to the laborers of enterprises, institutions and private business units resulted from contacting powder dust, radioactive substances, and other poisonous and harmful substances in the work.[122]

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[116] ZENGYI XIE, LABOR LAW IN CHINA: PROGRESS AND CHALLENGES 4 (Li Yang & Li Peilin eds., 2015).

[117] *Id.* (quoting *The Interpretation of Applicable Laws in Adjudicating Labor Disputes of the Supreme Peoples' Court* (II), 2006, Article 7).

[118] Fact Sheet, *supra* note 61 (citing LCL, *supra* note 23, art. 2).

[119] Fact Sheet, *supra* note 61 (citing LCL, *supra* note 23, art. 2).

[120] Law of The People's Republic Of China On Work Safety (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Nov. 1, 2002), art. 2, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/76096/108029/F924956495/CHN76096%20Eng2.pdf.

[121] *Id*. art. 44-52.

[122] Law of the People's Republic of China on Prevention and Control of Occupational Diseases, (promulgated by the Standing Comm. Nat'l People's Cong. Oct. 27, 2001, effective May 1, 2002) arts. 1-2 (2001), http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76103&p_country=CHN&p_classification=14.

The 1994 *Labor Law* applies to "laborers who form a labour relationship therewith within the territory of the [P.R.C.]" [123]

The 2008 *Labor Contract Law* "is applicable where organizations such as enterprises, self-employed economic organizations and private non-enterprise units within the territory of the [P.R.C.] establish labor relationships with workers through concluding, performing, modifying, revoking or terminating labor contracts with them."[124]

The 2008 *Law of the People's Republic of China on Labor-dispute Mediation and Arbitration* grants the right to mediate and arbitrate "labor disputes arising between employing units and workers."[125]

The *Trade Union Law* provides,

> [A]ll manual and mental workers in enterprises, institutions and government departments within the territory of China who rely on wages or salaries as their main source of income. . .have the right to organize or join trade unions according to law. No organizations or individuals shall obstruct or restrict them.[126]

The 1994 *Labor Law* also provides that "[L]abourers shall have the right to participate in, and organize, trade unions in accordance with the law."[127] It appears from this language that workers outside the regular employment relationship can be eligible for union membership.

As can be observed, regardless of how the word worker is translated (employees, laborers, workers), the issue comes back to the requirement of an employment relationship and a labor contract; and,

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[123] Labour Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994) art. 2, http://english.mofcom.gov.cn/article/policyrelease/internationalpolicy/200703/20070304475283.html.

[124] Labor Contract Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective July 1, 2013) art. 2, http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm http://www.lawinfochina.com/display.aspx?lib=law&id=6133.

[125] Law of the People's Republic of China on Labor-dispute Mediation and Arbitration art. 2 (promulgated by the Standing Comm. of the Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) art. 2, 22, http://www.ilo.org/dyn/travail/docs/488/Law%20of%20the%20People's%20Republic%20of%20China%20on%20Labor-dispute%20Mediation%20and%20Arbitration.doc. ("The worker and the employing unit, between whom a labor dispute arises, constitute the two parties to the labor dispute case for arbitration. Where a labor dispute arises between a labor dispatching unit or an employing unit on the one hand and a worker on the other, the labor dispatching unit and the employing unit constitute a joint party.").

[126] Trade Union Law of the People's Republic of China (amended by the Standing Comm. of the Nat'l People's Cong., Oct. 27, 2001) art. 3, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383823.htm.

[127] Labour Law, *supra* note 123, art. 7.

therein lies the conundrum. What does the employment relationship include and who is entitled to a labor contract?

C. ILO Standards

There are numerous ILO conventions relating to the many aspects of workers in the workplace, including the core labor standards[128] that set forth international labor standards, including wage, safety, accidents, etc. There also is a more targeted ILO Recommendation No. 198, Employment Relationship Recommendation, 2006.[129] The stated goal of this Recommendation is that "[M]embers should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship."[130]

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[128] *See, e.g.,* Int'l Law Comm'n, 14th Session, Forced Labour Convention, 14 ILO 29 (June 28, 1930), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029; Int'l Law Comm'n, 40th Session, Abolittion of Forced Labour Convention, 40 ILO 105 (June 25, 1957), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105; Int'l Law Comm'n, 34th Session, Equal Remuneration Convention, 34 ILO 100, (June 29,1951), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312245:NO; Int'l Law Comm'n, 42nd Session, Discrimination (Employment and Occupation) Convention, 42 ILO 29, (15 June, 1958), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C111; Int'l Law Comm'n, 58th Session, Minimum Age Convention, 58 ILO 138 (June 26, 1973), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C138; Int'l Law Comm'n, 87th Session, Worst Forms of Child Labour Convention, 87 ILO 182 (June 17, 1999), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO; Int'l Law Comm'n, 31st Session, Freedom of Association and Protection of the Right to Organize Convention, 31 ILO 87, (June 9, 1948), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232; Int'l Law Comm'n, 32nd Session, Right to Organize and to Bargain Collectively Convention, 32 ILO 98, (July 01, 1949) http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243.

[129] Int'l Law Comm'n, 95th Session, Employment Relationship Recommendation, 95 ILO 198 (June 15, 2006), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312535:NO [hereafter Recommendation]; *see also* INTERNATIONAL LABOUR ORGANIZATION, THE EMPLOYMENT RELATIONSHIP: AN ANNOTATED GUIDE TO ILO RECOMMENDATION NO. 198 ¶ 1 (2007), http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang—en/index.htm.

[130] Int'n Law Comm'n, 95th Session, Employment Relationship Recommendation, 95 ILO 198, (June 15, 2006), ("For the purposes of the national policy of protection

Many or most of the workers in precarious jobs are in the informal economic sector, which, by definition, are not covered or protected by occupational health and safety laws or social security legislation in most countries even though there may be pertinent ILO Conventions. The ILO has repeatedly urged nations and enterprises to extend coverage to those workers not covered by formal employment contracts.[131]

Changes in the nature of work in developing and developed countries have caused the ILO to develop standards for atypical and precarious employment. The ILO began to expand its policies to include precarious workers with the Convention Concerning Part-time Work in 1994[132] and the Convention Concerning Home Work in 1996.[133] The ILO's more recent initiative, titled "Decent Work", began in 1999 and attempted "to improve the conditions of all people, waged, unwaged, and those in the formal and informal markets, by enlarging labor and social protections."[134]

"On June 12, 2015, the ILO [ ] announced its first standards for assisting laborers in the informal market" in Recommendation 204: Recommendation Concerning the Transition from the Informal to the Formal Economy.[135] Its goals are to

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for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. [ ] Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.").

[131] International Labour Conference, *Transitioning From the Informal to the Formal Economy*: Rep. of the Int'l Labour Conference, 17, ILC 103 (June 2014); *see also,* Joan Burton, *WHO Healthy Workplace Framework and Model: Background and Supporting Literature and Practices* 81 (Feb. 2010), http://apps.who.int/iris/bitstream/10665/113144/1/9789241500241_eng.pdf?ua=1.

[132] *See generally* Int'l Law Comm'n, 81st Session, Part-Time Work Convention, 81 ILO 175 (June 24, 1994), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312320.

[133] *See generally* Int'l Law Comm'n, 83rd Session, Home Work Convention, 83 ILO 177 (June 20, 1996), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C177.

[134] LEAH F. VOSKO, PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 58. (Judy Fudge & Rosemary Owens eds. 2006). *See generally* International Labour Office Director General, *Report of the Director General: Decent Work,* ILC 87 (June 1999), http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm.

[135] Library of Congress, *International Labour Organization: Standards for the Informal Economy Proposed,* GLOBAL LEGAL MONITOR (July 1, 2015), http://www.loc.gov/law/foreign-news/article/international-labour-organization-standards-for-the-informal-economy-proposed/; Int'l Labour Org. [ILO], *Recommendation*

> [F]acilitate the transition of workers and businesses from the informal to the formal economy, while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods, and entrepreneurship; promote the creation, preservation, and sustainability of enterprises and decent jobs in the formal economy and the coherence of macroeconomic, employment, social protection and other social policies; and prevent the informalization of formal economy jobs.[136]

"More than half of the workers in the world are thought to be involved in the informal economy and most are denied workplace rights, social protection, and other benefits of the formal economy."[137] This especially impacts women, youths, ethnic minorities, migrants, older people, and the disabled who are disproportionally represented in the informal economy.[138]

> These workers are presumed to be forced into the informal economy due to a lack of better opportunities. The Recommendation contains a strategy and practical guidance on steps that could be taken to facilitate the movement of people from informal to formal status.[139]

In sum, the ILO conventions and recommendations all call upon members to provide rights and benefits to most workers, including the non-standard workers.

As to domestic workers, while "[t]he [ILO] promotes the Agenda on Decent Work for Domestic Workers: Rights, Productive Jobs, Social Protection and Representation in Domestic Services (2006-2015), which addresses the needs and concerns of domestic workers as some of the most vulnerable and least protected workers worldwide",[140] in 2013, a new Convention, Domestic Workers Conven-

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Concerning the Transition from the Informal to the Formal Economy, ILO Gen. Conf. Rec. 204 (June 12, 2015).

[136] Library of Congress, *supra* note 134; International Labour Organization, *ILO Adopts Historical Standard to Tackle the Informal Economy*, ILO NEWS (June 12, 2015), http://www.ilo.org/ilc/ILCSessions/104/media-centre/news/WCMS_375615/lang—en/index.htm.

[137] Library of Congress, *supra* note 134.

[138] *Id.*

[139] *Id.*

[140] *Fact Sheet: Domestic Workers in China,* PROJECT TO PROMOTE EQUALITY AND DECENT WORK FOR WOMEN THROUGH TRAFFICKING PREVENTION, PROTECTION FOR DOMESTIC WORKERS, AND GENDER, (last accessed Apr. 22, 2015), http://www.ilo.org/wcmsp5/groups/public/—-asia/—-ro-bangkok/documents/publication/wcms_114256.pdf; *see also* Pamela Gomez, *What Role Can People in Poverty Play in Eradicating Extreme Poverty?,* WORLD BANK 11 (Apr. 9, 2014) http://siteresources.

tion, 2011 (No. 189) was adopted[141] and has been ratified by over 20 countries.[142] "Rights [to be] given to domestic workers as decent work [include] daily and weekly [ ] rest hours, [ ] minimum wage, and [the right] to choose the place where they live and spend their leave."[143] It also states "ratifying [ ] parties should take protective measures against violence and should enforce a minimum age [ ] consistent with the minimum age for other types of employment." Also, "they are [ ] not to be required to reside at the house where they work, or to stay at the house during their leave.[144]

IV. Observations, Analysis, and Conclusion

A. Observations and Analysis

Which workers are entitled to legal benefits and labor protections? With the significant changes occurring globally and in China in the nature of work, it is time to re-imagine the concept of worker and recast labor legislation as the improvement of those who work.[145] Should those workers dependent on an employer for their livelihood who are categorized as contingent or in less than a standard employ-

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worldbank.org/CSO/Resources/GomezRoleOfPeopleInPoverty.pdf ("The main rights given to domestic workers as decent work are daily and weekly (at least 24 h) rest hours, entitlement to minimum wage and to choose the place where they live and spend their leave. Ratifying states parties should also take protective measures against violence and should enforce a minimum age, which is consistent with the minimum age at other types of employment. [Workers furthermore have a] right to a clear (preferably written) communication of employment conditions, which should in case of international recruitment be communicated prior to immigration. They are furthermore not required to reside at the house where they work, or to stay at the house during their leave."); *see generally* Int'l Labour Office, 100th Session, *Domestic Workers Convention,* ILC 189 (2011)

[141] Int'l Labour Office, 100th Session, *Domestic Workers Convention,* ILC 189 (2011), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189 (Providing the following definitions "(a) the term *domestic work* means work performed in or for a household or households; (b) the term *domestic worker* means any person engaged in domestic work within an employment relationship; (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.")

[142] *Ratifications of C189 – Domestic Workers Convention, 211 (No. 189)*, International Labour Organization, (Sept. 5, 2013), http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460.

[143] Pamela Gomez, *What Role Can People in Poverty Play in Eradicating Extreme Poverty?,* World Bank 11 (Apr. 9, 2014) http://siteresources.worldbank.org/CSO/Resources/GomezRoleOfPeopleInPoverty.pdf

[144] *Id.*

[145] *See* Katherine Stone & Harry Arthurs, *Rethinking Workplace Regulation* (2013).

ment relationship be denied the same legal rights and benefits of their co-workers doing the same work? If so, for what policy reason should they be distinguished?

Clearly, not all ILO labor convention standards are to be applied to all workers in all circumstances.[146] For example, a truly independent contractor should not have the Termination of Employment Convention, 1982 (No. 158) applied; but why not a dependent contractor? Is a Chinese construction worker really an independent contractor?

On the other hand, it would seem only fair that occupational health and safety legislation should protect all workers in the workplace, even though the Occupational Safety and Health Convention, 1981 (No. 155) appears not to provide protection for non-employees such as independent contractors.[147] Likewise, shouldn't the ILO standards under the Occupational Safety and Health Convention, 1981 (No. 155) provide protection for non-"employees," rather than limiting it to those in the employment relationship? Even the Convention on Protection of Wages, 1949 (No. 95), appears to apply only to those who are in the employer-employee relationship. Perhaps the inquiry should be—- who in the workplace does not deserve legally decent treatment and labor protections? Why should such protection be limited to the common law definition of the employment relationship?

In China, there are certain problem areas in the workplace that stand out. With at least one-fifth of China's 300 million urban workers holding temporary jobs at the end of 2010,[148] China's traditional model of long-term employment has been changing due to increased reliance on the informal sector, nonrenewable fixed-term, and temporary agency employment contracts. "Informal employment ([ ]'non-standard employment' or 'flexible employment') as a flexible labor strategy has been [growing] in China";[149] and now, with a high percentage of its workforce in this "informal" economy, with some estimates at 60 percent, the dilemma of *"workers without benefits"* is clear.[150] Even workers fitting in the formal standard employment relationship may not have been provided a labor contract as proof of their employment relationship and can find themselves as "workers without benefits."

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[146] *See* Breen Creighton & Shae McCrystal, *Who Is A 'Worker' In International Law?*, 37 (2015). Draft paper produced for presentation at the LLRN Conference, Amsterdam, June 25-27 2015. (on file with author).

[147] *See generally* Int'l Law Comm'n, 67th Session, Occupational and Health Convention, *Convention Concerning Occupational Safety and Health and the Working Environment* ILC 155, (June 22, 1981).

[148] *See* Liu, *supra* note 10; Cooney et al., *supra* note 10.

[149] *See* Cooke & Brown, *supra* note 16, at 19.

[150] *See id* at 20.

By law, standard workers are required to be given labor contracts, which entitle them to labor benefits and protections. Non-standard workers are often denied many of these rights and benefits, which can vary between national and local regulation. There is a widespread practice, particularly in some industries, of not providing labor contracts, notwithstanding its illegality.

B. To summarize: who *are these "workers without benefits?"*

Independent contractors are numerous and often misclassified. They need to be distinguished from the estimated 62 million *self-employed individuals* who are not dependent and controlled by an employer, and who are often outside legal labor benefits and protections.[151]

There are some 60-70 million *part-time workers* in China, sometimes categorized as "casual" employees, who lack full workplace benefits. Though the law permits these "casual" employees to enroll in workplace benefits by paying, there is an obvious obstacle— these part-time workers often have inadequate income to do so, or have not met the required length of service to qualify for unemployment insurance.

New regulations covering the estimated 60 million *dispatch workers* in China[152] appear to have slowed their use and created some equity in the workplace regarding labor benefits and protections, if not labor stability.

The following categories of workers raise issues regarding *ambiguous employment relationships* requiring legal interpretations, future policy decisions and regulations, and the will to enforce current laws. Can a vocational student be an employee? Is a construction worker really an independent contractor? Are domestic workers properly categorized as being outside an employment relationship and unprotected by labor laws?

There are over 8 million *vocational students* in factories, and as part of their "educational program," they work alongside regular workers who have labor contracts and are entitled to employment rights and benefits.[153] The question arises—- where this work generally or

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[151] *Id.* (reporting that in 2013 there were over 61 million workers employed in the "self-employed businesses").

[152] *See* Recursivity, *supra* note 34, at 982-83, n. 37 ("These figures come from a widely cited report of the Economic Observer quoting the results of a 2011 study of labor dispatch by China's national labor union, the All-China Federation of Trade Unions ('ACFTU')".

[153] Dou, *supra* note 46; Mass Production of Labour, *supra* note 44; Lucy Hornby, *Use of Student Interns Highlights China Labor Shortage*, REUTERS (Jan. 6, 2013), http://www.reuters.com/article/us-china-labour-interns-idUSBRE9050CV201301

specifically is unrelated to an educational program, shouldn't it lose its educational purpose and transform the "student" into a regular employee? Otherwise, there is a large supply of vocational student interns working at the low wage of 80 percent of a regular employee's probationary wage rate at work unrelated to their vocational education.[154]

Of the 40 million *construction workers* in China, the vast majority of them are reported to lack a labor contract with their employer.[155] The Chinese construction industry employs more than 40 million people, "most of them rural workers coming from all over the country[,] [with] [a]bout 30 per cent of all migrant workers coming from the countryside work in the industry."[156] With the apparent widespread practice of illegally using *baogong tou* ("contractors") to employ the construction gangs (which labels the workers as "labor service workers" entitled to only their wages under the Contract Law, and too often lacks labor benefits and rights)[157] why not enforce current laws of this outlawed practice; better mandate the use of labor contracts; or consider having the general contractor be jointly liable?[158]

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06 ("In any given year, at least 8 million vocational students man China's assembly lines and workshops").

[154] *See China to Better Protect Student Interns,* XINHUANET (Apr. 27, 2016), http://news.xinhuanet.com/english/2016-04/27/c_135317358.htm.

[155] While this is illegal and there are remedies, most workers do not contest it. *See Left Behind*, *supra* note 54. In another study of the New World China Land, reputed to be China's largest private developer, with billions in annual profits, it was reported that "above 95% of migrant workers are led and introduced by a labor contractor ([ ] Bao Gong Tou) to work" and "the rate of signing labor contracts is close to zero." *Migrant Workers in the Construction Industry—-the Largest National Private Developer, The New World China Land, Turn Blind Eye to the Chinese Labor Law*, STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR (SACOM), Jan. 4, 2009, *available at* http://sacom.hk/media-type/investigative-reports/page/6/. *See generally id.* It goes on to report on working conditions, low wages, long hours, zero participation of social security insurance, occupational injury, and lack of protective equipment. *Migrant Workers in the Construction Industry—-the Largest National Private Developer, The New World China Land, Turn Blind Eye to the Chinese Labor Law*, STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR (SACOM), Jan. 4, 2009, *available at* http://sacom.hk/media-type/investigative-reports/page/6/. *See generally id.*

[156] Ngai & Huilin, *supra* note 53, at 144.

[157] *Id.* at 147. In this study it was found that "less than half of the construction workers surveyed had any kind of social insurance and, despite the high injury and accident rates on China's construction sites, the survey found that just seven percent of workers had work-related injury insurance." *Left Behind*, *supra* note 51.

[158] Liability for the wages may be shared with the general contractor pursuant to government regulations. LCL, *supra* note 23, art. 12; Notice of the Ministry of Labour and Social Security and the Ministry of Constructions regarding the publication of the Measures of Controlling the Payment of the Migrant Workers' Salary

Domestic workers in China have been estimated to number about 20 million.[159] For the most part they fall outside the protection of the labor laws since they are not in an employment relationship with a statutory employer. The ILO is promoting better protections and improved labor benefits and rights. Perhaps it is time to provide some regulatory protections for these workers who are totally at the mercy of their bosses.

In analyzing the information pertaining to workers in standard and non-standard employment, in formal and informal employment relationships, and in the special problem categories of vocational schools and construction where the nature of the employment relationship has been deemed ambiguous (notwithstanding the law), and the statutory exclusion of worker categories, such as domestic workers, it becomes clear that in China's admittedly large work force, there are millions of its citizens who are currently workers without benefits.

If reforms were considered in view of ILO standards, the guiding principle would be to expand coverage, application, and enforcement of China's social insurance and labor protections and extend them to more of the disenfranchised employees who are denied rights and benefits of the law by economic obstacles such as self-pay for benefits, and by lax and inconsistent enforcement of existing social insurance and labor laws.

The labor safety net in China, notwithstanding all its recent advancements, is still allowing too many of its hard-working citizens to fall outside the net, leaving them unprotected and as *workers without benefits*.

(issued September 6, 2004). This joint liability may extend to worker accidents where there is fault by the employer and the general contractor has no knowledge of the baogong tou's lack of legal identity. Interpretation on Cases of Personal Injury, art. 11; LCL, *supra* note 23, art. 94; Ngai & Huilin, *supra* note 50, at 147.

[159] Fact sheet, *supra* note 61.

PURPOSE AND POWER OF THE GROUP TAX EXEMPTION IN HEALTH CARE

Marie Yascko-Rosado

I. INTRODUCTION

In 2011, many tax-exempt entities were losing their tax exemptions due to the fact that they had failed to file the required Form 990 not-for-profit returns for over a period of 3 consecutive tax years.[1] Shortly thereafter, an IRS advisory committee recommended the exclusion of some organizations from group rulings, and went even further to recommend the disallowance of group return filings.[2] The reasons noted were for transparency, accountability, and responsibility.[3]

With a focus on lessening the gap between health care organizations' executive staff and low-income populations, Congress mentioned various requirements and charity care thresholds supported specifically by Senator Grassley, which, while influential, did not result in a federal mandate nor a required charity care percentage.[4]

The IRS received comments and reviews emphasizing the benefits of consolidated returns.[5] Efficiency and limited resources were some of the benefits discussed in support of a continuing consolidated group tax exemption and return filing, which outweigh the added administrative burden.[6] In the health care arena, the Catholic Healthcare Association responded to the enactment of Health Care Reform and IRC 501(r) by creating Community Benefit and Charity Care

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[1] *See Is Your Tax Exempt Status in Jeopardy?*, MCGUIREWOODS LLP (June 21, 2011), http://www.mcguirewoods.com/Client-Resources/Alerts/2011/6/Is-Your-Tax-Exempt-Status-in-Jeopardy.aspx.

[2] *See id*.

[3] *See id*.

[4] *See generally* Robert Wolin et al., *Tax-Exempt Hospitals Under the Microscope – How Much Charity Care Are You Providing?*, BAKER HOSTELTER (July 26, 2007), http://www.bakerlaw.com/alerts/Tax-Exempt-Hospitals-Under-the-Microscope How-Much-Charity-Care-are-You-Providing-07-26-2007.

[5] *See*, *e.g.*, Lisa M. Hix, *Obtaining and Maintaining Tax-Exemption for Your Affiliates: The Mechanics, Pros and Cons of Group Exemption*, VENABLE LLP (Sept. 26, 2008), https://www.venable.com/obtaining-and-maintaining-tax-exemption-for-your-affiliates-the-mechanics-pros-and-cons-of-group-exemption-09-16-2008/.

[6] *Id*.

Standards to help not-for-profit health care organizations meet the new requirements.[7]

This article argues that the group tax exemption and consolidated group returns provide immense assistance to nonprofit healthcare organizations, because of simplicity, financial benefits and efficiency benefits. Part III will discuss what it means to be a tax-exempt entity and the legal basis for its existence, the historical basis of the exemption and its various rationales including relief of government burden, subsidy and income measurement theories. Part IV will explain the tax-exempt status in health care, the effects of the Affordable Care Act on the uninsured population, and key differences between for-profit entities and non-profit entities. Part V will both detail the consolidated reporting process from a financial accounting and tax perspective and also tie the group exemption rulings with industry concerns, benefits, and disadvantages.

II. Tax Exempt Status

A. What it means

"[T]here are three sectors. . . governmental, for-profit, and nonprofit".[8] Nonprofit organizations are not always tax-exempt organizations although almost all tax-exempt organizations are nonprofits. Interestingly enough, in the United States healthcare organizations exist in all three sectors.

Contrary to what one might assume, an organization being "nonprofit" does not mean that one of the goals of the organization is to not make money. The popular nun, Sister Irene Krause, is famous for saying to her staff, "no margin, no mission", and that adage remains true today.[9] Being a nonprofit organization means that the use of the organization's profits are put back into the community or organization whose purpose is more often than not for the support of a charitable mission.[10] In the for-profit context there are owners and stockholders

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[7] *See generally* Catholic Health Ass'n of the U.S., A Guide for Planning and Reporting Community Benefit (2012) (implementing a detailed guide which hospitals nationwide utilize in creating Community Benefit programs and local Citizen Advisory Committees required under the Patient Protection Affordable Care Act).

[8] *See* Thomas K. Hyatt & Bruce R. Hopkins, The Law of Tax-Exempt Healthcare Organizations 6 (4th ed. 2013).

[9] Bruce Bryant-Friedland, *Sister Irene Kraus Remembered for Vision, Leadership*, The Florida Times-Union (Aug. 25, 1998), http://jacksonville.com/tu-online/stories/082598/met_2a1Siste.html.

[10] *See* Marc J. Epstein & F. Warren McFarlan, *Nonprofit vs. For Profit Boards: Critical Differences*, Strategic Finance, Mar. 2011, at 31, http://www.imanet.org/PDFs/Public/SF/2011_03/03_2011_epstein.pdf.

of the corporation who are looking for the profits to go into their pockets as dividends.[11] They are not as focused on a charitable mission and instead invest for different economic income reasons.[12]

No constitutional law states that healthcare or any other organization must receive a tax exemption. Therefore, the tax exemption comes solely from Congress, who may alter the law at any time.

B. Rationales

1. Historical

After the ratification of the Sixteenth Amendment to the U.S. Constitution came subsequent attempts to create a corporate income tax.[13] This resulted in the initial tax-exempt organizations such as churches and educational institutions.[14] Congress based its reasons for making the organizations exempt from taxation purely on the historical and unstated belief that these types of institutions should not be taxed.[15] The decision to not name them as a taxable organization resulted in the affirmative stance that these charitable institutions would not be taxed. Based on the societal norms in those times, one might have asked how can we tax the workers of God?

2. Relief of Government Burden

An older argument in favor of tax exemptions for charitable organizations is that these organizations in fact relieve government burden from having to pay for the charitable services provided by these organizations.[16] Whereas the government may not pay for churches, they would pay for relief to the poor in the areas of provision of food, health care, and housing.[17] In an interesting case in regard to a tax exemption for a religious organization, the court upheld the constitutionality of the exemption for churches noting that the State, "consid-

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[11] *See id.*

[12] *See id.*

[13] *See generally* Erik Nelson, Comment, *Two Stories of Taxation of Capital,* 16 LEWIS & CLARK L. REV. 1049, 1054-55 (2012) (discussing the Revenue Act of 1916 and the movement toward more progressive corporate income taxation following the ratification of the 16th Amendment).

[14] *See* Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective,* STATISTICS OF INCOME BULLETIN, Winter 2008, at 105, http://www.irs.gov/pub/irs-soi/tehistory.pdf.

[15] *See generally* HYATT & HOPKINS, *supra* note 8, at 5 (discussing Congress's power to enact healthcare legislation and the historical context of wanting some things to be free from government).

[16] *See* St. Louis Union Trust Co. v. United States, 374 F.2d 427, 432 (8th Cir. 1967).

[17] *See supra* note 14.

ers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest."[18]

3. Subsidy and Income Measurement Theories

The modern day rationale's for exemptions have been set forth into two theories: subsidy theory and income measurement theory.[19] While some fellow legal professionals adopt the subsidy theory approach, I believe, specifically in the nonprofit health care sector, that the mutual benefit received by community health care consumers more than meets the tax exemption of the nonprofit entities.[20]

Virginia requires each hospital, in order to retain their state exemption, to file an annual Certificate of Public Need report declaring how much uncompensated care the hospital provided to the indigent community in the last taxable year.[21] The majority of organizations in Virginia exceeded the state requirements.[22] In particular, Mary Washington Healthcare, a nonprofit integrated health care system with two hospitals serving the Stafford and Fredericksburg regions, noted the importance of community benefits in maintaining their tax-exempt status.[23] The money it had saved by not paying federal and state income taxes had also provided threefold in uncompensated and subsidized health care for the community.[24] Not only did the community

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[18] Walz v. Tax Comm'n of New York*,* 397 U.S. 664, 673 (1970).

[19] *See* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 66-71 (1981) (discussing subsidy theory); Rob Atkinson, *Theories of The Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses,* 27 STETSON L. REV. 395, 408 (1997) (describing income measurement theory).

[20] *See* Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115, 126 (2013).

[21] VIRGINIA DEP'T OF HEALTH, VIRGINIA MEDICAL CARE FACILITIES CERTIFICATE OF PUBLIC NEED RULES AND REGULATIONS 35 (2011), http://www.vdh.virginia.gov/OLC/Laws/documents/2011/pdfs/COPN%20regs%202011.pdf.

[22] *VHHA Annual Report on Community Benefit*, VIRGINIA HOSPITAL AND HEALTHCARE ASS'N, http://www.vhha.com/research/community-benefit/ (last visited Sept. 28, 2015).

[23] *Community Benefit*, MARY WASHINGTON HEALTHCARE, http://www.marywashingtonhealthcare.com/community-benefit (last visited Sept. 28, 2015).

[24] *See* Kelsey Brimmer, *Virginia Hospitals and Health Systems Provide $2.2B in Community Support*, HEALTHCARE FINANCE NEWS (Feb. 10, 2012), http://www.healthcarefinancenews.com/news/virginia-hospitals-and-health-systems-provide-over-22-billion-community-support; *see also* MARY WASHINGTON HEALTHCARE, COMMUNITY BENEFIT REPORT 2012, http://www.marywashingtonhealthcare.com/images/stories/documents/CommBenefits/2012commbenefitreport_4pg_may2013.pdf (2013).

members receive a mutual benefit, but they also received a more substantial benefit.[25]

Another factor not always considered when looking into the benefits that nonprofits provide their communities is the access to care within a short distance from one's own home. Very often people will have to travel an hour or more to receive rare treatments that are not profitable, which nonprofits provide at a loss.[26] Although the loss is captured in unsubsidized care, the mileage expense and the time it takes to travel outside their region to obtain care is not calculated and included in benefits.

In 2011, Ernst & Young LLP (EY) completed an unprecedented report in collaboration with the American Hospital Association (AHA) that reviewed over 900 member hospitals' Form 990 Schedule H's, which are nonprofit tax returns that report hospitals' community benefit dollars.[27] The report found that over an average 12.3% of all expenses of hospitals went to community benefits, e.g. free health care or subsidized services.[28] Hospitals also spent 1% on bad debt expense, which commonly represents the indigent population unable to pay.[29] The report noted that nonprofit hospitals "not only provide charity care and make up for underpayments by Medicaid and other means-tested government programs, but also cover for losses due to unreimbursed Medicare and bad debt expense attributable to charity care."[30]

While 12.3% of total expenses are deemed to qualify as a community benefit, a more liberal way of looking at hospital expenses are that 100% of expenses go towards the promotion of health in the community.[31] As noted in a 1970 Catholic University Law Review article:

> If one accepts the thesis that promotion of health is a charitable purpose and that all receipts must be applied to that charitable purpose of the hospital, there would seem to be no logical reason why a hospital could not accept only paying patients, charge each the full cost of

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[25] *See* Brimmer, *supra* note 24.

[26] *See, e.g.*, CATHOLIC HEALTH ASSOCIATION, A GUIDE FOR PLANNING & REPORTING COMMUNITY BENEFIT: SUPPLEMENTAL CHAPTER 7 (2012), https://www.chausa.org/docs/default-source/community-benefit/social-accountability-and-the-long-term-care-continuum.pdf?sfvrsn=2 (discussing a community benefit framework for social accountability and accessibility of charitable organizations).

[27] *See* ERNST & YOUNG LLP, RESULTS FROM 2011 TAX-EXEMPT HOSPITALS' SCHEDULE H COMMUNITY BENEFIT REPORTING 1 (2014), http://www.aha.org/content/14/schedhreport.pdf.

[28] *Id*. at 1, 5.

[29] *Id*. at 5, 8.

[30] *Id.* at 10.

[31] *See id.* at 5.

> care, remain entirely self- supporting, and still qualify as a charitable institution.[32]

III. Tax Exempt Status in Health Care

Tax-exempt health care organizations normally have as their mission the promotion of health in their local and surrounding communities. This mission, in addition to the traditional mission of serving those unable to pay, is the initial reason for their tax exemption. Health care entities include not only hospitals but also home health and hospice agencies, physician practices, free standing emergency departments, ambulatory surgery centers, and medical research laboratories affiliated with a hospital.[33] As the years progressed, the IRS prescribed additional Revenue Rulings to further define the charitable hospital definition and, in 2000, the IRS placed a key focus on uncompensated care that would come to be known as "Charity Care" under the Community Benefit Standard.[34]

Lord MacNaghten originally defined "charity" in the context of charitable trusts in England as comprising four principle divisions of "relief of poverty", "advancement of education", "advancement of religion", and "trusts for other purposes beneficial to the community."[35] For a period of time, American law ignored the various principles and instead chose to focus solely on the "relief of poverty" provision.[36] In 1956, the IRS issued a revenue ruling and subsequent regulations suggesting "charitable" was not meant to be narrowly construed to this scope of assistance but in fact was represented by various ways and means constituting a public benefit.[37] Now, the "promotion of health" alone is a substantive rationale for applying charitable status for hospitals based upon the premise that a hospital is allowed to accept paying patients, be self-supporting, and still maintain its charitable mission.[38]

It is important to note that while the focus of this article on charitable hospitals views tax exemptions from a federal income tax perspective, state and local property tax laws exemptions also apply and hold much power over the nonprofit sector. In fact, as a result of the focus on federal tax exemption in 2000, states began to give more

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[32] Robert S. Bromberg, *The Charitable Hospital*, 20 Cath. U. L. Rev. 237, 247 (1970).
[33] *See* I.R.C. § 170(b)(1)(A)(iii) (2014).
[34] *See* Rev. Rul. 69-545, 1969-2 C.B. 117.
[35] Commissioners for Special Purposes of Income Tax v. Pemsel, [1891] A.C. 531 (H.L.) 583 (appeal taken from Eng.).
[36] *See* Hyatt & Hopkins, *supra* note 8, at 16.
[37] *See* Rev. Rul. 56-185, 1956-1 C.B. 202.
[38] *See* Hyatt & Hopkins, *supra* note 8, at 17.

attention to the charitable giving of hospitals and began to more closely monitor the state requirements.

A. Affordable Care Act means everyone is insured, right? So no more need for Charity Care?

In 2012, the United States Supreme Court decided *National Federation of Independent Business v. Sebelius,* upholding the individual mandate portion of the Affordable Care Act.[39] With the provision of health care to uninsured Americans at an entirely new level, this brought into question the need for tax-exempt nonprofit hospitals whose basis for exemption relied upon their provision of significant charitable care to those who could not afford health care insurance.

While Health Care Reform has drastically increased the percentage of the population with insurance, there still is and will always be people who opt out of the system and choose to either pay the tax penalty or simply not file a tax return at all.[40] In 2013, about 42 million people lacked health insurance coverage of any type, and according to the Tax Foundation, already 43.4 million Americans do not pay any income tax.[41] This does not include the people who do not even file returns. According to the U.S. Census Bureau there are 316 million people in the United States, of which 23% are children, leaving about 243 million adult taxpayers.[42] 51.2% (about 128.2 million) of Americans were single in its monthly job market report in August 2014.[43] Therefore, we can estimate 126 million single taxpayers and about 120 million married persons. If we assume that each of these married persons files a joint return, or would file a joint return, that leaves a total of 60 million returns for married persons and 126 million returns for single taxpayers for a grand total of 186 million returns. The IRS re-

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[39] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

[40] *See* Table A-1, *infra* note 96.

[41] JESSICA C. SMITH & CARLA MEDALIA, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2013, at 3 (2013); Scott A. Hodge, *Number of Americans Paying Zero Federal Income Tax Grows to 43.4 Million*, TAX FOUNDATION (March 30, 2006), http://taxfoundation.org/article/number-americans-paying-zero-federal-income-tax-grows-434-million (last visited Sept. 30, 2015).

[42] POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR SELECTED AGE GROUPS BY SEX FOR THE UNITED STATES, STATES, COUNTIES, AND PUERTO RICO COMMONWEALTH AND MUNICIPIOS: APRIL 1, 2010 TO JULY 1, 2013 (2014).

[43] Richard Florida, *Singles Now Make Up More Than Half the U.S. Adult Population: Here's Where They All Live,* THE ATLANTIC CITYLAB, (Sept. 15, 2014), http://www.citylab.com/housing/2014/09/singles-now-make-up-more-than-half-the-us-adult-population-heres-where-they-all-live/380137/.

ported in a 2012 report that the total returns filed were 145 million.[44] Therefore, we have a shortage of roughly 41 million returns. So if that is equivalent to 45 million people that refuse to file individual returns – either because their income is too low or they just think the law doesn't apply to them – that is about 45 million people who will feel no consequences if and when they refuse to obtain health insurance. That is a little less than 1 million taxpayers per state.[45]

The Federal Emergency Medical Treatment and Labor Act (EMTALA), enacted in response to "patient dumping" of the uninsured still applies to hospitals that accept Medicare and operate emergency departments.[46] It is important to note that nearly all tax-exempt hospitals accept Medicare and the Medicare Conditions of Participation require that all hospitals have the ability to provide initial treatment in emergency situations.[47] Therefore, those who remain uninsured will still require treatment, which leaves ample people in need of financial assistance.

B. Not-for-Profit v. For-Profit

Hospitals have traditionally been tasked with caring for the sick and, up until the 1920's, acted as full charities in the sense that they only survived on voluntary charitable donations since they were not paid for their services. Hospitals gain their income from Medicare, other government subsidies (Medicaid, CHIP, etc.), and patient and insurance fees.[48] This has caused some state courts to argue that there is no longer a distinction between nonprofit and for-profit hospitals and their operations.[49] However, as the dissent in *Utah County v. Intermountain Health Care, Inc.* notes, these state courts could not be more misguided.[50] The distinction in many underserved geographical regions is not whether hospitals are either for-profit or nonprofit – rather they are either a nonprofit hospital or there is not a hospital at

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[44] BRETT COLLINS, I.R.S., PROJECTIONS OF FEDERAL TAX RETURN FILINGS: CALENDAR YEARS 2011-2018, at 182 (2012), http://www.irs.gov/pub/irs-soi/12rswinbulreturnfilings.pdf.

[45] *See* Table A-1, *infra* note 96.

[46] *See* 42 U.S.C. § 1395dd (2014).

[47] *See*CENTERS FOR MEDICARE & MEDICAIDSERVICES, DEP'T OF HEALTH & HUM. SERVS., CMS MANUAL SYSTEM (2009), https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R46SOMA.pdf.

[48] *See generally* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS, AND PROBLEMS 414, 452, 472 (7th ed. 2008) (explaining how different government systems can contribute to hospital's income).

[49] *See, e.g., Utah County v. Intermountain Health Care, Inc*., 709, P.2d 265, 271 (Utah 1985)

[50] *Id.* at 279-280.

all.[51] Significant differences exist between the two; non-profit hospitals identify charity patients *after* admission rather than *at* admission, as for-profit hospitals normally do.[52] Non-profit hospitals are there to help people regardless of their ability to pay, and do not look at patients with dollar signs over their heads.

In an Institute of Management Accountants Strategic Finance article, Marc Epstein and F. Warren McFarlan created a Table to outline key differences between for-profit and nonprofit governance sectors in an effort to educate Board members.

FOR-PROFITS	NONPROFITS
MISSION	
Mission important	Mission very important
Financial results	Cash-loss generator may be the key service
Nonfinancial metrics important	Nonfinancial metrics of mission performance very important
FINANCE	
Financial metrics of performance P&L, stock price, and cash flow very important	Financial metrics of meeting budget and cash flow projections also important
Funds come from operations and financial capital markets	Funds come from operations, debt, grants, and philanthropy
Short-term goals very important	Deep focus on long-term goals (as long as cash is there)
EXECUTIVE	
Small board—paid governance	Often large board—volunteer governance
Few board committees	Often many board committees
Combined chair/CEO plus lead director	Nonexecutive volunteer chair, plus CEO

[53]

In conclusion, and as best described by Thomas K. Hyatt and Bruce R. Hopkins themselves, "Congress is not merely 'giving' eligible nonprofit organizations 'benefits'; this exemption from taxation. . . is not a 'loop-hole,' a 'preference,' or a 'subsidy.'"[54] The exemption is earned by factors such as a charitable purpose, a mission to promote health to the community and underserved, a location in areas that most profitable organizations would not service, providing subsidized

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[51] *Id.* at 289.
[52] *See Id.* at 284.
[53] Marc J. Epstein & F. Warren McFarlan, *Nonprofit v. For Profit Boards: Critical Differences*, 92 STRATEGIC FIN., 28, 30 (2011).
[54] THOMAS K. HYATT & BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT HEALTHCARE ORGANIZATIONS 13 (Wiley ed., 4th ed. 2013).

health services in which most profitable institutions would not, and treating anyone regardless of their ability to pay.

IV. Modern Non-Profit Health Law Changes

Since the passage of the principles established in 1969, various stakeholders in the health care community have taken the challenge to define and provide guidance to explain community benefit requirements for non-profit hospitals. The Catholic Health Association in particular has been instrumental in providing guidance to the Senate Finance Committee; particularly when the redesign of the Form 990's Schedule H occurred, which required non-profit hospitals to report and categorize community benefit dollars spent in a taxable year.[55] Outreach was a significant component in the 1990's ideal mission of hospitals, and was key in the expansion of the community benefit standard subsequent to national health reform and the inclusion of the I.R.C. 501(r) requirements.[56]

At the end of the 2014 calendar year, the Treasury issued Final Regulations for Tax Exempt Hospitals.[57] On the U.S. Department of Treasury's website in the Treasury Notes section, the government admitted to altering regulations in response to the number of stakeholder comments it received.[58] Key changes included a decrease in financial assistance policy translations based upon the community served, and individual notification of financial assistance policies only required when "extraordinary collections actions" are intended.[59]

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[55] *See generally,* Press Release, Catholic Health Association of the United States, Sr. Carol Keehan Emphasizes Catholic Health Ministry's Longstanding Commitment to Community Benefits in Testimony Before U.S. Senate Finance Committee (Sept. 13, 2006) (on file with PR Newswire). *See also* Julie J. Trocchio, *Something old something new: CHA's updated Guide for Planning and Reporting Community Benefit*, 89 Health Progress 6 (2008) (discussing Catholic Health Associations revision of its community benefit resource *Guide for Planning and reporting Community Benefit* in line with the new IRS Form 990 Schedule H). *See generally* Bruce R. Hopkins et al., The New Form 990: Law Policy, and Preparation 375–420 (Wiley ed., 2009).

[56] *See* Martha Somerville, et al., *Hospital Community Benefits After the ACA: The State Law Landscape*, The Hilltop Institute, March 2013, at 1; *see also* Paul Hattis, *Retooling for Community Benefit*, 74 Health Progress 38, 38 (1993). *See generally* I.R.C § 501(r) (2014).

[57] *See* Emily McMahon*, Treasury Finalizes Patient Protection Regulations for Tax-Exempt Hospitals*, Treasury.gov (Dec. 29, 2014), http://www.treasury.gov/connect/blog/Pages/Treasury-Finalizes-Patient-Protection-Regulations-for-Tax-Exempt-Hospitals.aspx.

[58] *Id.*

[59] *Id.*

The Treasury also enacted IRC 501(r), which requires hospitals to perform a community health needs assessment every three years to determine specific health related needs in its service area.[60] The assessment should drive the hospital's community benefit towards the health area identified.

V. Consolidated Returns

Consolidated return benefits ultimately provide non-profits with several advantages, such as efficiency of resources and time. They also provide the community with more transparency to see the company's profits, expenses, contributions, and community benefits as a whole. Because most persons in the community lack the expertise to understand complicated corporate structures with multiple parent and subordinate organizations, it is easier for them to look at one return that lays out all of the information they need to understand. For the IRS, the benefits are plentiful in the area of efficiency., The IRS would be unable to handle the increase in volume if the group return option were to be disallowed because the IRS and many government agencies at this time are understaffed and underfunded. Tax-exempt entities are not areas the IRS can target to provide high return on investment for audits, and therefore it would be an unworthy use of their limited time and resources.

A. Financial Accounting Guidelines

Consolidation occurs when financial statements of a parent organization are combined with its subsidiaries to produce one single comprehensive financial statement.[61] Consolidations are useful for management, auditors, and creditors to better determine income and expenses. The U.S. Generally Accepted Accounting Principles (US GAAP) consolidation rules provide several different models with guidance on how to consolidate financial statements of controlling and subsidiary companies.[62] The rules for the different models differ in

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[60] I.R.C § 501(r)(3) (2014).

[61] It is important to note that the degree and percentage of ownership will depend upon the type of inclusion the subsidiary is given into the consolidated financial statement. If a majority interest of more than 50% is held the parent is required to include the subsidiary in its consolidated return. If the parent only holds a substantial non-majority interest in the subsidiary it may still be required to be reflected as an investment on the financial statement.

[62] Ernst & Young, *Financial Reporting Developments: A Comprehensive Guide, Consolidated and other financial statements Noncontrolling interests, combined financial statements, parent company financial statements and consolidating financial statements, 1* (July 2014), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.ey.com%2Fpu

their basis on control, risk, or rewards.[63] Each model makes a concerted effort to eliminate intercompany transactions so that revenues and expenses are not counted twice, and to ensure financial statements are not erroneously inflated.[64]

B. Treasury Guidelines

26 U.S. Code § 1501 and § 1.6033-2(d) permit affiliated group corporations to file a consolidated return for income tax in lieu of the usual requirements of a separate return for each entity.[65] In order to obtain such privilege, all entities must consent prior to the last day of the taxable year. Treasury Regulation § 1.1502-75 details extensively the privilege of filing consolidated returns.[66]

One of the advantages of filing consolidated returns is that losses incurred by one member of the consolidated group are allowed to offset gains from another member.[67] In addition, transfers of property that would otherwise be deemed sales are classified as intercompany transfers and therefore escape immediate taxation.[68] This advantage is key because the delay in payment of taxes due to the time value of money is always a beneficial goal in tax planning,.

Disadvantages also exist with the consolidated return, and some argue that the disadvantages offset the advantages. Consolidated return regulations are extremely complex and although more often than not deferral of gain can be a positive thing it can also hurt a company that is on the verge of having a Net Operating Loss expire, which could have been utilized to offset these gains.[69] Furthermore in the loss arena the rules have issued consolidated loss limitations under Section 382.[70]

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[63] *Id at 23.*

[64] *Id at 47.*

[65] I.R.C. § 1501 92014); 26 C.F.R. § 1.6033-2(d) (2015). Affiliated group means one or more includable corporations connected through stock ownership with a common parent. I.R.C. §1504(a)(1) (2014).

[66] 26 C.F.R. 1.1502-27 (2015).

[67] *See generally id* at 80.

[68] *See generally id* at 20.

[69] *See* Amie T. Whittington, *Back to Basics: Consolidated Tax Returns,* Executive's Tax & Management Report, Nov. 2007, at 2, tax.cchgroup.com/images/FOT/BacktoBasics.pdf. *See generally,* I.R.C. § 172 (2014).

[70] *See generally,* I.R.C. § 382(b) (2014).

VI. Group Tax Rulings and Exemptions

A. History

The group ruling originally came into creation over 75 years ago.[71] Its main purpose was to create administrative convenience and efficiency for the IRS.[72] The thought was that it would also create efficiencies for central organizations that controlled subsidiary organizations allowing them to complete one combined tax return covering all of its entities.[73]

B. How the Group Exemption Ruling is Obtained

The IRS defines a group exemption as, "a recogni[tion] on a group basis [of] the exemption under section 501(c) of the Code of subordinate organizations on whose behalf the central organization has applied for recognition of exemption."[74] A "parent" or central organization generally has "subordinate" organization(s) underneath of it, which it controls or is affiliated.[75]

In order to receive a group ruling from the IRS, the central organization, in most circumstances, must first receive its tax exemption recognition from the IRS before it may request to establish a group. In addition, six requisites through various listed documentation must be established before the parent may ask for its subsidiaries to be included in a group exemption ruling.[76] The requirements include: 1) affiliation, 2) subject to control of the parent, 3) exempt purpose under IRC 501(c), 4) ineligibility for private foundation status, 5) identical accounting period, and 6) certain formation date requirements for backdating.[77] The subordinate organization must consent and certify that it wishes to be considered as a part of the group. The ruling generally takes the IRS 12 months to complete.

C. Group Ruling Benefits and Difficulties

In practice, the group exemption combined with the consolidated return has provided significant benefits – one of them being of a

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[71] Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Prespective,* http://www.irs.gov/pub/irs-soi/tehistory.pdf.

[72] Department of the Treasury, I.R.S., Publication 4573, Group Exemptions: Tax Exempt and Government Entities Division (2007), http://www.irs.gov/pub/irs-pdf/p4573.pdf.

[73] Rev. Proc. 80-27, 1980-1 I.R.B. 677 (discussing the rule for applying for group exemption).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

financial and efficiency nature. In the public sector, when an accountant files a return, a set fee is normally allocated to each return. If a company has ten subsidiaries and one parent, they would pay $3,000 per return. Thus, if they can minimize this to one return, they have saved the equivalent of ten returns and $30,000. Thus, according to the illustrated example, the IRS has now cut down its workload from reviewing eleven returns to only one. Even if the returns are done in house, utilizing software programs (for example the Lacerte Professional Suite) will also result in a savings based on the estimated costs of the example above. To access a return (i.e. to input data and send it electronically to the IRS) it costs a minimum of about $100 each, not including licensing fees of about $500, filing fees of about $25, and accountant time of about $30/hour.[78] If a company has 19 subsidiaries and one parent, allowing a consolidated return it saves the company an average of $200/return, not including internal accountant fees, which could easily be more than $50,000 a year! Although, this number appears small, costs can quickly add up for organizations and the IRS who must store and pay to receive all of these electronic returns.

D. Governmental Agency Confusion

Unfortunately, the group ruling has also created some confusion for persons who are unaware of its existence, including government agencies. According to the Author, one such instance occurred while working for a large health care system and applying for hospital funding for the Electronic Health Record (HER) Incentive Meaningful Use funds from the government.[79] The task proved to be difficult, as unforeseen issues were encountered relative to the IRS Employer Identification Number (EIN) verification letters while attempting to register the hospital with the Centers for Medicaid and Medicare Services (CMS).[80] The top of each subsidiaries EIN verification letter lists the parent corporation, as this is how the IRS sends out correspondence.[81] CMS did not understand how group exemptions function, and denied the organization funding due to this technicality.[82] After considerable efforts, the IRS and CMS escalated the matter and finally

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[78] Calculated using Intuit Accountants, ProSeries® Professional Tax Software, http://accountants.intuit.com/tax/proseries/professional/.

[79] Centers for Medicare and Medicaid Services, Electronic Health Care Record Incentive Programs, http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html.

[80] Internal Revenue Service, Publication 557 – Tax-Exempt Status for Your Organization, 8, (Oct. 2013), http://taxmap.ntis.gov/taxmap/pubs/p557-004.htm.

[81] No written account of this policy available to the public has been found. The Author learned of this procedure by an IRS representative in 2013 via telephone.

[82] This account is provided by the Author, Marie Yascko-Rosado while working at Mary Washington Healthcare as a Tax Specialist.

resolved the discrepancies between their systems. It is clear that the agencies do not speak to one another, and it is critical that taxpayers and professionals educate CMS and other agencies about the processes of the IRS.

E. IRS Advisory Council Concerns

A 2011 IRS ACT report stated that group returns are uninformative and lack transparency.[83] The parent is not part of the consolidated return and is reported separately. The Advisory Council also noted that the accounting transactions such as intercompany transfers in the group were not required to be netted, as in normal corporate consolidated financial statements based upon Generally Accepted Accounting Principles.[84] Therefore, they argued that determining financial operations of each subordinate member of the group was impossible without viewing unconsolidated financial statements.[85] However, this is arguably not a significant issue, as most states (and now federal law) have required nonprofits to publish their Audited Financial Statements on their websites.[86] The Audited Financial Statements often separate out the companies and their income and expenses so that bond investors and community stakeholders can see a transparent view of the parent and its subsidiaries.

As mentioned above, public disclosure of regulatory filings is expected of non-profits, which is why the Advisory Committee had concerns.[87] Nonprofits must annually file Form 990's, which report the compensation of executives, board members, and key employees, fundraising amounts earned, categorized expenses, and community benefit dollars spent.[88] In addition, unrelated business activity returns are also to be supplied to the public by the Pension Protection Act of

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[83] Advisory Committee on Tax Exempt and Government Entities (ACT), Exempt Organizations: Group Exemptions-Creating a Higher Degree of Transparency, Accountability, and Responsibility (June 15, 2011) at 35, http://www.irs.gov/pub/irs-tege/tege act rpt10.pdf.

[84] *Id.* at 19-26.

[85] *Id.* at 25

[86] *See* I.R.S. Publ'n 4221-PC (Rev. 7), (2014), *https://www.irs.gov/pub/irs-pdf/p4221pc.pdf*; Tiffany C. Wright, *Does the IRS Require Audited Statements for Nonprofits?,* AZCENTRAL, yourbusiness.azcentral.com/irs-require-audited-statements-nonprofits-21631.html; *see, e.g.,* Mary Washington Healthcare, IRS 990 Reports, http://www.marywashingtonhealthcare.com/about-mary-washington-healthcare/irs-990-reports.

[87] *See* Advisory Committee on Tax Exempt and Government Entities (ACT), Exempt Organizations: Group Exemptions-Creating a Higher Degree of Transparency, Accountability, and Responsibility (June 15, 2011) at 1, http://www.irs.gov/pub/irs-tege/tege act rpt10.pdf.

[88] I.R.C. 501(c)(3) (2014).

2006.[89] This tells the community the profitable businesses or sometimes non-profitable business that are unrelated to the organization's mission.[90] Since the non-profit is "owned by the community" transparency is important between the community and the nonprofit organization.

From a hospital perspective, when multiple subordinates can file one 990, the hospital must report only a combined set of the top highest five persons paid income.[91] Often, hospital management dislikes having its compensation publically posted, as they often receive criticism.[92] Also, the way that the Form 990: Schedule J is organized tends to provide inflated compensation numbers.[93] A valuation of benefits not generally includable in income must be valued and included in compensation. Such items any health insurance benefits and other Section 125 Fringe Benefits are not generally includable in income. Total compensation also requires a valuation and inclusion of bonuses and deferred compensation, as well as total Medicare wages. This essentially makes the Schedule J report an economic Haigs-Simmons reporting type of income rather than our present day federal taxation system of recognizing income.[94]

VII. CONCLUSION

"For the United States and other democratic nations, the community of nonprofit organizations is a necessary ingredient of a civil society."[95] The provision of a group tax exemption provides both the Internal Revenue Service and the public and private accounting, and legal sectors with efficiency and benefits well beyond any transparency concerns. In a time of a steadily shrinking government workforce and

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[89] Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure As a Regulatory Tool*, 12 Fla. Tax Rev. 183, 207.

[90] Unfortunately, Guidestar.com, the electronic storage bank of all 990's, does not have the 990T's uploaded and it would have to be requested directly from the organization.

[91] I.R.S., *Instructions for Form 990,* Cat. No. 11283J (Nov. 10 2014).

[92] *See, e.g.,* Naomi Freundlich, *High CEO Salaries at Nonprofit Hospitals Under Scruitiny. . . Once Again*, HEALTHBLOG (Mar. 24, 2011) www.healthblog.com/2011/03/high-ceo-salaries-at-nonprofit-hospitas-under-scrutinyonce-again/.

[93] *See generally, e.g.* Edmund B. Ura, *Reviewing the Compensation Information in Your Form 990- A Brief Guide for Board Members*, MERCES FQHC HUMAN RESOURCES CONSULTING (March 14, 2013), http://merceschcconsulting.com/2013/03/14/fqhcreviewing-compensation-form-990-a-brief-guide-for-board-members/.

[94] *See* Jonathan Barry Forman, *The Income Tax Treatment of Social Welfare Benefits*, 26 U. MICH. J.L. REFORM 785, 799-800 (1994). (The classic economic definition of income, also known as the Haig-Simons definition of income in footnote 130).

[95] Hyatt, Thomas K. and Hopkins, Bruce R, THE LAW OF TAX-EXEMPT HEALTHCARE ORGANIZATIONS §1.3 (4th Ed. 2013)

budgets the IRS is already struggling to keep up with the growing number of tax-exempt entities. Efficiency and budgetary concerns demand that we continue the rule of the group exemption.

(Numbers in thousands. Civilian noninstitutionalized population. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/acs/www/Downloads/data_documentation/Accuracy/ACS_Accuracy_of_Data_2013.pdf*) 96

State	2013 uninsured				2012 uninsured				Difference in uninsured			
	Number	Margin of error[1] (±)	Percent	Margin of error[1] (±)	Number	Margin of error[1] (±)	Percent	Margin of error[1] (±)	Number	Margin of error[1] (±)	Percent	Margin of error[1] (±)
United States	**45,181**	**200**	**14.5**	**0.1**	**45,615**	**195**	**14.8**	**0.1**	*–434	**279**	*–0.2	**0.1**
Alabama	645	17	13.6	0.4	632	17	13.3	0.4	13	24	0.2	0.5
Alaska	132	7	18.5	1.0	145	7	20.5	1.0	*–13	10	*–2.0	1.4
Arizona	1,118	24	17.1	0.4	1,131	27	17.6	0.4	–13	36	–0.4	0.6
Arkansas	465	14	16.0	0.5	476	11	16.4	0.4	–11	17	–0.5	0.6
California	6,500	57	17.2	0.2	6,710	52	17.9	0.1	*–209	77	*–0.7	0.2
Colorado	729	18	14.1	0.3	751	20	14.7	0.4	–22	26	*–0.7	0.5
Connecticut	333	14	9.4	0.4	322	11	9.1	0.3	11	18	0.3	0.5
Delaware	83	6	9.1	0.7	80	6	8.8	0.7	3	8	0.3	0.9
District of Columbia	42	4	6.7	0.6	37	3	5.9	0.5	*5	5	0.7	0.8
Florida	3,853	43	20.0	0.2	3,816	36	20.1	0.2	37	56	–0.1	0.3
Georgia	1,846	30	18.8	0.3	1,792	30	18.4	0.3	*54	42	0.4	0.4
Hawaii	91	6	6.7	0.4	92	6	6.9	0.4	–2	8	–0.1	0.6
Idaho	257	12	16.2	0.8	255	9	16.2	0.6	3	15	Z	1.0
Illinois	1,618	27	12.7	0.2	1,622	22	12.8	0.2	–4	34	Z	0.3
Indiana	903	19	14.0	0.3	920	20	14.3	0.3	–17	27	–0.3	0.4
Iowa	248	9	8.1	0.3	254	10	8.4	0.3	–7	13	–0.3	0.4
Kansas	348	12	12.3	0.4	356	10	12.6	0.4	–7	15	–0.3	0.5
Kentucky	616	14	14.3	0.3	595	14	13.9	0.3	*21	20	0.4	0.5
Louisiana	751	17	16.6	0.4	760	16	16.9	0.4	–8	23	–0.3	0.5
Maine	147	7	11.2	0.5	135	7	10.2	0.5	*12	10	*0.9	0.8
Maryland	593	17	10.2	0.3	598	16	10.3	0.3	–4	23	–0.2	0.4
Massachusetts	247	10	3.7	0.2	254	11	3.9	0.2	–8	15	–0.1	0.2
Michigan	1,072	19	11.0	0.2	1,114	15	11.4	0.2	*–43	24	*–0.5	0.2
Minnesota	440	14	8.2	0.3	425	11	8.0	0.2	15	18	0.2	0.3
Mississippi	500	16	17.1	0.5	498	11	17.0	0.4	2	19	Z	0.7
Missouri	773	18	13.0	0.3	801	19	13.6	0.3	*–29	26	*–0.5	0.4
Montana	165	8	16.5	0.8	178	6	18.0	0.6	*–14	10	*–1.6	1.0
Nebraska	209	9	11.3	0.5	206	8	11.3	0.5	3	12	0.1	0.7
Nevada	570	17	20.7	0.6	603	17	22.2	0.6	*–33	24	*–1.5	0.9
New Hampshire	140	7	10.7	0.5	139	8	10.6	0.6	1	11	0.1	0.8
New Jersey	1,160	22	13.2	0.2	1,113	27	12.7	0.3	*47	35	*0.5	0.4
New Mexico	382	13	18.6	0.6	378	10	18.4	0.5	4	17	0.2	0.8
New York	2,070	30	10.7	0.2	2,103	30	10.9	0.2	–33	43	–0.2	0.2
North Carolina	1,509	26	15.6	0.3	1,582	26	16.6	0.3	*–73	37	*–0.9	0.4
North Dakota	73	6	10.4	0.8	69	5	10.0	0.7	5	7	0.3	1.0
Ohio	1,258	21	11.0	0.2	1,304	22	11.5	0.2	*–47	30	*–0.4	0.3
Oklahoma	666	13	17.7	0.3	685	12	18.4	0.3	*–19	17	*–0.7	0.5
Oregon	571	15	14.7	0.4	576	17	14.9	0.4	–5	23	–0.3	0.6
Pennsylvania	1,222	22	9.7	0.2	1,225	20	9.8	0.2	–2	30	Z	0.2
Rhode Island	120	7	11.6	0.7	115	6	11.1	0.6	6	9	0.5	0.9
South Carolina	739	18	15.8	0.4	778	19	16.8	0.4	*–39	26	*–1.0	0.6
South Dakota	93	5	11.3	0.7	94	5	11.5	0.6	–1	7	–0.2	0.9
Tennessee	887	20	13.9	0.3	882	20	13.9	0.3	5	28	Z	0.4
Texas	5,748	55	22.1	0.2	5,762	54	22.5	0.2	–14	77	*–0.4	0.3
Utah	402	13	14.0	0.5	409	14	14.5	0.5	–7	19	–0.5	0.7
Vermont	45	4	7.2	0.6	40	3	6.5	0.5	5	5	0.8	0.8
Virginia	991	22	12.3	0.3	1,000	21	12.5	0.3	–9	31	–0.2	0.4
Washington	960	22	14.0	0.3	945	21	13.9	0.3	15	30	0.1	0.4
West Virginia	255	10	14.0	0.5	264	9	14.4	0.5	–9	13	–0.5	0.7
Wisconsin	518	14	9.1	0.2	506	13	9.0	0.2	12	19	0.2	0.3
Wyoming	77	5	13.4	0.9	87	6	15.4	1.0	*–10	8	*–1.9	1.3

*Statistically different from zero at the 90 percent confidence level.

Z Represents or rounds to zero.

[1] Data are based on a sample and are subject to sampling variability. A margin of error is a measure of an estimate's variability. The larger the margin of error is in relation to the size of the estimate, the less reliable the estimate. This number when added to and subtracted from the estimate forms the 90 percent confidence interval.

Note: Differences are calculated with unrounded numbers, which may produce different results from using the rounded values in the table.

Source: U.S. Census Bureau, 2012 and 2013 1-year American Community Surveys.

96 Jessica C. Smith and Carla Medalia, *Health Insurance Coverage in the United States: 2013*, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, at 18, (Washington, DC, 2014). (Utilized for total population without health insurance by state), https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-250.pdf.

"DURING WAR, THE LAW IS SILENT," OR IS IT?: EXAMINING THE LEGAL STATUS OF GUANTANAMO BAY

Kate Frisch

I. Introduction

On the morning of September 11, 2001, nineteen men, equipped with box cutters and knives, hijacked four American commercial airplanes. At approximately 9:00 am, American Airlines Flight 11 and United Airlines Flight 175 were intentionally crashed into the north and south towers of the World Trade Center in lower Manhattan, leaving an immense hole in the 80th floor of the 110-story building.[1] Hundreds were instantly killed or trapped inside the burning structure. At 9:37 am, American Airlines Flight 77 dove into the Pentagon in Washington, D.C. Twenty-six minutes later, United Airlines Flight 93 crashed into a field in Shanksville, Pennsylvania.[2] 6,333 were initially declared missing, and ultimately an estimated 3,000 were declared dead.[3]

The attacks were orchestrated by members of an Islamic militant organization known as Al Qaeda, which had connections with the Taliban regime[4] in Afghanistan, and marked the deadliest attack on American soil by foreign hands that the country had ever experienced. The events of September 11, 2001 forced the world to reconsider the role of non-state actors and terrorism as a legitimate and imminent threat to the order and peace that the international sphere inherently craves. As Cofer Black, the then head of the CIA Counterterrorist Center stated, "there was a before 9/11, and there was an after 9/11.

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[1] Colleen E. Hardy, The Detention of Unlawful Enemy Combatants during the War on Terror 4 (Melvin I. Urofsky ed. 2009); *September 11th Fast Facts*, CNN, (Sept. 8, 2016), http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/.

[2] *See* Hardy, *supra* note 1, at 4.

[3] Victor Jeleniewski Seidler, Remembering 9/11 Terror, Trauma, and Social Theory, 35 (2013).

[4] At the time of the attacks, the Taliban was considered to be the controlling government in Afghanistan, as it was governing the majority of the country. Only Saudi Arabia, the United Arab Emirates, and Pakistan ever officially recognized the Taliban as the lawful government of Afghanistan. Instead, Al Qaeda is a terrorist organization that spans numerous nationalities and countries. *See* Heather L. Rooney, *Parlaying Prisoner Protections: A Look at the International Law and Supreme Court Decisions that Should be Governing our Treatment of Guantanamo Detainees*, 54 Drake L. Rev. 679, 696-97 (2006).

After 9/11 the gloves come off."[5] As a consequence of the terrorist attacks, the United States, and many other members of the international community, categorized the attacks as an act of war, and President George W. Bush declared that America had begun its involvement in the infamous global war on terror.[6]

The introduction of terrorist attacks on American soil, combined with the unpredictable nature of terrorism and the shifting international focus, which now centered upon the very real threat of unpredictable non-state actors, reverberated throughout the global arena and was transferred into the regime of international public law. While this was not the first instance of terrorism by non-state actors against the United States in modern history,[7] it served as the contemporary proverbial shot heard 'round the world. One of the strategies involved in the implementation of the war on terror was to send several hundred Taliban and Al Qaeda militants whom United States forces had captured to detention centers at Guantanamo Bay, a United States naval base in Cuba.[8]

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[5] Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, (Dec. 26, 2002), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

[6] EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 56 (2010).

[7] Throughout the 1990's, the United States faced attacks both on a domestic scale as well as abroad. The only attack carried out inside the borders of the United States was the 1993 World Trade Center bombing, which was engineered and carried out by Islamic fundamentalists who sought revenge for the Palestinian people who had suffered from the U.S. aiding of Israel. But, there were at least six other successful or planned attacks against the U.S. during this time period as well. Attacks included the bombing of a military base in Saudi Arabia in 1996, almost concurrent attacks on U.S. embassies in Kenya and Tanzania in 1998, the planned bombings of the Holland and Lincoln Tunnels and the U.N. building in NYC, and the 2000 U.S.S. Cole bombing. *See 1993 World Trade Center Bombing*, CNN, (Mar. 2, 2016), http://www.cnn.com/2013/11/05/us/1993-world-trade-center-bombing-fast-facts/; David Hodari, *Main suspect behind 1996 bombing of US military base residence in Saudi Arabia arrested*, TELEGRAPH, (Aug. 26, 2015), http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/11825664/Main-suspect-behind-1996-bombing-of-US-military-base-residence-in-Saudi-Arabia-arrested.html; *1998 U.S. Embassies in Africa Fast Facts*, CNN, (Aug. 3, 2016), http://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/; Joseph P. Fried, *The Terror Conspiracy: The Overview; Sheik and 9 Followers Guilty of a Conspiracy of Terrorism*, NY TIMES, (Oct. 2, 1995), http://www.nytimes.com/1995/10/02/nyregion/terror-conspiracy-overview-sheik-9-followers-guilty-conspiracy-terrorism.html?pagewanted=all; *USS Cole Bombing Fast Facts*, CNN, (Apr. 6, 2016), http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/.

[8] Peter L. Bergen, *September 11 Attacks,* ENCYCLOPEDIA BRITANNICA (May 17, 2016), https://www.britannica.com/event/September-11-attacks.

The use of Guantanamo Bay as an extraterritorial detention center intended to house what the United States deems as "unlawful enemy combatants" has been problematic for several reasons. First, the United States government has argued that Guantanamo exists outside of its immediate territorial sovereignty, and therefore the detainees do not have to be afforded any significant procedural and substantive legal protections under the Constitution.[9] As Guantanamo Bay is not part of the United States' immediate territory, despite the continued exercise of direct and exclusive control over the naval base, the government has been able to practically ensure that detainees cannot rely on the Constitution to protect their basic rights or liberties.[10]

Second, it is unclear how and to what extent United States activities in Guantanamo Bay conform to international human rights standards.[11] Significantly, it has been questioned whether or to what extent public international and human rights law even can be applied to Guantanamo Bay, as the detention center serves as a seemingly extraterritorial "extension" of the United States that technically falls outside of its sovereign grasp.[12] The use of seemingly jurisdictional no-man's land in which there is a definitive exercise of control by a state, but without the requisite sovereignty piece, such as with Guantanamo Bay, has caused some to suggest that these extraterritorial state activities exist in a "legal black hole."[13] Under this notion, the detainees at Guantanamo Bay can therefore be lawfully denied basic rights and protections under public international law because they have been deemed to superficially exist outside of the responsibility of any one state.[14]

Supreme Court decisions beginning in 2004 have limited the scope of the "legal black hole" on a domestic scale,[15] but the potency of the ambiguous nature of extraterritorial state activities has yet to be definitively resolved under international human rights law. If Guantanamo does actually exist in such a hole, it insinuates that such detainees do not have to be afforded procedural and substantive rights under public international law. This holds grave consequences in terms of the protection of the detainees' basic human rights as well as the perceived strength and legitimacy of human rights law.

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[9] Boumediene v. Bush, 553 U.S. 723 (2008).
[10] *See* Wilde, *infra,* note 11.
[11] Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 740 (2005).
[12] *Id.*
[13] *Id.*
[14] *See id*.
[15] Rasul v. Bush, 542 U.S. 466, 474 (2004); Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2639 (2004); Boumediene v. Bush, 128 S. Ct. 2229, 2242 (2008).

Instead, I argue that international human rights law precludes the existence of any "legal black hole." Human rights law protects the rights and liberties of individuals purely based on their status as human beings, regardless of their location.[16] Therefore, an individual's rights cannot be suspended. As a result, it must be the responsibility of the entity that holds custody and control over the individual to protect those rights. In order to enforce the protection of human rights, international responsibilities stemming from treaties that have solidified the individual nature of the rights must be used as an instrument for enforcement to protect the legitimacy of human rights. Specifically, in the case of Guantanamo Bay, the United States is formally obligated to uphold such individual protections due to its commitments stemming from the Third Geneva Convention of 1949, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT).[17]

This argument will be explored throughout the rest of the paper, as Part II discusses the history of the detention centers; Part III outlines the human rights violations that have occurred at Guantanamo, and; Part IV analyzes the legal obligations set forth in the treaties to which the United States is a party,[18] and fleshes out the arguments surrounding the existence of a "legal black hole."

On a theoretical level, the ability of states to suspend human rights based on where certain individuals may be located at a certain point in time devolves the stability, legitimacy, and ultimate underpinnings of human rights law. As Eleanor Roosevelt posited:

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet, they are the world of the individual person. . .Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen

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[16] *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* 4, http://www.ohchr.org/documents/publications/training9chapter1en.pdf.

[17] *See generally* Convention (III) relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S.135; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, http://www.refworld.org/docid/3ae6b3aa0.html; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, United Nations, Treaty Series, vol. 1465, 85.

[18] Specifically, the Third Geneva Convention, the ICCPR, and the CAT.

> action to uphold them close to home, we shall look in vain for progress in the larger world[19]

To say that human rights attach based on a person's location ignores the fact that rights are triggered purely by the person being a person, and to say otherwise dissolves the underlying premise of human rights. The right to equal justice, opportunity, and dignity without discrimination cannot be diminished because of an individual's territorial movement in the world and to assert such a notion would inject chaos into an already vulnerable system. To argue that such freedoms can be suspended purely based on location diminishes the progress of the international community and ignores the ultimate purpose of human rights law in the first place.

Human rights under public international law was established to fill the inherent gap seen between state protections and the malleable and ambiguous international system due to a global policy movement following the atrocities seen during World War II.[20] The global movement that sparked the solidification of human rights was premised upon the idea that such rights attach and are triggered at birth and are not dependent upon the individual's territorial status.[21] In the most simplified terms, human rights are derived from being human and cannot be awarded or withheld by any particular government or single legal system. Therefore, it is the responsibility of the international system as a whole to recognize the individual status of these rights, and that the United States' treatment of detainees at Guantanamo Bay violates its international legal obligations set forth in the human rights instruments to which it is a party.

But in its current use, the law is not protecting against the violation of human rights despite clear obligations established in various treaties. Instead, it is being twisted to allow such violations to be initiated while avoiding the consequences of law.[22] For example, the definition of torture has been redefined to allow for its proliferation at Guantanamo against "unlawful enemy combatants", which is a term created by the Bush Administration in order to avoid the reach of the applicable law.[23] The alleged distinction between "unlawful enemy combatants" and "lawful enemy combatants" has allowed the United

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[19] Eleanor Roosevelt, On the Adoption of the Universal Declaration of Human Rights, Address at the United Nations in New York (Mar. 27, 1958).

[20] *See Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, supra* note 16, at 2,3.

[21] "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, art.1; Larry Cox & John Yoo, *Are Human Rights Universal*, 16 BROWN J. WORLD AFF. 9, 13 (2009).

[22] *Id.*

[23] *Id.*

States to exempt some human beings from having human rights. The term "enemy combatants" refers to individuals who are able to be legally detained during an armed conflict under the laws of war.[24] "Lawful enemy combatants" and "unlawful enemy combatants" have been treated differently under international law.[25]

If the United States defined the detainees as "lawful," they would be granted prisoner of war status, and thus protections stemming from the Third Geneva Convention.[26] But by defining the detainees at Guantanamo as "unlawful enemy combatants," they did not receive such protections. The Bush Administration instituted the hybrid term of "unlawful enemy combatants" as it proliferated the argument that the detainees were exempt from the typical protections of war.[27] As this was coupled with the fact that technically Guantanamo exists outside of the direct sovereign territory of the United States, the government was able to effectively allege that the detainees exist in a "legal black hole." Yet, the consequences of the notion that individuals can be located beyond the reach of law ignores the fact that human rights are dependent upon the person, not the place or a superficial status. Such rights are secured to the individual, and are inalienable and cannot be diminished. To do so would devolve the status of human rights law, and would initiate the type of chaos which the regime sought to protect against in the first place.

While this paper will focus specifically on Guantanamo Bay, it serves as a case study for the legality of the use of extraterritorial state activities to detain, interrogate, and torture individuals who are deemed a national security concern, and the manner in which such activities are performed. The abuses that have occurred at Guantanamo Bay are not only an unintended consequence of the detention centers in Cuba, but also describe a systematic global reality and concern.

Responsibility for the abuse of human rights at Guantanamo Bay, Cuba, lies also with the foreign governments that participated in and allowed the United States to operate the secret prisons.[28] The concerns surrounding the human rights abuses at extraterritorial deten-

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[24] William Haynes, *Enemy Combatants*, COUNCIL FOR FOREIGN RELATIONS (Dec. 12, 2002), http://www.cfr.org/international-law/enemy-combatants/p5312.

[25] Ex parte Quirin, 317 U.S. 1, 37-38 (1942).

[26] *See* Convention Relative to the Treatment of Prisoners of War art. 4, (Aug. 12, 1949), 6 U.S.T. 3316, 75 U.N.T.S. 135.

[27] Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007), http://www.tilj.org/content/journal/43/num1/Danner1.pdf.

[28] *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, Human Rights Watch (July 12, 2011) https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees.

tion centers not only resonate with the policies of the United States, but also must be analyzed as a truly global problem in the international community's response to terrorism.[29] If such actions are permitted due to the notion that they exist in a "legal black hole" because the torture, interrogations, and detentions are occur outside the technical sovereignty of the state actors, it is a slippery slope for the legitimacy associated with human rights law. In such a reality, the instituted protections associated with a persons' basic human rights quickly and efficiently devolves.

It is critical there be a shift in the literature to discuss how extraterritorial state activities are considered under public international law. The conversation concerning the mechanism for the protection of human rights has mainly been concerned with the relationship between the state and its activities within its own territory, and the obligation to uphold basic human rights within those set boundaries. Yet, this has proven to not be comprehensive enough in the current international community. The laws surrounding armed conflict and the multilateral treaties that have been created to set the parameters for the rules of war were intended to handle conflicts between sovereign nations. Yet, terrorism and terrorist organizations operate in multiple countries simultaneously, and it is inherently ambiguous in nature. The emergence of extraterritorial state activities used to control and respond to the threat of terrorism insinuates that the current discourse is not expansive enough, thus leaving individuals who become subject to such "legal black holes" to become susceptible to having their most basic rights openly violated.[30]

Therefore, although the discourse has suggested that because Guantanamo Bay suffers from an assumed technicality in which it is supposedly not under United States sovereignty and therefore exists outside of the realm of legal consequences, public international and human rights must be seen as expansive enough to cover extraterritorial state activities to provide for the maintenance of basic human rights. Further, the conversation must focus upon the fact that human rights attaches to the person, and therefore the legal obligations set out through the treaties must be used as an enforcement mechanism to protect the legitimacy of human rights law.

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[29] Such can be seen by British soldiers mistreating Iraqi's, or Jordan and Morocco instituting practices of detention and torture during interrogations similar to that seen in Guantanamo, and the Australian detention centers, which use Guantanamo as a justification for their mechanisms.

[30] Wilde, *supra* note 11, at 754.

II. HISTORY

In the months following the 9/11 attacks, Congress authorized President Bush to begin implementing the use of missile and air strikes against the Taliban regime in Afghanistan.[31] Soon after, the United States initiated a ground invasion as well, and by 2003 the war on terror had extended beyond the territorial boundaries of Afghanistan, and expanded to include Iraq as well.[32] The United States, in conjunction with its allies, has since captured thousands of members of both Al Qaeda and the Taliban throughout the war on terror.[33] While some were released or detained in the countries in which they were captured[34], more than 750 individuals have been designated as "unlawful enemy combatants" and sent to be detained at Guantanamo Bay, a United States naval base in Cuba.[35]

Guantanamo Bay has been leased by the United States since 1903, following the conclusion of the Spanish-American War which established the independent Republic of Cuba[36], and serves as the oldest American naval base outside of the continental United States.[37] The lease was then reaffirmed under a subsequent 1934 treaty, which further provided the two methods under which the lease could be terminated: if both Cuba and the United States agree to discontinue the agreement, or if the United States completely abandons the property.[38] Therefore, the duration of the lease was not specified and instead is seemingly perpetual in nature. Article III of the lease defines the extent of the control with the United States can exercise over Guantanamo Bay:

> While on the one hand, the United States recognizes the *continuance of the ultimate sovereignty of the Republic of Cuba* over the above described areas of land and water, and on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement, *the United States shall exercise complete jurisdiction and control* over and within said areas with the right to ac-

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[31] Hardy, *supra* note 1, at 151.
[32] Crawford, *supra* note 6, at 57.
[33] Hardy, *supra* note 1, at 151.
[34] Hardy, *supra* note 1, at 151.
[35] MARK P. DENBEAUX & JONATHAN HAFETZ, *Introduction* to THE GUANTANAMO LAWYERS INSIDE A PRISON OUTSIDE THE LAW 1 (Mark P. Denbeaux et al. eds., 2009).
[36] Hardy, *supra* note 1, at 152.
[37] Alfred De Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 288 (2004).
[38] *See id*. at 290.

> quire for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.[39]

Despite the century-long presence, the detention facilities did not open for their current purpose until 2001, following the American intervention in Afghanistan[40] and the first group of detainees' arrival on January 11, 2002.[41] Since 2002, Guantanamo Bay detention centers have been established as prisons with the primary purpose of detaining suspected Taliban and Al Qaeda fighters who were captured during the war on terror. The decision to utilize Guantanamo Bay as a prison was strategic, and directly linked to its interesting and relatively undefined legal status under both domestic and international law. As a consequence of the terms underlying both the lease and the subsequent treaty between Cuba and the United States, Guantanamo Bay is considered to be under the full control of the United States, but is significantly still subject to Cuban sovereignty. Therefore, Guantanamo Bay, and the 61 current detainees of the prison[42], are not entitled to the same legal protections that are afforded to citizens or those within the technical territorial bounds of the United States stemming from the Constitution and legislation, which has sparked sharp legal and political debates.

The debate focuses on how to categorize the detainees, and is underlined by the shattered notion of traditional security threats stemming from the 9/11 terrorist attacks. Typically, the international regime and the law of armed conflict focused upon state initiated attacks. With the introduction of non-state actors playing a significant role in the national security discourse following 9/11, it was unclear how international law would or could respond.

President Bush initially posited that these detainees would not be covered under the Third Geneva Convention[43], which established the rules surrounding the treatment of prisoners of war. This held significant consequences for the enumeration of rights and privileges that

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[39] *Agreement between Cuba and the United States for the Lease of Lands for Coaling and Naval Stations*, art. III, Feb. 16–Feb. 23,1903, 6 U.S.T.I.A 1113 (1968) [hereinafter Lease].

[40] Samantha Pearlman, Note, *Human Rights Violations at Guantanamo Bay: How the United States Has Avoided Enforcement of International Norms*, 38 SEATTLE U.L. REV. 1109, 1110 (2015).

[41] Berta Esperanza Hernández-Truyol, *Globalized Citizenship: Sovereignty, Security, and Soul*, 50 VILL L. REV. 1009, 1037 (2005).

[42] GUANTANAMO BY THE NUMBERS, https://www.aclu.org/infographic/guantanamo-numbers (last visited Sep. 16, 2016).

[43] Andrew Cohen, *The Torture Memos, 10 Years Later,* THE ATLANTIC (Feb. 6, 2012).

the Guantanamo Bay detainees could expect from international and human rights law. In 2002, President Bush then changed his position and instead posited that only the Taliban regime would be covered under the Third Geneva Convention, but not the Al Qaeda fighters.[44] This argument was based on the fact that Afghanistan was a formal signatory to the set of treaties, but Al Qaeda independently was not.[45] Yet, the shift in President Bush's position held no material effect on the rights, protections, or treatments afforded to the detainees at Guantanamo Bay.

Instead, the most significant denial of rights and privileges stemmed from the administration's categorization of the detainees as "unlawful enemy combatants" rather than prisoners of war. To categorize the Taliban and Al Qaeda as prisoners of war would have forced the United States to afford to the detainees a certain number of protected substantive and procedural rights, as required under the Third Geneva Convention as well as other numerous human rights treaties to which the United States is a party.[46] Instead, the detainees were deemed to be "unlawful enemy combatants."[47] As the detaining authority ultimately decides the status of the prisoners, the failure to grant the detainees the prisoner of war status has both allowed the United States to not afford the detainees significant legal, or even basic human rights, and has opened the country up to significant criticisms from the international community.[48]

In defense of this position, the United States argued that the Taliban and Al Qaeda militants do not qualify as 'prisoners of war' under Article 4 of the Geneva Conventions, which comes with a set of legally afforded protections.[49] As a consequence, the United States therefore did not have to afford the prisoners such rights as healthcare, or follow a set of standards in their interrogation and detention methods, as would be required if the detainees were labeled as prisoners of war.[50]

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[44] John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, (Feb. 8, 2002), https://www.washingtonpost.com/archive/politics/2002/02/08/bush-shifts-position-on-detainees/ae3e49c6-0db0-4b5b-a646-afb34c1dd0f1/.

[45] *Id.*

[46] *See* Kelly Wallace & Andrea Koppel, *Bush advisers debate detainees status*, CNN, (Jan. 26, 2002), http://edition.cnn.com/2002/US/01/26/ret.powell.detainees/index.html.

[47] *See id.*

[48] *See* Jerica M. Morris-Frazier, *Missing In Action: Prisoners of War At Guantanamo Bay*, 13 D.C. L. REV. 155, 160, 176 (2010).

[49] CCR, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba* 13-14 (July, 2006), http://ccrjustice.org/sites/default/files/assets/Report_ReportOnTorture.pdf.

[50] Morris-Frazier, *supra* note 48, at 160.

The debate over what exactly to do with Guantanamo has shifted from the Bush Administration, into a central theme of the discourse under the Obama Administration.[51] Within his presidential campaign, then Senator Obama pledged to close the detention centers at Guantanamo Bay, and to ensure that the United States upheld its obligations under the Geneva Conventions.[52] Yet, it is nine years later, and the facility still continues to operate. Despite the promises of the presidential hopeful in 2007, Congress has since made it difficult for President Obama to fulfill his vow to close the detention center. Congress has instigated strict procedures for the repatriation of detainees to countries that they have determined to have a vulnerable security environment.[53] Inside the detention centers, reprehensible conditions have been exposed as prisoners have come forward with the details of their abuse[54]. Detainees have also engaged in protests.[55] Despite the efforts and attempts of President Obama to improve and close the detention centers at Guantanamo Bay, fifteen years after it opened for its current purpose, both the status of the facilities and the detainees are still caught in a state of uncertainty and those that complied with and instigated the torture are still shrouded in the protections of this fake immunity.

III. HUMAN RIGHTS VIOLATIONS

Due to the malleable legal status of both the detention centers and the detainees, there is a great risk for human rights violations, which in the case of Guantanamo Bay have been admitted to exist.[56] This section will detail the myriad human rights violations that have occurred at the detention centers. The type of treatment described in this section further reiterates the need for human rights to be understood as belonging purely to the individual, regardless of location or superficial status.

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[51] *See* Senator Barack Obama, Speech at Woodrow Wilson International Center (Aug. 1, 2007), http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974.

[52] *See id.*

[53] *See* David Nakamura, *Obama Administration to Transfer Two Guantanamo Bay Detainees*, WASH. POST (July 26, 2013), https://www.washingtonpost.com/world/national-security/obama-administration-to-transfer-two-guantanamo-bay-detainees/2013/07/26/86a671a6-f62b-11e2-aa2e-4088616498b4_story.html.

[54] Human Rights Watch, *infra* note 58 at 30.

[55] Both in 2005 and in 2013, detainees have staged a mass hunger strike in protest of the worsening conditions. As a result, the military ultimately force-fed the detainees. *See Hunger Strike at Guantanamo*, N.Y. TIMES (Apr. 5, 2013).

[56] William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 34 (2015).

The United States has argued that the techniques used on the detainees and the activities at Guantanamo Bay are justifiable due to the possibility that the extraterritorial nature of the detention centers precludes the applicability of human rights law.[57] While the primary responsibility for the respecting, protection, and proliferation of such rights are dependent upon states, the rights are individual in nature.[58] Regardless of where an individual may be, or their status under the law of armed conflict, the ban on torture has become so valued within the international community that it cannot be derogated from.[59] The United States in its present activities at Guantanamo has ultimately ignored this requirement.[60]

Following the end of World War II, the prohibition against torture as well as the solidification of the notion of a standard of human rights became universally accepted, and serves as a pillar in international law. It first appeared in the Universal Declaration of Human Rights in 1948 and signaled the need "to eliminate the medieval methods of torture and cruel punishment which were practiced in the recent past by the Nazis and fascists."[61] Article 1 of the Declaration stated that 'All human beings are born free and equal in dignity and rights', and further Article 5 of the Declaration stated that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[62]

Significantly, the Universal Declaration of Human Rights identifies rights that belong to every human being and protects every human being from any violation of these rights.[63] As Eleanor Roosevelt, a key drafter of the Declaration, stated, "human rights exist to the degree that they are respected by people in relations with each other and by governments in relations with their citizens."[64] The Declaration has served as the keystone for the human rights instruments that followed, and each echoed the notion that human rights must be understood as belonging to the individual alone and cannot depend on

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[57] *Amnesty Int'l Report 2015/2016, The State of the World's Human Rights*, Amnesty Int'l, 1, 388 (2016) https://www.amnesty.org/en/countries/americas/united-states-of-america/report-united-states-of-america/.

[58] *Torture in Int'l Law: A Guide to Jurisprudence*, CEJIL & APT, 2 (2008) http://www.apt.ch/content/files_res/jurisprudenceguide.pdf.

[59] *Id*.

[60] *Torture and Prison Abuse*, Global Policy Forum (2005) https://www.globalpolicy.org/us-un-and-international-law-8-24/torture-and-prison-abuse.html.

[61] Nigel Rodley & Matt Pollard, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 18 (3d ed. 2009).

[62] *Id*.

[63] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A / RES/ 217 (III) (Dec. 10, 1948).

[64] *See* Eleanor Roosevelt Address, *supra* note 19.

the location or status of the individual. If the United States continues to disrespect the fact that human rights exist independent of any other circumstance, the legitimacy of human rights law, as it was codified in the Declaration, will dissolve. Despite the fact that the United States is a party to several key binding instruments which have established set human rights obligations and should have enforced the responsibility to protect such rights, there have been a myriad of reports which detail the torture that has occurred at Guantanamo Bay at the hands of American forces.

Several weeks following the initial invasion into Afghanistan, the United Nations' Working Group on Arbitrary Detention called for the Bush Administrated to allow for inspection of the centers, provide information about the interrogation techniques, and to ensure that prisoners would be afforded a fair trial.[65] Although it was clear that the prisoners were being held indefinitely, without trial, without having been officially charged or their guilt declared, the Bush Administration did not respond to the United Nations' Working Group's request.[66] Instead, information was slowly leaked to the public over the course of the war, which made it explicitly clear that the detainees were being subjected to torture and abuse, and their basic human rights were being violated.

In 2002, photos were released that depicted the detainees as "hooded, goggled, and shackled men in bright orange jumpsuits kneeling before a wire mesh fence, their postures a grotesque parody of common Muslim prayer positions."[67] In 2003, the International Committee of the Red Cross presented more than 200 reported accounts of abuse to the United States government.[68] As detainees have been released from the prison, they have publicly commented on the abuse and torture.[69] Further, several detainees have died as a result of the interro-

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[65] Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 321 (2004).

[66] *See id.*

[67] Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba, *supra* note 49, at 3.

[68] Human Rights Watch, The Road to Abu Ghraib 1, 30 (2004), http://www.hrw.org/sites/default/files/reports/usa0604.pdf.

[69] *Id.*

gation techniques.[70] Four detainees committed suicide in 2007, and attempted suicides were all but rare at Guantanamo.[71]

In 2014, the interrogation methods detailed in the Committee Study of the Central Intelligence Agency's Detention and Interrogation Program,[72] commonly known as the Torture Report, exemplified the harsh conditions and torture to which the CIA subjected detainees. Such examples of the torture and abuse the detainees experienced included: (1) mock executions; (2) slaps and "wallings"[73]; (3) sleep deprivation[74]; (4) nudity[75]; (5) waterboarding[76]; (6) sleep deprivation[77]; (7) 'rectal rehydration' or rectal feeding[78]; (8) placing detainees in ice water "baths"[79]; (9) threatening detainees that "they would never be allowed to leave CIA custody alive," or "suggesting to one detainee that he would only leave in a coffin-shaped box"[80]; (10) threatening detainees with harm to their families.[81] Further, throughout the actual interrogations, the CIA consistently listed the interrogation as a higher priority than the detainee's medical needs.[82]

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[70] *See* Duncan Campbell & Suzanne Goldenberg, *They Said This is America . . . If a Soldier Orders You to Take Off Your Clothes, You Must Obey*, GUARDIAN, (June 22, 2004), http://www.guardian.co.uk/world/2004/jun/23/usa.afghanistan; Jeannine Bell, *"Behind This Mortal Bone": The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 347 (2008), http://www.repository.law.indiana.edu/ilj/vol83/iss1/8.

[71] Brian Foley, *Criminal Law: Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 CRIM L. & CRIMINOLOGY 1009, 1054 (2007); Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L.J. 82, 96 (2010).

[72] STAFF OF S. COMM. ON INTELLIGENCE, 112TH CONG., REP. ON. CENT. INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 3-4, (Comm. Print 2012).

[73] *Id.* (describing "wallings" as "slamming detainees against a wall").

[74] *Id*.

[75] *Id*.

[76] *Id.* (describing how waterboarding would become physically harmful, and would cause convulsions, vomiting, one detainee to "become completely unresponsive, with bubbles rising through his open, full mouth," and further explained as a "series of near drownings").

[77] *Id.* (describing the technique as forcing detainees to remain awake "for up to 180 hours, usually standing or in stress positions with their hands shackled above their heads," which caused at least five of the detainees to hallucinate).

[78] Eric Bradner, *CIA report's most shocking passages,* CNN (Dec. 10, 2014), http://www.cnn.com/2014/12/09/politics/cia-reports-shocking-passages/.

[79] *Id*.

[80] *Id*.

[81] *Id.* at 4. (including threatening "harm the children of a detainee, threats to sexually abuse the mother of a detainee, and a threat to 'cut [a detainee's] mother's throat).

[82] *Id*. at 3. (describing how the CIA continued "its enhanced interrogation techniques despite warnings from CIA medical personnel that the techniques could exacerbate physical injuries," and how in at least one case, "the CIA instructed

In addition, the Torture Report outlines the poor conditions at the detention centers—the chief of interrogations went so far as to describe the center as a "dungeon."[83] The Report details how detainees were subject to being "kept in complete darkness and constantly shackled in isolated cells with loud noise or music and only a bucket to use for human waste."[84] The combination of the inhumane interrogation tactics and substandard facilities caused numerous detainees to demonstrate a myriad of different psychological and behavior issues, such as hallucinations, paranoia, insomnia, and attempted self-harm and mutilation.[85]

The numerous reports of torture and abuse that have occurred at the Guantanamo Bay detention centers have reiterated the need for the discourse surrounding the extraterritorial application of state activities to analyze how, and in what context, the detainees and the facility itself should be categorized. Throughout the war on terror, the United States has faced criticism concerning the accusations of torture inflicted upon the detainees. Nevertheless, the international community has not been able to adequately enforce the prohibitions against torture to protect the detainee's rights, which has created grave consequences for both the detainees and the continued legitimacy of human rights law. Despite the seemingly "legal black hole" under which Guantanamo Bay exists, international treaties do cover the activities that occur at the detention centers, and must be enforced to maintain the legitimacy surrounding the recognition and protection of human rights.

IV. The Relationship Between International Obligations and the "Legal Black Hole"

In response to the global war on terror, the current discourse has debated whether it is possible to combat an inherently ambiguous and amorphous concept such as terrorism under the established laws of war. Following the initial 9/11 attacks, a White House memorandum from early 2002 highlighted this debate by postulating that the war on terror "required new thinking in the law of war."[86] Yet, in 2001, at the time of the initiation of the global war on terror, the United

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personnel that the interrogation [sic] would take "precedence" over his medical care").

[83] *Id*. at 4.

[84] *Id.*

[85] *Id.*

[86] Memorandum from President George W. Bush to the Vice President, The Sec'y of State, The Sec'y of Def.,The Att'y. Gen., & Other Officials 2 (Feb. 7, 2002), http://www2.gwu.edu/nsarchiv/torturingdemocracy/docume nts/20020207-2.pdf [hereinafter Bush Memo].

States was a signatory, and therefore bound to, a number of international legal instruments dictate the standards for treatment and protection of all parties involved in a conflict. These international legal instruments have triggered a series of duties which the United States must abide by in terms of the treatment of detainees at Guantanamo Bay, and include: 1) The Geneva Convention; 2) The International Covenant on Civil and Political Rights and; 3) the Convention Against Torture.

Because the United States has signed and ratified these treaties, the United States is obliged to uphold basic human rights. In response, the Bush Administration argued that derogation from such treaties was acceptable under domestic law in the interest of national security concerns.[87] A treaty acts as a binding contract which establishes the rights and obligations of the contracting parties.[88] The war on terrorism was used as a scapegoat by many lawyers in the Bush Administration to undermine the well-established rules of international law and to justify the derogation from the treaty-created obligations. Initially following the attacks, the senior legal advisors to the President argued that because the United States was experiencing an unparalleled clear and present danger, international law was irrelevant, as it must allow for states to prioritize national security over all else. The argument relied on the idea that all necessary means to preserve national security could be instituted into the war on terrorism, thereby implicitly allowing the torture that occurred at Guantanamo Bay.[89] Yet, international law is clear in that torture or other cruel, inhuman or degrading treatment or punishment is prohibited. Such a bar has been explicitly stated and reiterated in the Geneva Conventions, ICCPR, and the CAT.[90]

In addition, the arguments promulgated by the Bush Administration fail because human rights cannot be suspended based upon an individual's territorial location or status at a certain place in time.[91] Instead, human rights are naturally afforded to the individual, and

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[87] Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 112 (2004).

[88] Sean Murphy, PRINCIPLES OF INTERNATIONAL LAW 78 (2nd ed. 2012).

[89] Peter J. Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L. L. & FOR. AFF. 1, 8 (2007).

[90] *Id.* at 11*; See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[91] Geneva Convention III, *supra* note 17.

cannot be stripped away through the use of seemingly extraterritorial and legally ambiguous circumstances.[92] Despite the fact that the United States government argues that these international obligations cannot be applied to the detention centers or the detainees at Guantanamo Bay as it does not technically fall under American sovereignty, the rights which each proliferates belongs to the individuals themselves, regardless of their placement. Therefore, the argument that Guantanamo Bay and the detainees exist in a "legal black hole" is inherently fruitless, and must be understood as illegitimate to preserve human rights.

A. Geneva Convention

The Geneva Conventions are a series of four treaties and two additional protocols which establish a series of standard rules for states to follow in terms of the treatment of civilians, soldiers who have been rendered *hors de combat*, and combatants during periods of war and armed conflict.[93] Significantly, the Third Geneva Convention governs the status and rights to be afforded to prisoners of war (POWs) and detainees. Under Article 4 of the Convention, protections associated with POW status are granted to members of a regular armed force, and other individuals such as militias and volunteer corps that serve as a part of the regular militia.[94] Further, even if a party is not a member of the regular armed forces but instead is part of a separate militia, volunteer corps, or an organized resistance movement that is not affiliated with the regular armed services, they too are to be granted the protections associated with POW status.[95] Such status and protections will only be afforded if (a) the organization has a hierarchical command structure, (b) displays a unique and distinctive sign that is recognizable at a distance, (c) carries arms openly, and (d) follows the prescribed laws of war.[96] Further, individuals who reside in the invaded territory, and took up arms against the invading force, shall be granted prisoner of war status.[97]

When the first detainees arrived at Guantanamo Bay, it was unclear which laws would regulate the detention or treatment of detainees, as their status as prisoners of war had yet to be determined. By 2002, the position of the United States and Secretary of Defense Donald Rumsfeld was that, ". . .technically unlawful combatants do

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* art. 4(A)(6).

not have any rights under the Geneva Conventions."[98] The term "unlawful combatants," rather than "prisoner of war" was bestowed upon the detainees because it was argued that the detainees did not wear identifiable uniforms, observe a hierarchical command structure, or follow the rules of war.[99] Yet this was strategically done to deny the detainees the well-established privileges, protections, and rights guaranteed under international law to prisoners of war. While the traditional laws of war encompass state engaged wars, Al Qaeda was not involved in any one particular state, but rather was an amorphous transnational organization. The United States then reiterated that the Taliban would not be covered by the Geneva Conventions, as they did not follow the traditional laws of war.[100] Yet, the attempt by the United States to classify the detainees under a new name as an "unlawful enemy combatant" does not eliminate the rights of a prisoner of war.

Domestically, the Bush Administration attempted to justify the detention through the introduction of the term "unlawful enemy combatants."[101] While American law typically precludes detention without a criminal trial,[102] the use of the term "unlawful enemy combatant" allowed for the Bush Administration to argue that at least under domestic law, the detentions were lawful.[103] The United States has insinuated that this "unlawful enemy combatant" status is a new phenomenon in international law, and therefore the detainees themselves seemingly exist in their own "legal black hole." As senior legal advisor to the State Department, John Bellinger stipulated the Geneva Conventions "were designed in 1949 for different sorts of circumstances, and they don't provide easy answers in all cases to how to deal with international terrorists."[104] Yet, this position is too narrow and does not allow for the Geneva Conventions to provide the individual protections that underline the Conventions original creation.

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[98] Monica Whitlock, *Legal Limbo of Guantanamo's Prisoners*, BBC NEWS (May 16, 2003), http://news.bbc.co.uk/2/hi/americas/3034697.stm.

[99] *See* Bush Memo*, supra* note 86.

[100] *Id.*

[101] *Id.*

[102] United States v. Salerno, 481 U.S. 739, 749 (1987) (stating that "a general rule of substantive due process [is] that the government may not detain a person prior to a judgment of guilt a criminal trial").

[103] In this way, the detainees at Guantanamo were likened to the thousands of German and Italian prisoners of war that the United States detained during World War II, without any significant contention. *See generally* In re Territo, 156 F.2d 142, 145-46 (9th Cir. 1946).

[104] *The Legal Basis of U.S. Detention Policies,* THE HERITAGE FOUNDATION (2016), http://www.heritage.org/research/projects/enemy-detention/detention-policy.

In 2006, the Bush Administration defined an 'unlawful enemy combatant' as:

> A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the US or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al-Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[105]

By creating such a definition, the administration attempted to circumvent the protections that should and would have been afforded to the detainees had they been granted prisoner of war status under the Geneva Conventions. Instead, the administration sought to create a new class which it argued held an indeterminate legal status and therefore protections could be withheld. But the definition still applies to an individual, and an individual alone, as do the protections afforded by the Geneva Convention. Despite the attempt by the administration to cloak the detainees in a new sort of legally ambiguous nature, the Convention and its protections attach to individuals, regardless of their location and therefore could not be withheld, even with this new definition.

Instead, the Third Geneva Convention defined prisoners of war as:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside of their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;

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[105] Military Commissions Act § 43, 10 U.S.C. § 948 (2006).

> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
>
> (5) Members of crews, including masters, pilots, and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[106]

And further, it includes civilians who are captured along with the combatants, but are not considered to be members of the organization and individuals who reside in the invaded territory and took up arms against the invading force.[107]

The United States has tried to argue that due to the fact that members of the Taliban and Al Qaeda forces reputedly failed part of the four-prong test, under Article 4(2), that they do not qualify as prisoners of war. Yet, even without meeting all four requirements, the detainees would still qualify under the prisoner of war status as "inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arm to resist the invading forces."[108] Based on this definition, American, Al Qaeda and Taliban forces are still guaranteed the protections associated with prisoner of war status.

While terrorism is a relatively new phenomenon in the global arena, and it may be difficult to group all the detainees under one umbrella definition, the Geneva Conventions can be seen as encompass-

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[106] Geneva Convention III, *supra* note 17, art. 4(A).
[107] *Id.*
[108] *Id.*

ing the ambiguity and providing a solution to these unchartered laws of war. Geneva Convention III Article 5 holds that:

> The present Convention shall apply to the person referred to in article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having falling into the hands of the enemy, belong to any of the categories enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[109]

Article 5 explicitly calls for all persons to be granted the protections associated with prisoner of war status, even if there is doubt.[110] Therefore, the argument that "unlawful enemy combatant" is a new phenomenon, inherently fails. Despite the fact that Article 5 does not define what constitutes doubt,[111] there is a presumption that detainees will qualify as prisoners of war until proven otherwise. Even with the creation of a thinly veiled new definition, Article 5 allows for the ambiguity associated with what sorts of protections should be afforded to terrorists to be encompassed by the Conventions.[112]

The United States argued that because there was not an Article 5 question of doubt, there was therefore no need for a fact finding tribunal — Al Qaeda did not qualify for the Geneva protections, so neither could the individual detainees.[113] In terms of the Taliban, the denial of prisoner of war status rights was justified on the basis that the President had the ability to decide the status of the detainees, absent a determination from a competent and neutral tribunal.[114] Although this position has been reiterated throughout the international community, the United States remains an outlier in this respect as it consistently questions the extraterritorial application of human rights treaties. Internationally, there is a strong consensus that human

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[109] *Id.* art. 5.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT'L & COMP. L. REV. 1, 48 (2013).

[114] Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Just., to Alberto Gonzales, Counsel to the President, and William J. Haynes II, Gen. Couns. of the Dep't of Def., (Jan. 22, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf.

rights treaties do apply if the government exercises control and jurisdiction over the territory.[115] Notably, it has been argued that:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or a medical professional of the military who is covered by the First Convention, but there is no intermediate status; nobody in enemy hands can be outside the law. Twisting the labels "belligerent" and "combatant" with adjectives cannot evade the laws of war because all categories have rights. . .[116]

The argument demonstrates the fact that international law and the rights associated with the regime attach to the person and cannot be dissolved based on a new situation, definition, or the use of an extra-territorial detention center. The limited legal loophole found by the United States reiterates the need for the international community to adapt the current standards of war to the changing regime.

Despite the shattering introduction of non-state actors and terrorism into the global mindset, the protection of human rights cannot be derogated from or ignored, as has been the case with the United States in Guantanamo Bay. It is clear that despite the clever attempt to mask prisoners of war under a new "unlawful enemy combatant" title, the United States continues to violate the obligations set out under the Geneva Convention. It is important to note that the definition and the Convention, as explicitly stated throughout the treaty's articles, apply to the person, and the person alone regardless of their locality.[117] This notion is consistently seen in the language of the Geneva Convention— the individual rights must be understood as attaching to the person regardless of their locality and they cannot be diminished just because they are being held outside of United States' technical sovereignty or because they're cloaked in an arguably new class of "unlawful enemy combatants."[118]

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[115] Recently, the Supreme Court of the United Kingdom and Canada have upheld this position, and numerous international bodies have echoed the same belief. *See* Inter-American Comm'n on Human Rights, Report on Terrorism and Human Rights, (5th rev. ed. 2002), https://www.cidh.org/terrorism/eng/toc/htm; *see also* Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?,* 43 ARIZ. ST. L. J. 389, 390-405 (2011).

[116] International Committee of the Red Cross, Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?documentId=18E3CCDE8BE7E2F8C12563CD0042A50B&action=openDocument.

[117] *See generally* Geneva Convention III, *supra* note 17.

[118] *Id.*

B. International Convenant on Civil and Political Rights

Ratified by the United States in 1992, the International Covenant on Civil and Political Rights attempts to ensure that states protect the right to life, peaceful assembly, and basic human rights such as the freedom from torture, slavery, and retroactive criminal legislation.[119] Article 2, paragraph 1 of the Covenant articulates that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind."[120]

Significantly, the treaty again explicitly states that the Covenant is bound to protect the rights of individuals based on their status as a human being, and by a state signing into these obligations, it contracts to protect the individual's rights.[121] The ICCPR limits itself by only binding states to protect individual's rights as they fall within the state's jurisdiction or territorial sovereignty.[122] As the detainees are held outside of technical American sovereignty, it is then necessary to determine whether or not the detainees at Guantanamo can be deemed as falling under the jurisdiction of the United States.

The relevant case law establishes that state actors can and will be held responsible for violations of human rights, even if the activities occur under the jurisdiction or sovereignty of another state.[123] The United Nations Human Rights Committee – an agency created to supervise state compliance with the treaty – has explicitly declared that the ICCPR is intended to apply to any area within a state party's jurisdiction and control.[124] The Committee, in its March 2004 General Comment No. 31, explained the scope of the Covenant by stating that a "State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party"[125]

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[119] *See generally* ICCPR, *supra* note 17.
[120] *Id*. art. 2.
[121] *Id.*
[122] *Id.*
[123] The Human Rights Committee has explicitly stated that Article 2(1) of the ICCPR "does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state." Delia Saldias de Lopez v. Uruguay, Comm. No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 (1985) 88, 91, ¶ 12.3.
[124] *See* ICCPR, *supra* note 17 art. 2. (stipulating that each state party must "ensure to all individuals. . . subject to it's jurisdiction the rights recognized in the present Covenant, without distinction of any kind").
[125] UN Hum. Rights Comm., General Comment No. 31 on Art. 2 of the Covenant: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 10 UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

This statement establishes a clear standard for the scope of the jurisdiction of the Covenant, and thereby asserts that jurisdiction is based solely upon the individual, regardless of the person's current location. Specifically, the Committee establishes that the jurisdictional standard is met when a person ("anyone") has a relationship with the State in which the State exercises "power or effective control."[126]

This was again reiterated in 2011, 2014, and 2015 by the Human Rights Committee, and can be summed up in the Committee's Concluding Observations on the Fourth Periodic Report on the United States of America:

> "The Committee regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the country of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice."[127]

Significantly, the Committee that is charged with determining the applicability of the treaty specifically noted that the treaty and thus the associated protections apply to the individuals without any other prerequisites besides jurisdiction. The United States signed and ratified the treaty without including a specific reservation that would have excluded Guantanamo from the covenant's jurisdiction.[128] As the United States exercises complete jurisdiction and control over Guantanamo by virtue of the lease and subsequent treaty with Cuba,, and further is a party to the ICCPR, it is clear that the detainees at Guantanamo are therefore fully entitled, without exception, to the protections the Covenant provides. This is due to the fact that rights attach individually and cannot be dissolved based on a thinly veiled argument of jurisdiction[129]. Guantanamo exists under American control, and this, coupled with the fact that human rights are triggered solely by an individual's status as a human being, means that the United States is in violation of its ICCPR duties. Further, it is important to note that the ICCPR applies during both peace times and periods of armed conflict[130]. Therefore, the ICCPR applies to the detainees at Guantanamo Bay, and the protections granted by the treaty must be provided to the detainees.

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[126] Wilde, *supra* note 11, at 804.

[127] UN Hum. Rights Comm., Concluding observations on the fourth periodic report of the United States of America, 10 UN Doc. CCPR/C/USA/CO/4 (April 23, 2014).

[128] Pearlman, *supra* note 40, at 1118; De Zayas, *supra* note 37, at 310.

[129] ICCPR*, supra* note 17, art 2.

[130] *Id.*

C. Convention Against Torture

As stated previously, torture and other cruel treatment had been internationally condemned following the end of World War II. The 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) codified the general duties and instead established detailed parameters that were originally set out in the 1948 Universal Declaration of Human Rights, and then reiterated throughout numerous other treaties.[131] The CAT specifically prohibits the use of torture, or "other acts of cruel, inhuman or degrading treatment or punishment"[132] within the party's territories.[133]

Article 1 then broadly outlines the prohibition by defining torture as:

> any act which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[134]

The Convention explicitly states that there is no acceptable derogation from the prohibition on torture as it declares that under "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."[135] Such a strict level of responsibility attached to the ban on torture demonstrates the importance of the ban, and therefore the significance of the American argument for the limited scope of the treaty to apply extraterritoriality. The CAT is clear that no circumstances can eliminate the responsibility to not torture another individual, which demonstrates that the United States' view that the seemingly extraterritorial nature of Guantanamo puts the prohibition on hold is invalid. For the prohibition to be truly effective in preventing the use of torture, it must be seen as being triggered purely by the individual's status as a human being. While it is undeniable that the United States can only uphold

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[131] CAT, *supra* note 17.
[132] *Id*. art. 16.
[133] *Id.* art. 5.
[134] *Id.* art 1.
[135] *Id.* art 2.

the protections of the treaty in areas of which it has control, the right to not be subject to torture is not based upon that same area. Instead, this right is based upon the individual being a human being and to insinuate that there is a geographic gap in that status dissolves the entire purpose of human rights law.

Further, pursuant to Article 2, all states must enact effective legislative, administrative, and judicial measures in order to prevent torture within any territory under the party's jurisdiction.[136] Under Article 5, a state party is considered to have jurisdiction over an act of torture in four situations: "(a) when the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is a national of that State; (c) when the victim is a national of that State if that State considers it appropriate; or (d) when the alleged guilty party is within any territory that falls under the jurisdiction of the state, and the state does not extradite the individual."[137] As stated within the initial lease as well as the subsequent treaty that established the United States right to occupy Guantanamo Bay, the detention centers fall under American control and jurisdiction.[138]

The United States has implemented a reservation to the treaty by stating that Article 16 only applies to the extent that the conduct is prohibited under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.[139] Notably, however, none of these amendments ban torture. The international community has accepted that there are no geographic gaps in terms of the bar on torture, and the prohibition applies to all individuals irrespective of their status as a possible alleged terrorist or state enemy, or the individual's location.[140] Still, the United States continues to argue that the extraterritorial nature of Guantanamo precludes the ability of the protections to apply. Yet, the international community has accepted the absolute nature of the bar on torture due to the fact that the protections apply to the individual regardless of any jurisdictional or territorial perquisites. The discourse has sought to ensure that every person, regardless of their criminal, terrorist, civilian, lawful or unlawful combatant status may not be tortured or subject to any other cruel, inhuman or degrading treatment based solely on the person being a human being.

Although the United States government has attempted to argue that the ban is inapplicable at Guantanamo due to the seemingly extraterritorial nature of the detention centers, the rights are not pre-

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[136] *Id.*

[137] *Id.* art 5.

[138] *See* Lease, *supra* note 39.

[139] *See generally* CAT, *supra* note 17.

[140] *Id.*

mised upon American sovereignty over the base. Instead, the rights exist independently as they attach to the individual, and such rights cannot be suspended based on an individual's location. To do so would diminish the legitimacy of human rights, and would hold severe consequences for the enforcement of human rights law. Such points were reiterated by the Committee Against Torture in 2006, when it stated that the United States "should rescind any interrogation technique, including methods involving sexual humiliation, 'water boarding,' 'short shackling', and using dogs to induce fear, that constitute torture, cruel, inhuman, or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with its obligations under the Convention."[141] The need for the United States to reevaluate its policies stems from the fact that the Convention and the ban on torture is inherent in every individual, regardless of their location. The government thinly veils this requirement by arguing that their effective control without the underpinnings of sovereignty does not require the same level of protections to be afforded to the detainees. But this position ignores the individual nature of the rights and therefore is in violation of the Convention.

V. Conclusion

In conclusion, despite the seemingly "legal black hole" under which Guantanamo Bay exists, it is clear that international law does cover the detention facilities and the detainees. Therefore, the United States has consistently violated, and continues to do so, the obligations and duties to which it is contractually bound under The Geneva Convention, ICCPR, and the CAT. In order to ensure the continued legitimacy of human rights law, it must be understood and reiterated that rights attach based on personhood alone. In addition, treaty obligations that solidify such rights must be used as enforcement mechanisms. Despite President Obama's recent and substantial efforts to officially close the facilities,[142] the need for the current discourse surrounding state activities and their extraterritorial application is still incredibility relevant. As officials in Egypt, Zimbabwe, Russia, Iran and China have pointed to Guantanamo Bay in defense of their own human rights violations,[143] the need for the absolute association of the rights as individual becomes especially pertinent and necessary.

The age of terrorism and non-state actors as a significant and impending threat upon the global community and regime is upon us,

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[141] Rep. of the Comm. Against Torture, CAT/A/61/44 (May 19, 2006).

[142] Gregory Korte & Tom Vanden Brook, *Obama takes last chance to close Guantanamo Bay,* USA Today (Feb. 23, 2016), http://www.usatoday.com/story/news/politics/2016/02/23/obama-releases-plan-close-guantanamo-bay/80792250/.

[143] Yoo & Cox, *supra* note 21, at 14.

and has not lessened since the inception and operation of Guantanamo Bay. On Christmas Day in 2009, a Nigerian Islamist whom Al Qaeda had trained, Umar Farouk Abdulmutallab, attempted to blow up an American airplane bound for Detroit by concealing explosives hidden in his underwear.[144] Further, in May of 2010, Faisal Shahzad, a Pakistani born American citizen attempted to bomb Times Square.[145] British soldiers have been accused of abuse and torture of Iraqi prisoners,[146] including allegations of beating a prisoner to death, beating a prisoner and forcing him to swim across a river where the prisoner subsequently drowned, and shooting civilians.[147] London, Paris, and Brussels have recently been the target of terrorist plots.[148] As a result of the obvious limbo under which this aspect of law and order exists in the age of terrorism, the public international law sphere needs to set substantial parameters as to how countries can respond to such threats.

The legal "black hole" surrounding Guantanamo Bay leaves uncertainty for other signatories to such treaties and strips the enforcement mechanisms associated with the protection of the detainees of their teeth. In addition, the argument ignores the fact that human rights are individual in nature, and cannot be suspended or dissolved based upon a person's location or arguable status. To do so would devolve the legitimacy and underlying purpose of human rights law as a whole, and would have severe consequences for the established order in the international community. Further, the legally ambiguous nature of the extraterritorial state activities creates a set of twin risks for state actors, which should serve as an incentive for the actors involved

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[144] David Ariosto & Deborah Feyerick, *Christmas Day bomber sentenced to life in prison*, CNN (Feb. 17, 2012), http://www.cnn.com/2012/02/16/justice/michigan-underwear-bomber-sentencing/.

[145] *Times Square Bomber Sentenced to Life in Prison*, FOX NEWS (Oct. 5, 2010), http://www.foxnews.com/us/2010/10/05/times-square-bomber-faces-sentencing-nyc.html.

[146] Andrew Williams, *British Soldiers Accused of Torture and Abuse During Iraq Occupation,* NEWSWEEK (Dec. 17, 2014), http://www.newsweek.com/2014/12/26/british-soldiers-caught-further-torture-allegations-during-iraqi-occupation-292323.html.

[147] *Id.;* Richard Norton-Taylor & Steven Morris, *Court Battle Over Iraqi Deaths*, THE GUARDIAN (May 5, 2004), http://www.theguardian.com/politics/2004/may/05/politicsandthemedia.iraqandthemedia.

[148] *7 July London bombings: What happened that day?*, BBC NEWS (July 3, 2015), http://www.bbc.com/news/uk-33253598; *Paris attacks: What happened on the night*?, BBC NEWS (Dec. 9, 2015), http://www.bbc.com/news/world-europe-34818994 (May 6, 2016); *Brussels attacks: Zaventem and Maelbeek bombs kill many*, BBC NEWS (Mar. 22, 2016), http://www.bbc.com/news/world-europe-35869254.

in the public international and human rights law to want to close the gap.

First, states may underestimate the obligations of the treaties, which may lead to unintentional but significant human rights violations. On the other hand, if a state overestimates the obligations, it is entirely possible that the state may not employ strategically necessary tactics that may lead to serious national security concerns. This creates a huge potential for violations to occur, and if it is allowed to continue, human rights law as a whole will devolve and lose the legitimacy it has worked so hard to gain. In terms of Guantanamo Bay specifically, it is crucial that the international public law and human rights legal spheres use this as case study as to how extraterritorial state action will be considered in the future and further solidify the individual nature of the rights in the global arena.

States cannot be permitted to believe that explicit torture and abuse are permitted simply because their actions exist in what has been deemed a "legal black hole" due to the territorial uncertainty that underlines extraterritorial state activity, Human rights are individual in nature and are triggered solely by the person's status as a human being. Such an acceptance of the "legal black hole" would devolve the existence of the international human rights law, as well as the legitimacy associated with the notion that human rights are capable of being sufficiently protected in this modern era. As Eleanor Roosevelt stated,

The basic problem confronting the world today, as I said in the beginning, is the preservation of human freedom for the individual and consequently for the society of which he is a part. We are fighting this battle again today as it was fought at the time of the French Revolution and at the time of the American Revolution. The issue of human liberty is as decisive now as it was then.[149]

In order to maintain that progress, it is crucial that the discourse shift to speaking about the individual nature of human rights, and to illuminate the mistakes of Guantanamo Bay to ensure that history does not repeat itself.

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[149] Eleanor Roosevelt Speech, *supra* note 19.