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The Dialectics: Journal of Leadership, Politics, and Society is a refereed, multidisciplinary electronic publication housed at the Abington College of the Pennsylvania State University. The Journal’s aim is to promote discourse and scholarship and to encourage students to pursue and engage in thoughtful discourses on topics of societal importance.

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THEIR CITIES, OUR PROBLEM: RAPID URBANIZATION IN THE DEVELOPING WORLD

By Connor Cavanagh*
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Canada

The future of warfare lies in the streets, sewers, high-rise buildings, industrial parks, and the sprawl of houses, shacks, and shelters that form the broken cities of our world. We will fight elsewhere, but not so often, rarely as reluctantly, and never so brutally. Our recent military history is punctuated with city names--Tuzla, Mogadishu, Los Angeles, Beirut, Panama City, Hue, Saigon, Santo Domingo--but these encounters have been but a prologue, with the real drama still to come. – Lieutenant Colonel Ralph Peters, Office for the Deputy Chief of Staff for Intelligence, US Army

Imagine this scenario, if you will. Every morning when you wake up, the first thing that you do is check with the several armed guards around your house, to see if there were any disturbances on your property during the night. Before you enter your vehicle to go to work, you examine the undercarriage to make sure that no explosive devices were attached since you last parked it. On the way to your workplace, you travel in a convoy with two other vehicles filled with armed guards. During the day, you periodically check your cell phone, office phone, and e-mail accounts just in case your children’s bodyguards have sent you a message about a disturbance at their school. Once you return home from work, you double-check the “international extraction” clause in your insurance policy, and make sure that you have memorized all relevant procedures should such an operation become necessary. Finally, you tuck your children in for the night and head to bed yourself, ready to repeat this entire process over again in the morning.

What I have just described is not a pessimistic prediction for a dystopian future; rather, it is simply an emerging reality for transnational professionals working in the increasingly violent cities of the developing world. Cities such as Kinshasa (Democratic Republic of Congo), Lagos (Nigeria), and Cairo (Egypt) are growing at nearly twice the rate of the well-known megacities such as Shanghai and Mumbai, yet with none of the accompanying economic prosperity (UNHABITAT, 2008). Annual income in Kinshasa, for example, is expected to either stagnate or decline by 2030, which means that the city will have a GDP per capita of $300 US, and an average annual income of less than $100 US (Demographia, 2008). As the slums around the cities of Africa, Latin America, and Southeast Asia continue to grow despite an environment of economic decline, so does their capacity to erupt into violence. My thesis, therefore, is quite simple: the crises brought on by rapid urbanization in the developing world will have far-reaching consequences that no one—especially citizens of the United States and other Western countries—will be immune to. If we want to avoid a future in which our daily lives resemble the

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one described in the opening paragraph of this paper, we need to take action now in order to curb the rise of violence and socioeconomic grievance in the cities of the developing world.

There are three main reasons why Americans and other Westerners should be concerned about the uncontrolled growth of cities in the world’s poorest countries.

1) Conflict-ridden cities in failing states often require Western military intervention. The conflict analyst David Keen once noted that “those who wish to facilitate peace will be well advised to understand the nature of war” (Keen, 2000). The nature of modern warfare increasingly requires Western militaries to fight in the urban centers of the developing world. They fight both as aggressors (such as the Americans in Fallujah or the Israelis in Gaza) and as peacekeepers (such as the Canadians in Kigali or the Norwegians in Beirut). As a result, US military analysts and consultants have intensively explored the realities of fighting in the urban “battlespaces” of the developing world. In this area of emerging military literature, there is a definite consensus that the conflicts of the future will take place not in World War II-style battlefields; rather, most analysts assert that the violent conflicts of the twenty-first century will be fought in the rapidly growing cities of the developing world and their informal peripheries (Peters, 1996; Dalzell, 2006). Recent examples, however, reveal that this is a task which is easier said than done.

In August 1993, a battalion of US Army Rangers arrived in Mogadishu, Somalia to join the UN-mandated hunt for the infamous warlord Mohammed Farah Aideed, who was believed to be guilty of several crimes against humanity. In a botched assault on Aideed’s headquarters, two US Black Hawk helicopters were shot down, another two were damaged. In addition, eighteen US personnel were killed, and about eighty were injured (Rosenau, 1997). During the operation, it is estimated that 312 Somalis (both militiamen and civilians) were killed and that an additional 814 were injured (Rosenau, 1997). The raid was largely a failure, as Aideed himself was not captured and large numbers of civilian casualties turned the population’s sentiment against the US force, making it difficult for them to conduct other operations in the area. Although the official population of Mogadishu was around 500,000, some analysts estimate that the actual population of the city at the time of the raid was about 1,500,000 as a result of an influx of refugees seeking asylum from the violence in the countryside (Roseneau, 1997). Aideed’s force actively recruited these dispossessed former-villagers, for whom it was nearly impossible to find a job in the conventional economy. Today, the ‘Black Hawk Down’ debacle is largely seen as one of the most embarrassing failures of the US military, and was essentially a massive waste of resources not only in terms of finances but in human life as well.

Also in 1993, the Canadian-led UNAMIR mission began operating in Kigali, Rwanda, in an effort to maintain a peace agreement signed by both belligerents in the Rwandan civil war. Between April and July 1994, disenchanted ethnic Hutus—mostly in Kigali—began slaughtering the ethnic Tutsi elements of the population, and managed to kill between 800,000 and 1,200,000 people by the time the violence ended (Reyntjens, 1996). The outnumbered UNAMIR force was largely unable to stop the killing, even against the Interahamwe—an unorganized militia force which was armed primarily with machetes and other improvised weapons. A little-acknowledged fact about the Rwandan genocide is that it was mainly carried out in urban areas by groups which were organized out of the cities. The Rwandan civil war had created dire economic conditions in urban centers such as Kigali, and the violence which followed can thus partially be seen as the unleashing of pent-up frustration at years of unrest and economic decline.
2) Underdeveloped urban areas level the playing field between advanced militaries and loosely organized armed groups. The United States and the United Nations are not the only forces that have learned about urban combat the hard way. In December 1994, Russian troops and armored columns entered Grozny in an effort to depose Chechnya’s anti-Russian leader General Dzhokhar Dudayev. Although the Russians faced only irregular Chechen guerrilla units, they found themselves desperately outmatched in the narrow, winding streets of Grozny. Despite being outnumbered five to one and having no heavy weapons systems to speak of, the Chechens managed to inflict massive casualties on the invading force. The Russians finally left the city a year and a half later, but not without leaving behind thousands of dead soldiers and about seventy percent of their tanks in the streets of Grozny (Rosenau, 1997).

More recently, the ongoing war in Iraq has proved to be a contemporary lesson in the challenges of urban warfare for the US Army. Sadr City—Baghdad’s largest slum—has become a breeding ground for extremist militants. Now unofficially named “Vietnam Street,” the main thoroughfare through Sadr City has become a home base for the terrorist Mahdi Army (Davis, 2006). The little infrastructure which did exist in the area was destroyed during the initial US bombing campaign, and residents now see few reasons to support the American-led transition to democracy. Although US forces were extremely successful in winning the battle against Saddam Hussein’s Ba’ath regime, they are proving rather unsuccessful in winning the war for the hearts and minds of the Iraqi people, which by definition includes the growing numbers of disenchanted slum dwellers in places like Sadr City.

3) Large slums foster extremism, organized crime, and terrorism. One influential study from the US Army’s Arroyo Center for Research and Development suggests that the combination of rapid population growth, rapid urbanization, and economic decline has resulted in an “urbanization of insurgency” across the developing world (Hoffman and Taw, 1994). Whereas revolutionary movements during the Cold War tended to be rural-based, today’s insurgent groups recruit almost exclusively from the large pools of unemployed, disenfranchised young men in the world’s megaslums. Today, notable examples of urban-based insurgency include the rise of Hamas in Gaza, the Mahdi Army in Baghdad’s Sadr City, Hezbollah in Beirut, the Party of Islam in Mogadishu, and the narcotraficantes in Bogota and elsewhere in Latin America (Davis, 2006). Indeed, one recent report from the US Joint Special Operations University went so far as to conclude that the growth of “informal peripheral housing” was the single greatest national security risk for Morocco, because slums inevitably provide safe havens for Islamic militants (Dalzell, 2006).

As such, urban rebellions can often be seen as “quasi-criminal” rather than ideological in nature (Collier, 2000). When a city becomes trapped in a vicious cycle of slum population growth, economic decline, and political impotence, disenfranchised slum dwellers will often turn to insurgency or organized crime for a source of income, if nothing else. Although some economists such as Hernando De Soto assert that urban poverty can be remedied through the provision of micro-credit and land tenure (De Soto, 2001), such legal strategies for upward social mobility are often impossible in situations of total economic collapse. Such is the situation today in cities like Kinshasa, Mogadishu, and Harare, where economic conditions are so unstable that foreign direct investment is almost nonexistent.
The United States of America, 2025

As you may already know, 2008 was the first year in human history in which more people live in cities than in rural areas (UNHABITAT, 2008). This is an ominous milestone for a world that is increasingly marked by dramatic poverty and social unrest. Of the world’s six billion inhabitants, one billion now live in the squalid shantytowns and slums of the developing world—in other words, 78% of urbanites in the world’s least developed countries will live (and probably die) in a slum (Davis, 2006). Right now, an entire generation is growing up entirely within the informal peripheries of cities like Kinshasa, Harare, Baghdad, Phnom Penh, Caracas, and Mogadishu. These children will very soon be young adults, and may be tempted to unleash their discontent through violence if no other avenues are available.

Thus, America now stands at a crossroads. We have two main options: the first is fortification and isolation—we can attempt to create an impenetrable nation that is immune (or nearly immune) to the socioeconomic cataclysms that will continue to ravage the developing world. We can clamp down on immigration, increase the national defense budget, and invest in private sector security firms so that those of us who can afford it will be protected like the hypothetical individual described in this paper’s opening paragraph. In other words, we can raise the walls, circle the wagons, and pretend like we can insulate ourselves from the rest of the world.

The truth, however, is that no one in our increasingly interconnected international community is going to be immune to the unrest created by the combination of life-threatening poverty and rapid urbanization in the developing world. We have a second option, therefore, which is this: we can redouble our efforts to form development partnerships with the poorest countries in the world, in an effort to find win-win solutions to the problems of absolute poverty and economic collapse. We can reach out to the impoverished, disenchanted youth of the developing world and remind them that America stands for peace, prosperity, and a better way of life. If we neglect to do so, events such as those of September 11, 2001 may be all too common in the United States of America in 2025.

References


Uganda: Confronting a Human Rights Crisis

By Meagan Boonie*

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“What began as a vaguely ideological war against perceived ethnic discrimination by the government degenerated into something close to madness” (McCrummen, 2008). Such is the case of the 23-year crisis surrounding the Lord’s Resistance Army in Uganda. It is rooted in the country’s political turmoil, present since its independence in 1962, and it has become a human rights tragedy plaguing Central Africa. Over the years, unspeakable crimes against civilians have been committed by the LRA, including the abduction of tens of thousands of children, killing and mutilating thousands more. The Ugandan national army, known today as the Ugandan People’s Defense Force (UPDF), is also guilty of committing atrocities, including killing civilians and raping women—carelessly transmitting HIV/AIDS throughout the country.

Uganda has been plagued by this war for almost two dozen years. It is clear that a series of steps must be taken to help remedy the immediate situation by stopping the violence that is terrorizing Ugandans, providing a return to a normal climate, allowing the Internally Displaced Persons to safely return home, and holding accountable all who are guilty of these human rights abuses. It is also important to provide the foundation for a stable and healthy Uganda in the long term, by pushing for a transparent and accountable government and rehabilitating the traumatized.

Uganda’s regionalization can be traced back to the times of British Colonization; it sets the stage for years of conflict between the northern and southern regions of Uganda. The southern region’s climate and resources were deemed more economically viable than those of Northern Uganda. A “divide and rule” strategy was implemented and found to be especially helpful to the British since the people of Uganda were pinned against each other, reducing the possibility of a rebellion. This North-South divide marks an extremely notable theme in Uganda, past and present.

When Uganda gained its independence from the British Empire in 1962, Milton Obote was chosen as the first Prime Minister. He was thrown out of office nine years later in 1971 by Colonel Idi Amin, an event that commenced a power struggle between the two figures. Between 1971 and 1979, more than 300,000 civilians were executed, suspected of threatening Amin’s power. When Obote reinstated himself as dictator of Uganda in 1980, current president Yoweri Museveni created the National Resistance Army with the hopes of ousting Obote, which he did successfully in 1986. It was this overthrow that set the stage for the Lord’s Resistance Army to assume power and create what Senator Sam Brownback of Kansas later described as the “world’s most neglected humanitarian crisis” (US Dep’t of Congress, 2009).

In an effort to extinguish Museveni and his National Resistance Army throughout the country, Obote called upon the national military, at the time named the Ugandan National Liberation Army. This was the same army Amin had used less than a decade earlier to secure his own position in Ugandan politics against Obote. Between the two administrations, the UNLA is

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responsible for more than 400,000 civilian deaths, a clear and unfortunate indication that Ugandans are no strangers to violence. When, in January 1986, Museveni’s army captured the nation’s capital, Kampala—located in Southern Uganda—he took hold of the government. Because the UNLA drew the vast majority of its manpower from the Acholi region of Northern Uganda, many today accuse Museveni of ignoring the needs of the Acholi people. It is noteworthy that this conflict between the government and the Acholi reflects the North-South divide that was so prevalent decades before.

Figures other than politicians and army generals have also played a prominent role in the events that have shaped Uganda’s current conflicts. One such prominent figure was Alice “Lakwena” Auma, who rose to national prominence in 1985. Auma claimed that she was channeling the spirit of a dead Italian army officer named “Lakwena” and believed this to be divinely inspired by Jesus Christ. She thus argued that by seizing national power, she could carry out her duties of cleansing the Acholi for their sins (the crimes they committed while serving in the UNLA). Auma called this the Holy Spirit Movement, which quickly gained a group of followers. Spirituality proved to be an integral part of the Holy Spirit Movement. Auma urged her followers to smear shea oil on their skin, with the promise that it would serve as a shield against bullets. Auma’s power was short lived, however, and she fled to Kenya in 1986. Though her movement faded, Joseph Kony, the founder and current leader of the Lord’s Resistance Army used Alice Auma as a stepping stone for gaining his own power. In April 1987, he claimed to be Alice’s cousin and maintained that the spirit “Lakwena” was manifesting itself through him. Kony’s strategy worked. He attracted many of Auma’s followers, and immediately formed the Lord’s Salvation Army, which later changed its name to the United Salvation Christian Army. It became the Lord’s Resistance Army—the name used today—in 1994.

For the past 22 years, Kony has been waging a war on Museveni’s administration. He still seeks to “cleanse the Acholi,” as did Alice Auma years before. To him, the “cleansing” has meant massacre. Kony contends that the LRA is fighting for a theocratic state based on The Ten Commandments, but he has implemented guerilla tactics and has been resistance to peace talks. Kony’s actions have left many skeptical. According to Robert Gersony, an analyst of the conflict, “The LRA has no political program or ideology, at least one that the local population has heard or can understand” (US Embassy in Kampala, Uganda, 1997).

To most, the Lord’s Resistance Army is known for its human rights abuses and its brutality (cutting off the victims’ lips is done as a LRA trademark). The group’s soldiers are responsible for the deaths and disfigurement of thousands of Ugandans, Sudanese, and Congolese, the displacement of two million more, and the abduction of more than 20,000 children, forced to work as child soldiers and sex slaves (Gettleman & Schmitt, 2009). The child soldiers are physically assaulted and emotionally traumatized. An abducted child interviewed by the Human Rights Watch reported, “Early on when we were captured, the LRA explained to us that all five brothers couldn’t serve in the LRA because we would not perform well. So they tied up my two younger brothers and invited us to watch. Then they beat them with sticks until the two of them died. They told us it would give us strength to fight. My youngest brother was nine years old” (Weber, Becker & Rone, 2003).

When the children brought into the LRA are not fighters, they become either a slave, or they are given to a commander as a wife. The treatment of wives varies: some claim they are being treated much better than when they were slaves, but many report having been beaten daily. At World Vision—a rehabilitation center in Northern Uganda—nearly 85% of all children receiving care have one or more STD, most frequently syphilis and gonorrhea. What’s worse is
the astounding prevalence of HIV/AIDS among the children abducted by the LRA. Among the 83 children tested at the center, 43 of those were found positive (Weber, Becker & Rone 2003). Sadly, the former abductees deal not only with the physical and mental abuse that they suffered, not only with the scars left on their bodies by being physically assaulted, but also with diseases that are often either too expensive to treat, or simply incurable.

Simply put, the trauma suffered by the LRA’s abductees does not stay in the LRA camps; it follows the victims home and for the rest of their lives. Many Ugandans, be it because of Post Traumatic Stress Disorder or blunt force trauma to the head suffer from mental illnesses. According to an Integrated Regional Information Networks report gathered for the United Nations in October 2008, an estimated 48% of the Internally Displaced Persons (IDPs) in the districts of Gulu, Kitgum, and Amuru suffer from PTSD, 24.8% have exhibited suicidal tendencies, and 24% suffer from depression (2008). Recovering from the havoc that the LRA has created clearly demands some rehabilitation for those suffering from emotional trauma.

Integration into society also poses a significant obstacle. While some abductees are lucky enough to escape the LRA, they often find themselves uncomfortable—and, in some cases, resistant to—returning home. Women who served as wives in the LRA, for example, are often not taken back by their husbands. An employee for Caritas, an organization that deals with poverty throughout the world, describes the difficulties faced by former LRA wives, “They know they are a burden for their relatives, they will not be able to go to school if they return with children, and they don’t see any future for themselves here” (Weber, Becker & Rone, 2003). Additionally, children often hesitate to return home because they fear a re-abduction. In fact, about 61% of escaped children who were held by the LRA for more than two years reported fearing for their lives.

As an increasing amount of attention has been brought to the crisis in Uganda, the Lord’s Resistance Army’s presence appears to have diminished since 2005. In 2001, the United States declared the LRA as a terrorist organization, and, in 2005, the International Criminal Court issued 33 arrest warrants against Joseph Kony and some of his top officials for war crimes and crimes against humanity. As a response to these arrest warrants, Kony and his top officials immediately retreated out of Uganda and into both Sudan and the Democratic Republic of Congo. Though the violence in Uganda has thus decreased dramatically, the number of attacks in Sudan and the Democratic Republic of Congo has escalated. Most notably, the Christmas Massacre of 2008 left an estimated 189 people dead in northeastern Congo. The LRA spent three days in late December burning down houses and shops, and storming a Catholic Church service. Uganda, Sudan and the Democratic Republic of Congo have launched a military operation called Thunderclap to combat the LRA. As of March 15th, 2009 Ugandan and Sudanese military forces began withdrawing from DR Congo, perhaps a sign that there have been some improvements in the situation. According to General Etumba, chief of staff for the Democratic Republic of Congo’s national military, “the LRA is left without any central command, its communications system has been made ineffective and their troops have been routed” (Gettleman & Schmitt, 2009). While the transnational Operation Thunderclap has aimed to capture Joseph Kony, the LRA has been forced to retreat into the dense Central African jungle, a terrain that, unfortunately, the LRA knows better than most national armies.

Consequently, a major dilemma has arisen out of Kony’s apparent disappearance due to the arrest warrants and Operation Thunderclap: In recent years, Kony has reportedly come close to signing a peace accord with Museveni, the Ugandan president, but one of his requirements for the agreement has been that all charges be dropped. Although peace meetings have been
scheduled from time to time, Kony has consistently failed to appear to negotiate the terms. The question begged now is, “is it worth it to do away with the ICC arrest warrants in exchange for Kony’s resurfacing?”

More recently, the United States has started work with the governments of both Uganda and the Democratic Republic of Congo, helping to plan an offensive on the LRA in early 2009. However, the attack itself, carried out by the Ugandan and Congolese troops, was seen across the board as a blatant failure. It is reported that there was little precaution taken—if any—to ensure the safety of civilians. In fact, as many as 900 civilians were killed in the midst of the attack. Julie Spiegel of the Enough Project, a campaign against genocide, has been quoted as saying, “The operation was poorly planned and poorly executed. The massacres were the LRA’s standard operating procedure, and the regional governments knew this” (Gettleman & Schmitt, 2009). More recent attacks have yielded some progress: the LRA’s command center as well as its food supply centers were taken over, and about 100 children have been rescued as a result. However, on the whole, the attacks have been seen as “swatting a hornet’s nest” (Gettleman & Schmitt, 2009). That is to say, the army is now scattered and will be more difficult to wipe out.

In March 2009, Russ Feingold, Senator from Wisconsin and the Chairman of the Subcommittee on African Affairs, highlighted the urgency of the situation for President Barack Obama. Senator Feingold condemned Operation Thunderclap by saying, “thus far, this operation has resulted in the worst-case scenario: it has failed to stop the LRA, while spurring the rebels to intensify their attacks against civilians” (United States Department of Congress, 2009). Feingold urged the United States to help Uganda plan better military offensives, ones that focus on the safety of the civilians but can also counteract an anticipated LRA response. Senator Feingold has made it clear that the United States must consider Uganda’s health and stability in the long run, with regards to both politics and the economy. Finally, he has urged the involvement of the United States Africa Command (AFRICOM), an arm of the United States Department of Defense that conducts the United States military operations and military-to-military relations with 53 African countries. Feingold contends, “By putting in place such a proactive strategy, we can better help the region’s leaders to get this mission right and protect their people from the LRA’s continuing atrocities. This could finally pave the way for a new future for this region and its people, and help shape an AFRICOM that works effectively for both Africa and America’s security interests” (United States Department of Congress, 2009).

While most of the crises’ focus and proposed solutions have been on the LRA, and while it would be easy to pin all the wrongdoings solely on the group, the sad truth is that crimes have also been committed by he Ugandan People’s Defense Force, Uganda’s national military, which is guilty of detaining civilians without cause and responsible for extrajudicial torture and execution of detainees. Many female captives claim to have been raped by UPDF officers and have been found HIV positive as a result of the assault. According to a Human Rights Watch report, “in February 2003 members of parliament visited Kigo Prison and interviewed, among others, two of these nineteen [prisoners], who said that the UPDF tortured them during their stay in the UPDF Gulu barracks. Aids Lagulu claimed that she was gang-raped during her detention there. Tony Kitara, the local councilor of Bungatira, Gulu district, reported that he was tortured in Hulu barracks. He also alleged that the army kept snakes in the torture cell” (Weber, Becker & Rone, 2003). Clearly, remedying the crisis not only requires a dismantling of the LRA, but must also entail a less corrupt Ugandan military.

The situation in Uganda is clearly grim. As a Ugandan village chief recently noted, “Fear has taken over. We are alive today, but we don’t know about tomorrow” (O’Reilly, 2009).
It is evident that much more needs to be done to address the crises. I suggest the following:

1) The governments of the affected countries (Uganda, Sudan, and the Democratic Republic of Congo) must not disregard the International Criminal Court’s arrest warrants. The warrants are not only necessary for ensuring that Kony never rises to power again, but also for setting an example in the future. Too often are powerful criminals bargained with, sending the message that there are no consequences for reeking havoc in unstable countries.

2) The governmental expenditures of the involved countries must be transparent to ensure that no money or arms are given to the Lord’s Resistance Army.

3) The United States must assist in the military action against the LRA. It is clear that Uganda, Sudan and the Democratic Republic of Congo alone cannot capture Kony and release his captives. A greater US involvement is therefore crucial.

4) Runways must be built for the UN peacekeeping force MONUC—the United Nations Organization Mission in DR Congo. One of the main obstacles MONUC is facing is getting food and medical supplies to the affected areas. The building of runways will result in the safe and efficient transportation of such supplies.

5) The Government of Uganda, as well as the Ugandan People’s Defense Force, must investigate and follow through with cases of human rights abuse. This must apply to militants within the UPDF as well. Specifically, the UPDF must cease its torture and rape activities that it has been known to commit. By enforcing human rights laws, there is hope for a new era in Uganda, where civilians need not fear for their safety.

6) Donor countries must support peacekeeping troops in Uganda to monitor the country’s human rights commitments.

7) Rehabilitation centers must be built around the country to remedy the atrocities. These centers must address the numerous diseases that are infecting the population as well as mental illnesses such as Post Traumatic Stress Disorder. Training Ugandans to work in these rehabilitation centers can also serve as a stage for building a stronger economy.

The Dalai Lama once said, “I believe that to meet the challenges of our times, human beings will have to learn to develop a greater sense of universal responsibility. Each one of us must learn to work not jut for oneself, one’s own family or nation, but for the benefit of all humankind. Universal responsibility is the key to universal survival. It is the best foundation for universal peace.”

Certainly, in an economic climate as tumultuous as ours, human rights issues seem to be put on the backburner. But it has been shown time and time again that ensuring the welfare of humanity often means reaching across national borders and political divides. By helping to create stronger countries throughout the world, by developing a greater sense of universal responsibility, we can truly become a stronger, more secure civilization.
References


The past thirty years have been marked by tremendous economic progress in China. Unfortunately, that economic progress has not been matched politically or socially. In terms of socio-political standards, China is not a rule of law nation. The United States could stand to benefit from a stronger rule of law climate in China. The question then becomes “how?” How does one nation go about improving the rule of law in another? Unfortunately, there is no quick fix. One of the ways the United States can accomplish this goal indirectly is to support university legal aid clinics. By providing additional funding to university legal aid clinics, the United States can hope to ensure that China’s economic rise is accompanied by an adherence to the rule of law standards.

China’s economic growth numbers are staggering. For most of the decade, the country’s growth rate in terms of GDP has averaged more than 10% a year (Keidel, 2008). This breakneck growth is unmatched by any other country during the same period. Even amidst the current financial crisis, China is still expected to maintain growth, in terms of GDP, in excess of 6% for this year (Economist Intelligence Unit, 2009). Compare that to the expected negative growth rates in Europe, the United States, and Central Asia (World Bank, 2009). Should China’s level of increasing prosperity continue, a reshuffling of the rankings of the most prosperous nations will occur. By 2035, China will have overtaken the United States as the largest country in terms of GDP (Keidel, 2008).

Yet, China’s exponential economic growth has failed to give rise to an increased adherence to international rule of law standards. Rule of law is commonly understood as a legal-political regime that restricts government action while preserving certain individual liberties. In theory, the rule of law is a system that ensures that the rights of citizens are protected from arbitrary and abusive use of power from the government (Yu, 2009). Unfortunately, continuing crackdowns on China’s ethnic minority citizens, ongoing manipulation of the media, and more severe repression of human rights defenders indicate that China is not a rule of law nation.

Even the Chinese government itself acknowledges this critical shortcoming. In a recently published White Paper (2008), the Information Office of the State Council of the People’s Republic of China wrote, “The development of democracy and the rule of law still fall short of the needs of economic and social development.” In other words, the government knows the country is being hurt by the lack of rule of law.

While the lack of the rule of law in China may not be hurting the United States, the United States certainly could benefit from a stronger rule of law climate in China. A stronger rule of law could lead China to become a world power within the existing international

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framework, support American interests, and further American values like democracy and equality (Kapp, 1998). A China that fits within the existing international framework, supports American interests, and furthers American values, like democracy, would be an ideal global partner for the United States. Both nations would espouse similar legal standards. Both nations would work through the United Nations and other international institutions in addressing global issues. And, both nations would often have, and promote, overlapping priorities.

Improving adherence to the rule of law in China is an ambitious task, however. What distinguishes a rule of law country from one that is not are a host of issues such as government transparency, unbiased judges, codified laws, etc. No nation can hope to take on all of those challenges at once. Thus, the most pressing issues prohibiting China from becoming a rule of law country must be prioritized and analyzed one issue at a time. Among the more specific problems restraining China from becoming a rule of law nation are an outdated legal framework, protectionism, bribery among Chinese officials, and a limited awareness of the law among the public (Information Office of the State Council of the People’s Republic of China, 2008). This last problem, noting a disconnect between the public and the rule of law concept, is particularly interesting, as it is the one issue that does not entirely concern government policy.

The disconnect between the public and the law in China is a partial result of the existing limitations of legal aid clinics that provide free legal assistance to citizens. Legal assistance includes legal counseling, drafting legal documents, representation in criminal, civil and administrative proceedings, non-litigation legal issues, and notarization (Huaiqing, 2008). Often, the services are primarily aimed at low-income people. Legal aid clinics fall under one of two types—government-sponsored or non-governmental organizations. Neither has done enough to connect the public to the law. Thus, neither has done enough to aid the rule of law in China.

The majority of legal aid clinics in China are government-sponsored. By the end of 2007, there were 3,239 legal aid organizations (Congressional-Executive Commission on China, 2008). China had 12,285 full-time legal aid personnel, including 5,927 lawyers and 76,890 registered volunteers working in the clinics. During that year, government spending for legal aid services reached an all-time high of 520 million yuan or about $76 million (2.37 million Chinese receive legal aid since 2003, 2008). Government legal aid clinics are vast, patchwork funded, and seemingly well staffed.

Legal aid by the government began in China in 1994 when the Ministry of Justice proposed a legal aid system. By the end of that year, only four cities (Beijing, Shanghai, Guangzhou and Qingdao) had government-sponsored legal aid clinics (Rule of Law in China, 2004). The institution was strengthened in 1996 with the passing of the Lawyers Law and the revision of the Criminal Procedure Law (Legal System of China, n.d.). Taken together, these laws allowed citizens, who needed legal assistance but could not afford it, to obtain legal counsel in criminal matters. The Lawyers Law also established a loose framework for a large national legal aid system.

To serve China’s 1.3 billion people spread over 22 provinces, the framework encompassed four levels separated between a national level, a provincial level, a prefecture/city level, and a county district level. This four-tiered system was constructed to work in unison in providing legal assistance to every part of China. It was solidified in 2003 with the passing of Regulations on Legal Aid. In accordance with the provisions of the Regulations on Legal Aid, legal matters such as criminal, civil and administrative proceedings and non-litigation matters fell within the scope of legal aid (The Legal Aid System, n.d.). It was around this time that China
became the country with the largest government legal aid system in the world (Taylor, 2002). From 2003 until now, government legal aid has continued to expand.

China’s governmental legal aid system does face significant problems, however. The funding system for legal aid often leads to poorer provinces receiving substantially less money than their wealthier counterparts (Zhou, 2002). Dependent women are sometimes disqualified for legal aid because of the use of household income as a determinant as to who receives aid from the government (Huiqing, 2008). The system of forcing lawyers to take legal aid cases pro bono in China often times leads to poor and unenthusiastic representation (China’s legal aid is multiplying, n.d.). In addition, governmental legal aid clinics are limited by the cases they can undertake. They often shy away from controversial matters. Even if they do undertake a sensitive case, they will often not represent their client in court (Kao, 2004). All of these issues indicate that the government system has not done enough to foster rule of law in China. In not providing fair and accessible services uniformly, the government is allowing the public to remain disconnected from the law.

Non-governmental (NGO) legal aid organizations are also important in China. Organizations and universities both have legal aid clinics that fall under this category. As of 2008, the All China Women’s Federation, an NGO, claimed to have set up 2,828 legal aid clinics; the Communist Youth League set up 1,749 local legal service centers (Huiqing, 2008). In addition, over six prominent universities maintained legal aid clinics by the end of 2008. The first university NGO legal aid clinic in China was set up as an NGO through Wuhan University in 1992. Named the Center for the Protection of Rights of Disadvantaged Citizens (CPRDC), this clinic aimed to extend legal aid in administrative hearings to disadvantaged citizens comprised of women, children, and handicapped people (Zhou, 2002). Since that time, numerous other legal aid clinics at universities have been started including those at Beijing University, Renmin University, and Nanjing University. In addition, NGOs like the All China Women’s Federation have partnered with the government to become a prominent force in furtherance of legal aid.

NGO legal aid clinics face their own problems. NGOs like the All China Women’s Federation are funded in large part by the government. Consistent government funding has enabled some NGOs to be able to establish and finance independent legal aid clinics. But direct funding by the government raises questions about whether government-assisted NGOs, like the All China Women’s Federation, are willing to challenge the state in controversial matters. University legal aid clinics, on the other hand, are often underfunded. Despite being associated with universities, university NGOs receive no money from the state or the schools with which they are associated. Most university NGOs are almost completely funded by organizations within the United States (China’s legal aid is multiplying, n.d.).

The NGO legal aid system simply has not done enough to promote rule of law in China because it can only offer limited services. The university legal aid clinics have succeeded in helping the public more fully understand the legal system, but they are only a very small part of the legal aid system. University legal aid clinics offer quality and enthusiastic legal aid as exemplified by the following accomplishments of CPRDC in 2008: servicing 2020 visitors, representing a client who won a significant case against the government, hosting delegations to other countries to examine ways to improve clinic services, and exposing hundreds of law students to legal aid (The Center for Protection for the Rights of Disadvantaged Citizens of Wuhan University, 2009). By exposing aspiring lawyers to legal aid work, they are connecting the public to the law. More importantly, these university legal aid clinics are helping to create a
generation of lawyers who champion the rule of law. While success at CPRDC is admirable, it
begs the question why only a small percentage of law schools in China maintain legal aid clinics.

Additional funding to university legal aid clinics in China would improve legal aid services. If university legal aid clinics were instituted at all existing and newly planned law schools, citizens would not be forced to accept the restrictive legal aid offered by government-sponsored or government-supported legal aid clinics. Citizens would then be able to access truly unbiased representation willing to take on controversial cases. The quality of legal aid service would improve significantly through the advent of eager law students dedicated to their clients. An expansion of services offered by legal aid clinics would bridge the disconnect between the public and the law. China legal scholar Jamie P. Hornsley has noted the link between increasing legal aid and raising legal consciousness: “Continued development of legal aid programs by government and non-governmental organizations is another significant step in the direction of providing increased access to the legal system and enhanced legal consciousness within society” (Center for Strategic and International Studies, 2007).

Bridging the disconnect between the public and the law would strengthen rule of law in China. Ideally, citizens would become more aware of their rights, or lack thereof, with the realization that they could access fair and unbiased representation regardless of income level. To strengthen rule of law in China, the United States must provide additional funding to the university legal aid clinics in the country. The United States already provides money to NGO legal aid organizations in China. In 2008, the United States spent approximately $15 million on this type of initiative (Congressional Research Service, 2008). But, the current funding allocations by the U.S. government are not enough, as noted in the recommendations of the Congressional-Executive Commission on China’s annual report. One of the recommendations was to “bolster program funding to support civil society development and capacity building in China” (2008). The Commission noted the importance of civil society organizations, like NGO university legal aid clinics, in promoting rule of law in the country.

Providing additional funding to university legal aid clinics in China is vital, but not the total solution to the larger rule of law issue in China. It represents one solution to the many challenges China faces in becoming a rule of law nation. Yet, only by addressing one challenge at a time can the United States hope to raise legal consciousness nationwide in this emerging economic powerhouse. By doing so, the United States will be furthering its national interests and will be ensuring that the world of the future is one in which the most powerful nations respect the rights of their citizens and, hopefully, each other.

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Social Capital in Urban Public School Leadership

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Urban schools in the United States struggle amidst poverty, despair and an overall attitude of disenfranchisement. Poor performance on standardized tests, endemic violence and significant staffing issues have left urban schools the education center of last resort in the eyes of many parents, reserved only for those students too poor to afford private tuition. The breakdown in urban schools is related more fundamentally to a breakdown in the basic stabilizers in any social system: trust, transparency, and collaboration. As part of a leadership strategy, social capital can reinforce these stabilizers and thereby create fertile ground for substantive reform.

The Social Capital Dynamic in School Leadership

School leadership is not only administrative but inherently social and political. Goldring and Greenfield (2002, p. 3-6) identify four social characteristics unique to school leadership. The first characteristic is the need for moral agency. Where values conflict, moral agency is an essential aspect of arbitrating disputes: “in a pluralistic society ... it follows that the ends—the common good, the public interest—will, by definition, be multiple and often conflicting” (Jackson, 1995, p. 5). In education, policy disputes are frequently specific expressions of general moral principles like the right to unionize or the responsibility of the state to children. School leaders must evaluate and prioritize among these principles when actors like teachers unions, parent organizations or lawmakers place them in conflict. Second, school leaders are stewards of the public trust. School constituencies demand quality schools which provide the best outcomes for their children while not advocating for specifics; school leaders make significant policy decisions in their place. When schools produce a “poor product,” their essential role in children's lives draws a unique level of criticism from the public (Jackson, 1995, p. 3). Third, school leadership is unique because of the complexity of teaching and administration, made particularly intense with the increased attention to pedagogy applied in the last twenty years. School leaders must define what makes a good teacher or what curricula prepare students for the modern economy where answers to these questions are inconclusive, contradictory and constantly evolving. The most important characteristic of school leadership, however, is the highly people-intensive character of education delivery. School leaders are “people working with and through people to influence people” (Goldring and Greenfield, 2002, p. 6), subject to the will of the people. Although all local administration is to a certain extent social, school leaders are expected to balance running a bureaucracy, pleasing taxpayers and legislators, and caring for a constituency of the young and dependent.

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Urban school districts, plagued by poor performance and high leadership turnover, present even stronger political challenges. First, poor performance on standardized tests leads urban political constituencies to demand revolutionary changes in school agendas (Cronan and Usdan, 2003, p. 184). Second, urban districts are also the largest source of power for teachers unions (Buchanan, 2006, p. 69), which can cause even more daunting labor disputes in districts that employ hundreds or thousands of teachers. Finally, the inevitable rejection of one interest group’s agenda in favor of another’s causes a significant political headache in the urban district. “If a school superintendent in a town of 5,000 residents angers 1% of the population, he or she can answer all of their critics in a single room. If a superintendent in a large metropolitan area upsets 1% of his or her constituents, he or she is facing a small army” (Ibid., p. 83). These three challenges produce rapid leadership turnover among urban public school superintendents. The average tenure of an urban superintendent is 3.5 years; only 18% have been in office for five or more years. (Council of the Great City Schools, 2008/9). Rapid leadership turnover can in turn produce a “bunker mentality” in which school system veterans reject new ideas and new leadership as temporary and cosmetic changes (Buchanan, 2006, p. 22). Lack of support for reforms perpetuates poor performance and high turnover, leading many to believe that large urban districts have intrinsic problems which are impossible to solve.

Mayoral Control and Social Capital Breakdown

Recently implemented in a number of urban districts, mayoral control is a reform designed to remove the political factors which create chronic dysfunction in school systems. In a mayoral control system, the schools chief is appointed by the mayor and is directly accountable to the mayor's office, with limited or no leadership control by school boards. This clear line of accountability creates, proponents argue, “a clear and compelling incentive” for mayors to fix schools because those mayors are absolutely accountable for a district's success or failure (Hannaway, 2007). Mayoral control also makes coordination between school leaders and the community even more necessary. Before mayoral control, parents could lobby a number of democratically-elected school board members regarding key issues; the mayor’s office is less accessible to voters (Labbé, 2008). In New York City, the contentious leadership of Chancellor Joel Klein has demonstrated mayoral control's vulnerabilities.

Since his appointment in 2002 as New York's first chancellor under mayoral control, Klein has pursued an expansive agenda, including an overhaul of admissions to gifted programs, the creation of over 300 small and charter schools, and the replacement of several principals. However, the perception of lawmakers and teachers that Klein is distant and antagonistic—a leadership style which former New York City teachers union head Randi Weingarten calls “my way or the highway” (Gootman, 2009)—has proven a significant stumbling block to the chancellor's agenda. The Panel for Education Policy, a group charged with district oversight and data collection, is perceived by many lawmakers as a rubber stamp for Klein's agenda (Hernandez, 2009). Principal turnover in the district is high as many school leaders feel overwhelmed by the “Herculean task” of meeting Klein's expectations (Gootman and Gebeloff, 2009). Klein's leadership style has brought intense scrutiny on the mayoral control model. On July 1, 2009, the New York State Assembly dismantled mayoral control and restored a traditional school board leadership program. While as of this writing Klein remains chancellor and mayoral control may be reinstated, blame for this setback lies clearly at Klein's feet. Klein's
leadership style, not the legitimacy of the reforms he proposes, has been the largest obstacle to his success.

Mayoral control proposes that school leaders are better able to implement reforms where large constituencies such as school boards or electorates are prevented from applying direct political pressure. Under the traditional “constituency of many” model, they argue, the pressure to keep inefficient schools open or retain poor teachers will overwhelm school leaders who rely on pleasing everyone. Mayoral control proposes a “constituency of one” model in which political pressure is applied to school leaders indirectly through the mayor. The mayor, the model argues, is under political pressure to create a quality school system regardless of means and will pick school leaders accordingly. Implemented in isolation, the model ensures its own downfall by alienating voters, who value the political proximity school boards provide them (Land, 2002, p. 233), and perpetuating the high turnover and disenchantment which create the bunker mentality. While a constituency of one may be preferable for policy selection, policy implementation requires the achievement of broad consensus.

In one sense, social capital breakdown is bred by mayoral control: voters expect mayors to appoint school leaders who will institute the kinds of reforms which ruffle feathers among district veterans. In another sense, however, the factors which drive the mayoral control movement—low-performing school bureaucracies which appear entrenched and unresponsive to voters' concerns—are themselves indicators of a school system which has lost the community investment necessary to drive lasting reform. A report on school governance commissioned by the Public Advocate of New York City (2009) recommended significant reforms to the city's mayoral control model, including the reinstatement of Community District Education Councils and School Leadership Teams to provide a clear link between parents and policy development. Mayoral control, they write, “is not a panacea for the problems that hamper urban schools. It is not a guarantee. A sound governance model is a balancing act between competing ideals—the need for strong and decisive leadership and the need for democratic deliberation” (5). The Government Accountability Office (2009) made similar recommendations to the District of Columbia School System, also experimenting with mayoral control: “[s]takeholder consultation in planning and implementation efforts can help create a basic understanding of the competing demands that confront most agencies and the limited resources available to them ...Continuing to operate without a more formal mechanism—other than community forums or e-mails—for stakeholder involvement could diminish support for the reform efforts, undermine their sustainability, and ultimately compromise the potential gains in student achievement” (40).

Sound governance is always leader-dependent. Klein's unwillingness to pursue consensus-driven policies demonstrates mayoral control's central flaw: under mayoral control, the incentive to develop social capital is completely eliminated and a constituency of one mentality produces leaders ill-suited for collaborative reform.

**Recommendations**

The effectiveness of school reforms is linked inextricably to the political effectiveness of the school leaders who propose them. Political effectiveness, however, is not exclusively constituted by a leader's personal likability. The perceived responsiveness of a school leader to the concerns of teachers, parents, lawmakers and students forms a community in which each actor feels they play a part in crafting policy. The relationship between school leaders and this community forges “the social and economic linkages vital to the formation of social capital as a
public good” (Mawhinney, 2002, p. 235). Reformers who serve the “constituency of many” achieve legitimacy for their reforms, which alongside rigor and relevance constitutes an essential element to successful systemic change.

First, leaders must cultivate a large base at the center of policy disputes. Community governance is based on a proper understanding of power. For most leaders, power is the ability to influence others. In order to govern differently, the administrator must expand her definition of power to reflect multiple paradigms of action (Watson and Grogan, 2005, p. 67). For school leaders, one important paradigm is the ability to act in response to the needs of the multiple and conflicting interest groups who depend on public schools. School leaders are dependent on diverse actors: on the school boards and legislators who appoint them, on the parents who advocate for funding and policy on the state and federal level, and most importantly on the teachers who provide the crucial labor power which drives the school service machine. “To some, teachers unions are an obstinate barrier keeping school systems from true educational reform. To others, they are the sturdy shield protecting the rights of employees against an aggressive, uncaring leadership looking to cut costs on teachers’ backs” (Buchanan, 2006, p. 69). Where extreme views like these are cultivated, or key actors are disregarded, a school leader will lose a nexus of support which is essential to even the most basic school operations. Utilizing broad-based paradigms of power, school leaders can diffuse these conflicts and cultivate a community responsive to their reform mindset.

Once incorporated into a community at the beginning of a leader's tenure, the interests of teachers must be included in a participatory decision making model during policy adoption. Leaders typically select one of two styles: individual decision making, where the leader is solely responsible for leadership decisions, or group decision making, where authority is delegated to boards or committees. Individual decision making is subject to confirmation bias, overconfidence and a tendency to evaluate alternatives in pairs instead of as a whole (Sharp and Walter, 2004, p. 82). Group decision making models, while a notable improvement in creativity and accountability, are often slow to act (Ibid., p. 83-4). Not surprisingly, extensive criticism has been levied against school boards, which are sometimes subject to special interest group influence and unable to collaborate with superintendents (Land, 2002, p. 236). Neither the individual nor the group approaches is appropriate for social capital formation: both are motivated by notions of power which treat teachers as an enemy either best ignored or best placated.

In a social capital-based leadership model, input is not restricted to those given political power. Under the guidance of strong leadership, ad hoc groups of teachers and parents produce better policy long-term by increasing community participation in policy implementation. A participatory model enhances trust between teachers and administration by allowing teachers to provide some agenda-setting and allowing their input in significant choices. School leaders can create a participatory decision making model by carefully weighing community needs in the implementation of reforms and by actively seeking input on the specifics of their reform agenda.

Finally, school leaders must integrate actors fully into the social capital framework over time. As in traditional capital networks, all actors require some incentive to participate in the market. In a group decision-making model, that incentive is provided by the faith of each individual actor in their own ability to influence the whole system. Teachers, for example, seek to influence relevant aspects of the school system by unionizing and engaging in collective bargaining. As a result, teachers unions are essential aspects of inner-school social networks. While teachers unions may be regarded as organizations detrimental to democracy and to social
capital formation (Paxton, 2002), they are still a critical link in the “supply chain” that is the delivery of education and are often the exclusive means by which individual teachers feel they influence the system. Incorporating organizations into a group decision-making network is the best way to shape those organizations and help them become positive contributors to the overall good of a district. Over time, individuals may seek input in the process through the school leader directly and rely less on external advocates.

By increasing the participation of members in a community, social capital can habituate participation and enhance virtues like tolerance, reasoned opinion and open-mindedness (Ibid., 258). In school administration, these virtues can lead to greater collective responsibility, accountable personal leadership and increased respect between actors (Reitzug and O'Hair, 2002, p. 120). When individual teachers and parents participate in district-wide decision making, the virtues of social capital can trickle down into inter-teacher relationships, “facilitating processes that cause individuals or groups to examine, study and challenge goals, directions and practices” (Ibid., p. 122). The benefits of positive social capital networks within schools are similar to and as important as social capital networks between schools. Most importantly, a social capital network which reaches directly into schools, teacher's unions, PTA groups and other hyper-local organizations defuses potential conflicts over the legitimacy and true intentions of a school leader.

Conclusion

Social capital cultivation through community governance is an effective method of controlling the political factors inherent in urban public school reform. As instruments of policy delivery, public schools evoke a unique and justified level of emotion. In trusting a bureaucracy with the intellectual development of their children, constituents develop a level of personal involvement which make school disputes far more visceral than disputes about road use or taxes (Buchanan, 2006, p. 84). Governance reforms which do not cultivate a constituency of many, like the mayoral control movement, select school leaders who alienate key constituencies and thus jeopardize their ability to promote new policies. Where revolutionary change is required, as in the case of urban public schools, leaders ignore social capital development at the expense of much-needed political legitimacy necessary to achieve a reform agenda.

References


Airborne allergens and chemicals cause asthma, which is a common chronic disorder of the airways that is characterized by various recurring symptoms. The prevalence of asthma has been increasing, and it is the third-ranking cause of hospitalization for American youth. The Clean Air Act is a law intended to protect and enhance the quality of the United States’ air resources and advance public health. One of the goals of this act is to help the federal, state and local governments work together on pollution prevention (Clean Air, 1970). In order to help asthmatics, the Clean Air Act must be improved upon by including genetic research, more frequently reviewing Maximum Achievable Control Technology, and a national discussion to establish a clear position on the problem.

Currently, the environmental health effects research portion of the Clean Air Act includes epidemiological, clinical, laboratory and field studies to assess the effects of air pollutant exposure on human health, but not genetic research. The administrator of the Clean Air Act can confer with federal scientific laboratories and research centers that are currently in operation in order to avoid duplication of research. The administrator must develop the methods and procedures needed to evaluate the dangers to human health from exposure to air pollutants with the use of an Interagency Task Force. This task force includes representatives from “the National Institute for Environmental Health Sciences, the Environmental Protection Agency, the Agency for Toxic Substances and Disease Registry (ATSDR), the National Toxicology Program, the National Institute of Standards and Technology, the National Science Foundation, the Surgeon General, and the Department of Energy” (Clean Air, 1970).

The administrator also supports the joint actions of state and local governments for the management and prevention of air pollution. Some of these joint actions include the creation of agreements and compacts between states for the control and abatement of air pollution. Congress gives permission to two or more states to enter into pacts for the combined prevention and maintenance of air pollution. No agreement or compact is compulsory until it has been approved by Congress. States can only be included into agreements if they are a part of that air quality control region (Clean Air, 1970). An air quality control region is an interstate or intrastate area apportioned by the U.S. Environmental Protection Agency (EPA) for the acquirement and conservation of National Ambient Air Quality Standards—NAAQS (Glossary Term, n.d.). There are presently over four-hundred air quality control regions.

Despite all of these efforts and decades since the Clean Air Act passed, “six in 10 Americans still live in dirty air areas, areas where the air is unhealthful to breathe,” says Paul Billings, the Vice President for National Policy and Advocacy at the American Lung Association (Billings, 2009). Clearly, additional provisions need to be made to the Clean Air Act in order for there to be major improvements in the air quality of the United States. Some specific provisions

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that need to be made to protect and improve the condition of United States air quality are as follows:

1) **The Clean Air Act must require genetic research in data collection.** Currently, the Clean Air Act does not focus on genetic research, which is crucial in aiding the identification of the specific stressors caused by a person’s surroundings. Individuals who are born with a vulnerability to asthma can have hereditary polymorphisms, which may increase the risk of developing asthma; yet, overt symptoms may never develop if they are not exposed to a substance that prompts their asthma. Genetic information can significantly improve the evaluation of ecological contaminants where genetic predisposition influences the threat of unfavorable health effects. This type of research helps to differentiate between genetically predisposed asthmatics to identify those who are most vulnerable to particulate matter (Cullen, 2006).

2) **The EPA must reduce the emissions of hazardous air pollutants in a timely manner by reviewing Maximum Achievable Control Technology standards more often.** Under Section 112 of the Clean Air Act, the EPA is required to establish emission standards that demand the maximum level of decrease in emissions of hazardous air pollutants. The Maximum Achievable Control Technology (MACT) standards are for immobile sources that release or have the potential to emit “10 tons per year or more of one hazardous air pollutant or 25 tons per year or more of a combination of hazardous air pollutants” (Seitz, 1995). Every eight years, these standards are evaluated to determine whether any continuing risk exists for that source. If needed, the standards are revised to address such risk. If the MACT standards were reviewed every four years instead of eight, the EPA could help reduce the emissions of hazardous air pollutants in a timely manner, and asthmatics could look forward to a lessening in severity of their symptoms with a decrease in hazardous air pollutants.

3) **A national discussion must be sponsored to facilitate education, effective mandates, and inter-regional sharing of best practices research.** Air quality control regions must hold meetings at least twice a year, whereby representatives from each region discuss the progress they have made with air quality problems in their respective areas. This would allow other regions to have a plan ready if they come across the same problems experienced at one of the other areas. Representatives must also discuss developing problems caused by pollutant drift. Pollutant drift claims must be supported by clear evidence. During the meetings, representatives of the Interagency Task Force must be present to consult with air quality control representatives on how various pollutants are affecting the population in a given area. For example, a major problem in the Bronx County of New York air quality region is asthma. Hence, a representative of the Agency for Toxic Substances and Disease Registry must speak with the designated air quality control representative about what pollutants in the area greatly affects those with asthma. The air quality control region representative can then devise a plan to decrease those specific pollutants.

While the Clean Air Act has helped improve the nation’s air quality during the past four decades, there is still much that can be done. If the steps above are taken in order to improve the law, life for all asthmatics and many others with diseases that are affected by the quality of the air would be dramatically enhanced. It is time to act.
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When the subprime mortgage crisis broke out in 2007, few people could imagine that this crisis would evolve into a global financial tsunami. Of course, many institutions, including government agencies, are responsible for this crisis. Among them, credit rating agencies (CRAs) have aroused drastic disputes, and not for the first time. After the Enron Scandal and the IT bubble, CRAs were blamed for their failure to forecast these affairs (U.S. Securities and Exchange Commission, 2002). Criticism of CRAs has become even fiercer this time around, because they have played such a central role in the current crisis.

The present financial crisis was mainly triggered by residential mortgage-backed securities (RMBs) and collateralized debt obligations (CDOs). RMBs are financial products, usually created by investment banks, that package hundreds or thousands of subprime mortgage loans into a pool. A trust purchases these pools and becomes entitled to the interest and principal payments. The trust then issues RMBs to investors in order to finance the purchase (U.S. Securities and Exchange Commission, 2008:6). In this way, investors receive their interest and principal payments through the interest and principal payments from the pool. Based on the RMBs, the CDO is created to ensure the value of the investments to RMBs, making the process even more complicated (U.S. Securities and Exchange Commission, 2008:9).

Because the debt chain had been largely extended, it was difficult for investors to assess the risk of these products, even though many of them were managed by financial elites like those working at AIG. So, investors relied largely on CRA ratings of complicated products such as RMBs and CDOs. Credit rating agencies showed great optimism for these structured finance products, especially CDOs. Based on the same mortgage asset pool, 80% of CDOs could get a Triple A (AAA) rating (Zhao, 2008). Not surprisingly, CRA involvement greatly stimulated the explosion of structured finance products.

Even worse was the failure of CRAs’ early detection of the deterioration of these structured finance products, without a gradual regrading. For example, New Century Financial Corporation, the second largest subprime mortgage company, issued a profit warning on 13th Feb 2007, but none of the big three CRAs (Moody’s, Standard & Poor’s, and Fitch) reacted to
this situation. After New Century Financial Corporation declared bankruptcy on April 2nd, CRAs began to downgrade their new subprime mortgage products (Zhao, 2008). Clearly, CRAs were seriously derelict in their duty, since one of their main jobs was to warn investors about a problem beforehand rather than afterwards.

After July 2007, CRAs downgraded almost all of the subprime mortgage securities in a short period. In one day, July 10th, Moody’s downgraded more than 400 of these securities; on the same day, S&P placed 612 securities on a watch-list, and downgraded most of them within two days (Zhao, 2008). This sharp degrading greatly shocked investors, even though some of the securities were still based on A-paper mortgages. After these events, most investors restructured their portfolios, decreasing the percentage of high risk investments. The market quickly lost liquidity, and the subprime mortgage problem evolved into a global crisis (Zhao, 2008).

Problems of CRAs

1) Conflicts of Interest

Credits rating agencies have long been criticized for the issuer pay model, which raises doubts about the independence and accuracy of their reports. Usually, clients who receive CRA services will pay agents in order to ensure that the agents will try their best to protect the interest of the clients. However, in the credit rating industry, many of the CRAs adopt the issuer pay model, especially the big three who have dominated the market (U.S. Securities and Exchange Commission, 2008:23).

CRAs are supposed to defend investors’ interests by providing credible assessments to help investors maximize the profits from their investments. Nevertheless, these CRAs get paid from issuers of the bonds that they need to rate. Issuers always hope their bonds will be purchased by investors, so of course they are eager to get a high rating to attract investors even if their bonds are unprofitable. Right now, the issuer pay model gives them leverage to persuade CRAs to give issuers favorable ratings. If a CRA gives an unfavorable rating, the issuer can turn to another CRA to achieve a better rating. If another CRA is willing to provide a higher rating, other issuers will be attracted, so the “generous” CRA will take a bigger and bigger part of the market. Consequently, other CRAs will imitate this agency, and the cycle continues.

Factually, it is not necessary for any CRA to be “punished” by an issuer, since every CRA is aware of the outcome. Hence, CRAs may not routinely give favorable ratings, but they will not easily give adverse ratings or downgrade their original ratings. This is why almost all CRAs failed to respond instantly to the subprime mortgage crisis when it emerged in 2007.

2) What’s So Special about Structured Financial Products

Conflicts of interest due to the issuer pay model have existed in the credit rating industry for quite a long time, but such problems are even more serious when rating structured finance products. The reason is that these products are more flexible to adjust, which gives structured finance products a chance to get more favorable credit ratings from CRAs.

Usually, an issuer or arranger presents a proposed structure to a CRA, which will assess the underlying asset pool based on its model and methodology. This assessment includes the problems of the structure and asset pool, the credit enhancement level of the product, and a predicted rating for this product. Common bond or securities issuers find it difficult to adjust
their operations in a short time to comply with CRA requirements for a higher grading. Structured finance products, however, are able to restructure their products to cater to the criteria of CRAs. Credit rating agencies will also carry out a new assessment for the adjusted structured product (Gullo, 2009). This way, CRAs actually have taken part in the process of designing structured finance products.

These CRAs do not consider this interaction process a consulting service offered to arrangers. The agencies explain that they may give rating to proposed structured finance products with credit-enhancement levels, but they do not provide any advice on how these products should be adjusted (Gullo, 2009). So, there are no additional conflicts of interest here. However, if the rating agencies are really as fair as they claim, rated products with the same grading should bear similar default rates. When we compare the corporate bonds and CDOs that received Baa ratings from Moody’s between 1983 and 2005, the default rate of the former was only 2.2%, while CDOs’ default rate was as high as 24% (Strier, 2008). Given that CDO issuers were more generous to CRAs than corporate bonds issuers, Moody’s obviously tilted towards their CDO clientele.

What is problematic about CRAs is that not only do they get paid from the objects of their ratings, but they earn much of their money from these products. A chart of Revenue with data on Moody’s revenue from 2004 to 2008 shows that revenue from structured finance took around 50% of the total revenue for the four earlier years. After the subprime mortgage crisis broke out in 2007, Moody’s revenue dropped by $575 million, and almost all of the decrease came from structured finance products. Due to the CRAs’ dependence on structured finance products, they have more incentives to be partial to arrangers in order to ensure the prosperity of the market, and to boost their revenues (Strier, 2008).

Revenue of Moody’s 2004—2008 (Million Dollars)

Sources: Moody’s 10K Reports from 2004 to 2008

3) Problems with “Reputation Capital”

For a long time, although without strict supervision, credit rating agencies and their ratings were still recognized as fair and reliable by the market, which is explained by the reputation capital theory.
Under this theory, in a comparatively free entry market, competition is fierce and based on good reputation. Every rating made by each CRA will have an impact on its reputation capital. If they make an independent and reliable rating recognized by the market, this capital will increase; vice versa, it will decline. Due to this process, CRAs would operate under market surveillance. Based on this continual examination, investors would establish certain images for different CRAs, and would then decide to subscribe to a credit rating service based on these images. In this way, to sustain or even expand its market position, every agency would have to maintain its reputation capital with every prudential rating report (Stover, 1996:62-63). In a word: credit rating agencies rate different securities, while investors rate credit rating agencies.

However, there’s an absurdity to this theory. The effectiveness of reputation capital is based on a competitive market, but the aftermath of its function will erode this base. In an earlier period, the credit rating industry was a comparatively free entry competitive industry. The credit rating agencies lived mainly on the income from the purchasing of credit rating reports by investors. However, an agency’s reputation improves because it succeeds in sustaining the fairness and reliability of its reports. Reputation plays an increasing role in the development of a rating agency as its market place becomes increasingly bigger. In this way, many other small credit rating agencies were squeezed out of the market. Gradually, the big three—Moody’s, Standard & Poor’s, and Fitch—came to dominate the credit rating market. This mechanism was vital to the process towards the monopoly of the big three CRAs.

Since the three agencies dominated the credit rating market, the incentive to keep the ratings fair and reliable was weakened, and the risk increased that they would not be as cautious as before and would possibly cheat. The conflicts of interest discussed above magnified this risk. In addition, for investors, the dominance of a few agencies will lead to some kind of credulity. Based on previous experience, these few agencies’ rating reports were relatively accurate, so investors could be willing to accept their new reports without prudential examination. In these two ways, monopoly in the credit rating market impaired the reputation mechanism.

What Is Wrong With Government

1) Lack of Supervision

Just like many other financial instruments, credit rating agencies appeared before government supervision was imposed. Even now, there has not been a mature and effective supervision over the credit rating industry, compared to other financial markets like banking and security markets.

Under the Security Act of 1933, lawyers, accountants, valuers, underwriters, etc., had to take legal responsibility for false statements in documents issued by them. But credit rating agencies were exempted from this law. Even when rating agencies, such as Moody’s, Standard & Poor’s and Fitch IBCA, were willing to register as an investment corporation according to the Investment Company Act of 1940, they did not need to expose their internal information to the SEC like common investment corporations. So they avoided SEC supervision (Bottini, 1993:615-619). However, it seemed a miracle that CRAs sustained the quality and fairness of their reports just depending on self-discipline, until the Enron Scandal broke out in 2001. Enron’s financial deception had existed for a long time, yet by the 28th November of 2001, just four days before Enron went into bankruptcy, the big three still reported that it was worth investment, greatly misleading investors. What happened afterwards was just like a rehearsal of
the current financial crisis. Just four days before Enron’s bankruptcy, these agencies hurried to
down rate it, which greatly pricked up the volatility of the market (U.S. Securities and Exchange
Commission, 2002).
Credit rating agencies’ behavior aroused controversy over their credibility, and brought in
the Rating Agency Act in September 2006. However, the Commission did not vote to apply
these rules to the NRSRO until June 18th, 2007, and they became effective on July 26th, 2007,
when the subprime mortgage problem had already emerged (U.S. Securities and Exchange

2) Facilitating Monopoly

By the 1970s, the credit rating industry had gradually become dominated by the big three.
They had an overwhelming voice to affect investors’ investments in financial market, although
their rating was still comparatively reliable.
Meanwhile, the economic recession of the 1970s triggered a debt crisis, and regulators
tried to control investments’ risk through credit rating reports. In 1975, U.S. security exchange
commission declared minimum criteria on agents/dealers’ clearance (Securities Exchange Act,
1934:Rule 15c3-1). For the first time, the rating results of the National Recognized Statistical
Rating Organization (NRSRO) were considered as part of the legal system of federal security
supervision. This rule stated that when calculating net capital, agents/dealers have to discount a
certain percentage of it from the market value of the securities they hold, in order to mitigate the
effect of price fluctuation in market. But if these securities are rated as the first two grades of the
highest credit rating by at least two NRSRO, the discount on their market value can be largely
reduced (Securities Exchange Act, 1934:Rule 15c3-1).

Afterwards, more rules related to NRSRO credit rating were brought in. In 1982, the SEC
revised the information disclosure rule. It confirmed that if unconvertible bonds or unconvertible
limited securities are rated as investible securities by at least one NRSRO, they will be able to
use the S-3 form, the simplest and least informative way to release their business information. In
1996, the SEC stipulated that currency market funds can only invest in high-quality short-term
financial tools, using an investment portfolio based on NRSRO rating results. Even the U.S.
Department of Education required new financial responsibility from organizations that sought to
join the student loan program, by submitting to NRSRO ratings. In a report submitted to US
senators by the SEC, at least eight federal laws, 47 Federal regulations or rules and more than
100 local laws at that time used NRSRO rating results as regulation criterion (U.S. Securities and
Exchange Commission, 2002).

In this way, government’s reliance on NRSRO greatly magnified the already strong voice
of these CRAs. Investors become increasingly credulous towards the rating results. Security
issuers now had to apply for a rating from NRSRO to benefit from good ratings. The voluntary
credit rating system had gradually become an established process, which further weakened the
reputation capital mechanism.

What was worse was the lack of objective or clear statements on NRSRO licensing
conditions and procedures for a long time. From 1975 to 2003, there were few credit rating
agencies licensed as NRSRO, apart from the big three. Even though there were some, they were
taken over by the big three after all (Yu, 2008). So the NRSRO greatly strengthened the current
monopoly situation in the credit rating market. And these big three gradually changed from
private business organizations into some kind of regulators. Although these agencies were
powerful forces in the financial market, there was little regulation of these credit rating agencies for a long time.

**Failure of Accommodating to the New Financial Derivatives**

In an economic boom, the earnings from structured finance products based on the subprime mortgage can be comparatively stable, because of the combination of financial pools with different risks. But in an economic downturn as we have now, the funds from the subprime mortgage to these products will shrink sharply, as there is a high correlation among these mortgages (Strier, 2008:533-53). Thus these structured financial products are more sensitive to the economic environment than traditional corporate or municipal bonds.

So if the CRAs go ahead and rate these novel instruments which no one has ever known how to rate, it’s difficult to estimate to what extent the CRAs are risking their reputation to benefit from these ratings. Their failure to forecast the risk for structured finance does not show that their ratings on traditional corporate and municipal bonds are unreliable. Accordingly, issuers and investors are not likely to cast doubt on the CRAs’ traditional ratings after their failure in novel instruments. From the Chart above, Moody’s loss after the subprime mortgage crisis was derived mainly from the structured finance products, while its revenue from traditional ratings has not been affected. This was also illustrated by the continual prosperity of the CRAs after the Enron Scandal. However, there is a risk here that the CRAs may take no actions to adjust their methodologies or criteria catering to novel financial instruments if they know no one will really look into their responsibility.

**Possible Solutions**

1) **Information Disclosure**

When the U.S. government noticed potential conflicts of interest with the relationships of bond issuers, CRAs and investors, it tried to solve this problem by strengthening information disclosure. The Credit Agency Reform Act passed in September 2006 intended to protect investors. NRSRO’s obligation to expose information to the public was stressed (Credit Rating Agency Reform Act, 2006). In July 2008 after the subprime mortgage crisis emerged, the SEC published a report on the big three CRAs. This report stated that significant aspects of the rating process and the underlying data based on which ratings are made should be sufficiently documented and disclosed (U.S. Securities and Exchange Commission, 2008:13).

Of course, information disclosure is an important part of the solution, because it allows for regulation by government and competitors, and the assessments of investors. The regulators have emphasized the importance of transparency of methodologies, models and weighting of key parameters of the CRAs. However, there’s a question if complete information disclosure will improve the competition of the credit rating market as well as the quality of rating reports. One problem is that different credit rating agencies have their own methodologies, model consumptions, etc, although they may not be totally different (U.S. Securities and Exchange Commission, 2008:13).

In fact, CRAs consider their methodologies and models unique and part of their competitive edge. What is worse is that CRA may lose their incentives to innovate new rating methods and instruments to improve the accuracy of their rating reports, especially when the
transactions have become increasingly complicated and diversified. So it may be unrealistic to disclose all the details of CRAs’ rating procedures, but there is one thing that can be done: the underlying data supplied to CRAs from the issuers or arrangers should be regulated and exposed to the public, so any CRA can examine the accuracy of its competitors’ reports. And, obviously, the SEC has been aware of this option (U.S. Securities and Exchange Commission, 2008:13).

2) The Pay Model

Some have argued that the issuer pay model has to be altered to an investor pay model in order to solve the conflicts of interest problem (Strier, 2008:533-553). However, the investor pay model will bring in another problem—a “free ride”. In fact this is one of the reasons the big three moved gradually to depending on issuers rather than investors in the 1970s. This creates the danger that information bought by some investors may be spread to others who don’t subscribe to the CRAs’ service (Richardson, 2009). That would make it difficult for CRAs to make enough profits to sustain their high-quality staff, which would harm the initiative and capacity of CRAs.

If a shift from an issuers pay model to an investor pay model will induce another problem in the course of trying to solve a problem, it would not be an optimal solution.

3) Reducing regulators’ reliance on CRAs

According to the SEC report, privilege extended to the securities which are rated highly by NRSROs should be reduced (Gullo, 2009). In this way, investors will depend more on their own assessments rather than NRSROs’ ratings.

Although this is the right direction to reform the NRSRO mechanism, it has to be noticed that it is almost impossible to eliminate all these requirements from all the systems, because they involve too many regulations and rules. And, in fact, in some regulations, their guidelines are necessary to regulate the financial market. It would be costly for regulators to keep watching the market respectively to make these guidelines.

So, the key point here is not to remove all these regulations and rules from all systems, but that the regulation of the NRSRO needs to match the power they gain from these rules.

4) Facilitating New Entrants

Another way to offset the negative effect of conflicts of interest is to increase competition in the credit rating market, especially among NRSRO. In the reform act of 2006, the SEC defines the conditions of registration for NRSRO, including participating in the credit rating business for at least three years, and the wide recognition of its ratings by financial institutions, issuers, insurance companies (Credit Rating Agency Reform Act, 2006). After this act was put in practice, ten CRAs were accepted as NRSROs by the end of 2008 (Hunt, 2008). In this way, the monopoly status of the big three can be gradually weakened.

In addition to clarifying NRSRO conditions, the SEC can examine the qualification for all NRSRO based on a set of criteria after a period of time. Most importantly, the SEC can establish a record center for historical ratings of all NRSRO. In this way, NRSRO will be forced to act more cautiously because being classed as an “NRSRO” provides privilege in the credit rating market and can bring great benefit to a business.
5) Record Center and Standardization

In addition to information transparency, there is another method that could improve the quality of rating reports and make CRAs more responsible. This measure would require governments to establish a records ratings center that would gather historical rating results from all CRAs, especially NRSRO. In this way, investors could compare the latest CRA reports’ accuracy with a CRA’s historical performance, then make their investment decisions to maximize their profits based on this comparison.

There are two advantages to this method. First of all, it could stimulate competition among CRAs, because every failure of their ratings will be recorded for investors. If a CRA’s ratings record is poor, investors are not to use these ratings when deciding where to direct their money. After a time period, it is unlikely that issuers will still pay this CRA for its rating reports. To some degree, the problem of conflicts of interest could be resolved without abandoning the issuer pay model completely. Secondly, CRAs would be encouraged to strengthen their internal governance without much external regulation, as they would be aware that any mistake made in their rating procedure would harm their reputation as well as revenue. Last of all, CRAs would have a greater incentive to innovate new methodologies and models that would enhance the accuracy of their ratings for rapidly evolving financial instruments.

These steps could be instrumental in preventing another “subprime mortgage crisis” in the future. Furthermore, CRAs would have incentives to review the quality of the data submitted by issuers or arrangers. If they find a high possibility of the unreliable data, they could ask for more accurate data or decline the rating, without risking their reputation. In this way, they can really come to serve as a “gatekeeper” for the financial market.

To make the rating results of different CRAs comparable, it is necessary to standardize the criteria and format of rating reports. Although right now the rating results of different CRAs are published with similar combination of letters (A, B, C, etc) to express the quality of bonds, actually there are actually no uniform criteria (Yingjie, 2006). For example, if a corporate bond is rated as AAA by S&P, while AA by Moody’s, there is no evidence that the AAA rating given by S&P is different from or the same as Moody’s AA rating. Thus, investors may feel confused when comparing CRAs, even if they have access to their historical records. However, standardization report criteria does not mean that the whole rating procedure, including methodologies, model assumptions, etc must be standardized, since a complete standardization could impair the initiative of CRAs.

6) Litigation

Although CRA practices provoked controversy even before the current financial crisis, causing some investors to initiate lawsuits, CRAs were protected from litigation due to their special status in the US legal system. Under U.S. common law, the credit rating industry has been considered a form of media, so their rating results would be considered “media opinions” and protected by the first amendment of the Constitution (Bottini, 1993:615-619). In this way, the credit rating industry has become a field exempted from litigation.

However, there are great differences between CRAs and the media. Revenue generated by CRAs is partially based on investors’ trust of their authority, thus they are still responsible for investors’ interest. Due to current subprime mortgage crisis, there has already been some litigation against CRAs (Gullo, 2009). Although the results of this litigation have not come out
yet, this is a good opportunity for the US legal system to review the status of CRAs. Such a review would be an important measure towards the protection of investor interests.

**Conclusion**

CRAs have played an important negative role in this subprime mortgage crisis. In view of the multiple reasons behind CRA responsibility for this crisis and the long duration of the practices contributing to the current state of affairs, solving these problems will involve a comprehensive approach. The best approach will create a balance among a variety of encouraging mechanism and regulations.

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The United States’ income tax system is inefficient, archaic and overly complex. To the everyday US citizen who is generally unfamiliar with the endless volumes of US tax code, the annual task of filing a federal income tax return (with the exception of possibly the “EZ” form) becomes an overbearing chore. The system could, and should, be made simpler. Americans shouldn’t need to be accountants in order to keep the government honest about how much money it is entitled to, or have to worry about being subject to penalties for misinterpreting tax law that is cumbersome and poorly communicated. Flat-tax proposals and campaigns for tax simplification have often been portrayed as extremist and unrealistic. But at some point we need to objectively assess the absurdity of the existing system, measure the cost and burden of effort that goes into delivering our nation’s fiscal lifeblood, and implement a fair and effective approach to taxing the income of Americans.

Debate over our income tax system is nothing new. Nearly every decade a new cry arises for major tax restructuring, often driven by claims of over-complexity and unfairness or a need to adjust to meet national or global economic trends. This year it’s the recession. So, the Obama administration has announced its intention to “form a task force to simplify the tax code, reduce evasion, close loopholes, and make changes in corporate breaks” (Sahadi, 2009).

But exactly how does tax law complexity equate to tax payer compliance? The Obama administration sees the potential to reclaim a portion of that $300 billion annual tax gap (the amount of unclaimed tax due to the government) to help offset some of the massive government spending related to the recession. By simplifying the tax system he hopes to gain greater process compliance, and in turn cut away at that tax gap to yield higher tax revenues. Many argue that there’s not a high correlation between tax code complexity and tax avoidance, and that the majority of the tax gap is intentionally non-reported, or under-reported income. However, even if an Obama sponsored reform initiative falls short of its intended revenue windfall, larger and longer term financial and productivity gains can still be generated by introducing major improvements to add simplicity and efficiency to the meandering mess that is our federal income tax system.

So just how complex has this system become? According to the National Taxpayer Advocate, “The U.S. federal income tax return contains 3.7 million words... Since the beginning of 2001, there have been more than 3,250 changes to the tax code, an average of more than one a day, including more than 500 changes in 2008 alone” (Olson, 2008). A clear sign of this growing complexity is evident in the fact that Americans have turned away from completing their own tax returns and are opting instead to spend money to ease the stress of this burdensome process. In
2008, 60% of returns filed were completed by tax professionals for a fee, and an additional 22% were completed using the assistance of purchased tax preparation software (Olson, 2008).

It’s not just the size of our tax code that complicates the process, it’s also the manner in which the internal revenue system is used. The tax system is not just a tool to collect revenues for the government; it’s also being used for the assertion of fiscal and regulatory policy. Our income tax rules are littered with incentives, deterrents, and stimuli aimed at issues such as spending on education, investment incentives, and tax credits for the environmentally conscious, among others. The centralization of these political and social agendas into one single instrument has turned our income tax system into an economic Swiss army knife for the government to use each time it wants to incentivize, punish, or financially segregate a portion of the American populace. This approach has overburdened the system and extended it beyond original intention.

The Federal income tax was created at the onset of the 20th century. Prior to this the national government did little along the lines of spending. In fact, less than a third of government spending was at the hands of the Federal government. It was the Sixteenth amendment, in 1913, that granted the government the right to tax income. It was implemented as a meager 1% tax for those earning more than $3,000 a year, with an additional 6% imposed on only the very wealthy. In total, it affected only 2% of adults (Jillson, 2008). Today all wage earners are affected, and the delta of tax burden between income brackets has closed significantly. The creation of a system to handle such a diverse set of income and wealth has developed a socio-political battleground and fueled ongoing controversies over the tax regulations imposed by our government.

Tax reform proposals often identify the complexity of our tax system as the primary motivation for reform, but these campaigns have historically taken on larger objectives than simplifying the process imposed upon the taxpayers. They have equally proposed to tune our tax code, steer the economy, meet widely recognized indicators of good policy, or to attain horizontal and vertical equity (AICPA, 2005). Unfortunately, these objectives are more often counterproductive to simplifying the act of filing a tax return, and, instead, inject even more conditional specificity into a myriad of existing tax scenarios.

Most of the leading proposals for tax reform, whether it be a “bottom-up” overhaul of the existing system, a “fundamental tax-reform” replacement of the entire system, or a hybrid blend of these two (AICPA, 2005), involve rethinking much of the underlying philosophical and political structuring of our governments tax strategy. Therefore, any such proposal will tilt the scales in favor of one group of individuals over another, which makes these reform campaigns difficult to champion, difficult to gain support for, and difficult to successfully accomplish.

Despite the challenges they face, the proponents of tax reform have, for decades, continued to engage the battle in an effort to see change come about in our tax system. Examples of such reform proposals include a number of consumption based income tax alternatives, such as Senator Roth’s Business Transfer Tax proposal in 1985, the Armey-Shelby flat tax proposal of the late 1990’s, and now the Freedom Flat Tax Act introduced in early 2009. In fact, in the 108th Congress alone, there were four separate proposals for tax reform initiatives (Schenk, 2005). These proposals have been criticized by some for imposing an increased tax burden on the less wealthy, and subsequently lacked the support to carry them through to implementation.

So, then, how do we go about simplifying a process that is so inherently complex but politically sensitive? The answer is to separate the systemic issues from the political issues. In essence, don’t change the tax code; just redesign the process to be adept at handling the fluidity of the tax code, but capable of greater efficiency with significant reduction of effort.
In 2008, more than 250 million people in the United States spent a combined estimate of 7.6 billion hours, all doing roughly the same manual accumulation of tax information… to file tax returns. This equates to an effort of 3.8 million full time workers for a year (Olson, 2008). And all of this effort will be repeated again, year after year, in ever increasing scale. Any person with a business or engineering mind would identify a repetitive and time intensive effort of this magnitude to be a massive opportunity for automation and technology. But with the lack of political backing that tax system reform proposals have received in the past, I believe the bigger challenge will be in attaining the support and funding for the IRS to undertake this monumental process reengineering. To be successful, the initiative needs to steer clear of the politically fueled tax policy debates or agendas, and focus purely on implementing functional efficiency to the system; in essence, start running this agency like a business.

If an independent corporation set out to create a process to collect funds from every American, would the system look anything like our current tax system? Would they create a dizzying array of forms, one or more for each tax scenario, or an iterative process that requests largely the same data, year after year? Would it ask their customers to calculate what is owed to them? The IRS is the only organization I can think of that asks its clients to calculate their own bills; and in all likelihood the most complex bill we have to pay all year. If the local electric utility company asked their customers to compute their own energy bill each month, what kind of effect would it have on their ability to remain functional? With each and every customer trying to equate kilowatt hours to cost, the utility company would have to hire thousands of customer service representatives to help review (audit) the discrepancies brought about for each billing cycle.

Industry handles process complexities by creating highly refined and tested systems to perform these tasks for their customers. Such systems provide consolidation of process, efficiency, and business scalability, while still providing visibility and manageability over the processes and rules they employ. Americans deal with these systems more and more each day, and with relative ease: banking systems, stock trading systems, etc. But, more importantly, corporate America utilizes technology to build out its customer base, by relieving customers and clients of the burden of dealing with the day to day complexities of business. Isn’t this President Obama’s objective in closing the tax gap, to create a system that people are willing to work with?

The challenges faced by the IRS provide many opportunities for process streamlining and the introduction of technology. Already, many companies and products exploit the technology-void that the IRS has neglected to step up and fill. But these products and services are still only cogs in the larger antiquated machine. There is no doubt that automation of our current tax return process would be an enormous undertaking. With countless information sources and integration points, it would likely be a slow incremental crawl to completion. In fact, it may never achieve the Utopia of one day having our tax bill (or refund) simply mailed to us each year on April 15th; better yet, have the taxes taken from our wages with such accuracy that neither is required. But make no mistake: regardless of the approach taken or level of success, the introduction of technology and efficiency will become inevitable to meet the ever increasing revenue demands placed upon our government in this challenging global economy.

As long as there have been governments, there have been debates over the social morality of taxes and the fiscal responsibilities of governments. In fact, taxes were a major catalyst in the cry for liberty at the founding of our own nation. These policies will always be debated, and the tax code will continue to be manipulated based on the mood of the incumbent politicians and their constituents. However, we can not let this debate continue to compromise the health of the
system that keeps our nation afloat. We need to put aside the philosophical debates and focus on
the need to advance and modernize a system that is used by every working person in our country,
a system vital to keeping the United States an economic leader for generations to come.

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America’s current economic situation parallels the early and middle years of Japan’s “Lost Decade” of the 1990’s. Beginning with the rise in land prices and a stock market boom, America has unintentionally mimicked the events and reactions of Japan and its government. However, as a nation, Americans must become conscious of and split from the latter phases of mistakes and inaction by the Japanese. During this period, Japan was not in a depression or even a deep recession; its economy was merely allowed to slow down and stagnate. As early as 1998, the United States began to follow a shockingly similar path to Japan in regards to home and land prices. The decline in housing prices has been a focus area as it is easy to follow and to represent graphically; however, the two economies have been slipping in many other similar aspects.

Initially, Japan’s central bank, the Bank of Japan, attempted to ease credit and unburden the country’s banking and investment system, but the solution was implemented too gradually and no serious effect was rendered. The steps taken to offset inflation with cheaper credit backfired, and the result was an unstable bubble economy. As the rescue efforts floundered along, banks stopped lending, and bad loans crippled the industry. The parallel to modern America eerily continues as Japan instituted the first of 13 stimulus plans, all of which did little or no good. The appropriate cliche for these plans was “too little, too late.”

The Japanese example should provide a lesson: while large sums of money funneled into the economy are necessary to fight a serious economic crisis, the most important facet is that the funds must be put into something useful and productive. The majority of stimulus money in Japan went to public works projects such as a bridge to a nearly unpopulated island and excess roadways in the already congested cities. These projects were futile, as their construction created jobs for only a short time, and the capital investment produced little to no return.

As the United States Treasury Secretary Timothy Geithner has noted, a lesson learned from the Japanese experiment must be that any government spending must come quickly, in massive doses, and be continued until recovery takes effect (Fackler, 2009). So far, President Obama has introduced a spending package that includes varying amounts of money to support “green projects.” These projects are funded according to environmental impact, creation of new jobs, and the ability to be implemented immediately. A stimulus package based on the above-mentioned criteria ensures justified expenditures and a guaranteed return on investment. Additional money from the stimulus plan will be spent to improve and develop a new knowledge-based economy with a demand for better health and improved education. The nation’s healthcare sector will receive approximately $160 billion to contribute to everything from Medicare to military hospitals, while the American education system will receive $150 billion to fund state education and school modernization.

The planned government expenditure on education makes sense, as education funding yields a very high non-monetary return on investment. Investment in higher degrees of

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knowledge and skills allows the future labor force to be more efficient and productive, and expenditures on human capital facilitate guaranteed returns through their benefit to a large percentage of a varied labor market. According to a 1998 report by the Japan Institute for Local Government, a nonprofit policy research group, for every one trillion yen spent on education, the Japanese economy added 1.74 trillion yen in growth. The Japanese expenditure on social services such as care for the elderly and pension payments also helped economic growth: for every one trillion yen spent on such programs, the Japanese economy added 1.64 trillion yen in growth (Fackler, 2009). If the Japanese experience is any indication, projects funding education and social development are key to rescuing, maintaining and restructuring the economy based on a new focus of a sustainable knowledge base. Every other type of stimulus spending must become under severe scrutiny.

Another issue surrounding our current economic crisis is the debate over the possible reinstatement of the Glass-Steagall Act of 1933, which served to compartmentalize financial institutions as either investment or commercial banks. The act was created during the Great Depression to prevent bank speculation. In 1999, at the urging of the nation’s financial institutions and lobbyists, the act was repealed by Congress, making it easier for financial institutions to engage in speculation in countless financial instruments. During the ten years since the Act’s repeal, we have witnessed over-speculation by banks that have yielded deep financial turmoil for both the public and private sectors. The repeal of the act has also led to the massive restructuring of financial entities. Clearly, the Glass-Steagall Act must be reinstated as a measure to cushion our economy and financial industry from the dangers of speculation by banks and investors. We must also consider enacting laws that enable financial literacy, awareness, responsibility, and transparency for our citizens and the markets, so that our efforts today are sustained well into the future.

Ultimately, any steps we take must be whole-hearted and well planned, as “one lesson from Japan is that halfway recovery measures lead to years of subpar growth that make deficits even bigger” (New York Times, 2009). While America may be facing a Japanese-style lost decade, there are policy measures that may be taken to avert it. It is not too late.

References


The Second Amendment: Relic or Requirement?

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The Second Amendment is like a piece of gum that loses flavor over time and after awhile is discarded. Legal scholars have a wide variety of interpretations of the Second Amendment, ranging from whether this amendment is still good law to a conditional clause approach of the first and second sections of the amendment. (If this, then that: if there is a standing militia, then citizens have the right to bear arms).

As I read the recent Supreme Court opinion District of Columbia v. Heller (2008), I became convinced that the majority was correct in its interpretation of the Second Amendment. In this paper, I will argue that, as law, the Second Amendment is still relevant, and while the majority’s decision was given as an interpretation of what they believe the Founder’s would have wanted, it, in a roundabout way, coincides with popular opinion. First, I will explore the implications of the right to bear arms during colonial political times and why it was considered a right. Second, I would like to highlight arguments from both gun control and guns rights activists. After evaluating these arguments, I would like to examine a breakdown of the Second Amendment’s language that coincides with the Founder’s intention.

History

In order to understand the psychology of the Founders regarding the Bill of Rights, the Second Amendment specifically, we must first explore colonial relations with Great Britain at the advent of the American Revolution. As tensions began to come to a head between the colonists and the British government in the late 1760s, colonists were told that one of the measures the British government would be employing was the colonists’ disarmament. This was seen to be a grievance as important as the issue of excessive taxation. One of the reasons that in some colonies, such as Massachusetts, the colonists were required to have weapons in their homes was the continuous fighting between France and Great Britain. The colonists were on the frontline of the skirmishes and had to have a line of defense because it took a long time for the British army to arrive in order to engage the French. It took long for British troops to reach the front lines because the idea of maintaining a standing army in time of peace was seen of violation of the colonists’ rights. In the English Bill of Rights in 1689, English citizens accused James II of violating these rights and said that without the approval of Parliament this was against the law. In 1768, the governor of Massachusetts sent for troops in order to help enforce tax collection policies. After British troops arrived in Boston, taking over several buildings central to the Massachusetts House of Representatives, the colonists decided to make a formal

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list of grievances to other representatives in the colony (Halbrook, 2008). After being severely reproved, the House refused to discontinue its circulation of the letter and was dissolved (Halbrook, 2008).

Meanwhile, one of the Founding Fathers, Samuel Adams of Massachusetts, advocated the right to bear arms as an unalienable right by referring to the Englishman William Blackstone’s writings. After the Glorious Revolution of 1688, which saw the overthrow of King James II of England, Blackstone argued how, in response to an attack, an Englishman has several guaranteed rights, including the right to pursue justice through the court system, to address the king and Parliament with grievances, and to use arms to defend his property, person, or liberty (Halbrook, 2008). Also, according to Blackstone, the right to have arms is “a natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression” (Halbrook, 2008). In 1772, Samuel Adams used Blackstone’s line of reasoning to promote gun rights when he published, in the Boston Gazette, an essay titled “Rights of Colonists.”

According to many colonists, the major source of their undue oppression was the king’s troops. By now, statements were being published of the harassment that well-meaning citizens were enduring as a result of the quartered troops. The colonists were to petition through more judicious methods the repeal of the taxes that the soldiers were sent to help collect, but the rejection of these proposals, along with the previously mentioned altercations were wearing on their patience. So, when the Massachusetts House of Representatives reconvened in 1769, it attempted to petition Governor Francis Bernard, a British colonial administrator, to remove the troops stationed at the State House. But Bernard’s response was that he was no longer in control of civil matters since the military was present. The colonists protested. In an essay in favor of armed resistance, lawyer Daniel Leonard argued that in self-defense, the aggressor forfeited his right to live. Leonard noted that the self-defense rule applied to “states, and to those employed by them to distress, rob or enslave other states” (Halbrook, 2008).

Arguments in favor and against the right to bear arms

McAffee and Quinlan offer several arguments in favor of why the right to bear arms may be outdated. The first argument they propose is based on belief that, in interpreting the Second Amendment, the right is conditioned upon the necessity of a militia. This view would deem discussion of gun control irrelevant since the right is no longer applicable (2008). The second view proposed by Quinlan and McAffee is that the gun right discussion is no longer applicable because the federal courts have issued opinions in favor of gun ownership in cases of military personnel. (Before District of Columbia v. Heller (2008), these decisions would not have prevented gun control advocates from having legislation passed restricting the rights of gun ownership). The final argument McAffee and Quinlan propose is based on a similar notion as the first. The Founders argued that the right to bear arms was necessary to promote a standing “citizen militia” and that most American citizens aren’t aware of this philosophy. The idea of the common good is not as important a concept in today’s republican ideology as the idea of “liberal individualism” As a result, being an American citizen “does not call for the sort of patriotic sacrifice upon which the general militia rested” (2008).

Gun control proponents offer several points to counter the reasons given by gun rights proponents. First, they argue that American citizens have one feature today that colonists did not have when they were arguing for the necessity of an armed militia: a police force, an entity
whose sole job is to promote an environment of respect for personal property. Hence, under their social contract, Americans gave up the right to bear arms in exchange for the security that the police force provides. This argument presupposes that the right to bear arms clause of the Second Amendment is “limited or qualified” (McAffee, 2008) by the Militia Clause that precedes it. A second argument proposed is that the idea of individual gun ownership does not translate into modern society because our philosophical leanings and material security has changed, rendering individual gun ownership right claims irrelevant.

In *The Founders’ Second Amendment*, Stephen Halbrook breaks down the Second Amendment and discusses what he believes each clause means. He states that the amendment declares “a political principle about the militia, followed by a clause declaring a substantive right” (2008). In conjunction with the First Amendment, Halbrook argues that the Second Amendment is supposed to be an individual right. Furthermore, Halbrook notes, the Second Amendment ensures that the citizen’s Fourth Amendment rights “to be secure in their persons, houses, papers, and effects” are protected and that the right to bear arms is a right conferred solely to the individual and not for the states to control. The Second Amendment, according to Halbrook, clearly differentiates between “the militia,” “the people,” and “the State.” None of these groups are used interchangeably. Instead, they are referred to separately in order to specifically grant “the people” the right to bear arms, to acknowledge the necessity of “the militia,” and to separate “the state” from “the people.” Halbrook strongly argues that to assume that this right can be abridged in any way is to undermine the entire spirit of the Bill of Rights (2008).

To interpret the wording “to keep and bear arms” and to better understand what the words may have meant to the Founders, Halbrook uses the dictionary constructed by Noah Webster, the famous American lexicographer contemporary to the time of the Revolution. In the dictionary, Webster defines “keep” as the ability to have in one’s possession, to retain which includes the household or the individual’s property (Halbrook, 2008). The inability to “keep” a gun was seen as a mark of inferiority to the colonists, since laws prohibited slaves from owning a firearm (Halbrook, 2008). To be considered the same status as a slave was an insult. Halbrook also notes that weapons for a general militia were traditionally kept in a common storehouse and that the Amendment specifically delineates the individual’s right to keep arms (2008).

As for the term “bear” in Webster’s dictionary, the word was defined as “to carry or to wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat” (Halbrook, 2008). Traditionally, during this period soldiers carried their arms in their hands, and officers holstered their pistols at their side. The other way to “bear” arms during this period was to carry small pistols on one’s person, which some did. Halbrook hence concludes that the right to “bear” arms was not granted specifically to a state militia but instead given to each individual citizen (2008).

The next phrase Halbrook proceeds to define is “shall not be infringed.” A number of amendments in the Bill of Rights have similar phrases that note the limitations of the government. The First Amendment, for example, uses the word “abridging” in the context of the government’s ability to limit the freedom of speech and the press, the Fourth Amendment notes that the right to be free from unreasonable searches and seizures “shall not be violated,” and the Ninth Amendment uses “deny or disparage” to limit the interpretation of the Constitution in such a way that would limit certain rights retained by the people (Halbrook, 2008). According to Halbrook, the phrasing, placed in the context of the other amendments, suggests that the Second Amendment does not allow for any restriction on the right to bear arms.
The next two phrases Halbrook breaks down are “well regulated militia” and “being necessary to the security of a free State.” Halbrook defines a well regulated militia as “a group of all able-bodied men whose training is regulated by customary rules and methods” (2008). Halbrook argues that since the Second Amendment states that a well regulated militia is necessary “to the security of a free State,” then having militias, contrary to popular belief, can never be antiquated and is directly related to this country’s fulfillment and protection of its republican ideology. The “security of a free state” can come in the form of militia protection from outside invaders, an individual protecting his property from a criminal threat, or protection from governmental oppression (2008).

Halbrook rebuts the argument that there is no right to bear arms since there are no more militias. As a future law school student, I can appreciate his logic. He derives it from what he calls conditional syllogism: if A, then B. Opponents of gun rights have claimed that if there is A) a well regulated militia, then there is B) the right to bear arms. Here lies the crux of the argument. While condition A is sufficient enough to bring about condition B, it may not be the only reason that the resulting condition B can come about (2008). As a result, opponents of the right to bear arms cannot negate the second part of this clause.

In short, while exploring the language of the Second Amendment in detail and placing it within the historical context, as well as in the context of the other amendments within the Bill of Rights, we can conclude that it was the intention of the Founders for the right to bear arms to be an individual right, independent of the importance of militias. Even though, through legislation or other actions, the opponents of the Second Amendment have hoped to render the Amendment null and void, the Founders’ original intentions have largely withstood the test of times and have been re-iterated by the (correct) Supreme Court decision in District of Columbia v. Heller.

References


**FREE EXPRESSION:**
**MOVING THE EUROPEAN UNION TOWARDS AN AMERICAN MODEL**

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Freedom of thought and the freedom to express that thought are fundamental freedoms to man. Allowing this freedom to be robust and only minimally regulated allows society to develop more rapidly. There are plenty of theories that support this claim, most notably the public debate theory and the expressivist theory. As far as creating a legal system that supports these theories, the United States’ First Amendment should be looked to as a standard. For this reason, the European Court of Justice should look to the United States’ model while developing its free expression jurisprudence, for the current system has not been as robust and as free as it should be.

First, I will examine the various theories that support a robust idea of freedom of expression. The public debate theory indicates that expression is “an adversarial process whereby social benefits such as truth and good public policy advance through the constant introduction of new ideas to compete with established ideas” (Nelson, 2005:31). Therefore, since speech leads to such benefits as truth or good public policy, expression should be left unregulated. In this theory, expression works as in a market: once the expression is expressed, it is considered to be in the marketplace. Considering the content of that expression, it will be improved, disproved, or simply ignored. I will draw a few examples: Consider the process of creating the Constitution of the United States. When the Annapolis Convention first met, it was for the purpose of amending the Articles of Confederation. However, a debate began as to whether amending the Articles of Confederation would be sufficient in establishing an acceptable government. These debates led to the decision to adopt a new constitution instead. Then again debate occurred. Noble expressions such as James Madison’s Virginia Compromise or William Paterson’s New Jersey Plan were debated and improved and led to the “Great Compromise,” later adopted in the new Constitution. While other, less noble, or even insidious ideas, such as Alexander Hamilton’s idea of a monarch-like president, were chiefly ignored or debated briefly and disapproved of quickly. As this example should show, the public debate theory allows for a market where good ideas flourish while bad ideas are ignored or quickly countered. Therefore, since bad ideas cannot survive in the market, there is no reason to legalize them, as the market will correct itself.

However, there are a few objections to the public debate theory of speech. One of those objections is that some expression undermines public debate. Therefore, since public debate and truth are the objectives of the public debate theory, those who believe in it will be willing to accept restrictions on expression that would limit speech that undermines public debate (Nelson, 2005:47). To draw an example, one might believe in outlawing hate speech because it distracts from the truth and good policy or equality. However, this objection is easily answered. Even expression that may undermine public debate should be left unregulated because if it were regulated it would produce a chilling effect or a slippery slope. Considering the latter, that is to

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say, that if one set of expression is restricted it may limit a person’s desire to express oneself freely, as one is not aware whether his/her speech is included in the restricted category. Now considering the former, that is to say by making regulation on one form of expression acceptable, it may be easier than to regulate other expression.

Further, it is not evident which expression has no value in the search for good public policy or truth. The mere fact that hate speech exist shows this. While great majorities do not believe in the content of the hate speech, to regulate it would block a minority view from the market, resulting in a market crash brought about by the exclusion of all available ideas. Alternatively, even when there appears to be a clear consensus, opinion on the subject may change over time. As Justice William Douglas put it, expression should not be regulated because, “the audience that hissed yesterday may applaud today, even for the same performance” (Kingsley v. Brown, 1957).

Lastly, it is easy to confront expression that undermines public debate. Again, consider the example of hate speech: if a person is ranting and raving about how one race is inferior to another, that speech does not need to be regulated, but answered. That is to say, one should follow the classic maxim, that bad speech ought not to be regulated but answered with good speech.

A second theory that supports the view that a robust concept of free expression is good for society is the expressivist theory. The expressivist theory “emphasizes freedom of [expression] as an independent value rather than a means to an externally realized good” (Nelson, 2005:62). That is to say that free expression is a good in itself rather than as a means to another good. Many scholars believe that when others express themselves as an end to itself, the expression promotes and produces self-realization (Nelson, 2005). Having an open and robust arena of expression forces one to take responsibility for the expression. Society is so diverse that there will often be someone else with opposing viewpoints. This challenge may lead to the reinforcement of one’s original expression or it may force one to rethink the original expression. Again, we can consider the example of hate speech. One person enjoys partaking in hate speech and thinks that his ideas are completely justified, while another person disapproves of hate speech and thinks that the ideas are completely unjustifiable. The second person is likely to challenge the first person and at the end of the exchange, the first person is unable to justify his ideas. As a result, person one will rethink his ideas on hate speech and, ideally, develop into a greater person because of it, while the second person will have his ideas reaffirmed and realize that his ideas are reaffirmed. This theory is not only good for the individuals benefitting from self-realization, but also society, as the society can run more effectively if all individuals are given the opportunity to realize their potential and develop solid ideas backed by reason and logic.

The main problem with the expressivist theory is that it is has been poorly defined (Nelson, 2005:68). For example, one can consider Rodney Smolla’s definition, “[freedom of expression is] a right defiantly, robustly, and irreverently to [express] one’s mind just because it is one’s mind…freedom to [express] without restrain provide the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment” (Nelson, 2005:68). The problem is that Smolla’s definition focuses too much on individual fulfillment, without mentioning the benefits to society as a whole. Individual fulfillment on its own is not enough of a justification. As Nelson notes, “if one’s mind is to express racial hatred in the form of racist epithets, it is not at all self-evident that the speaker’s inner satisfaction and self-identity should
be more important than the damage likely to be done to the satisfaction and identity of the person targeted” (Nelson, 2005:68).

Now that I have laid forth the theoretical framework that supports how a robust concept of freedom of expression affects self and society, I will explain why the First Amendment of the United States Constitution should be considered as the universal standard for self-expression. First amendment jurisprudence has been broken down into three categories for protection purposes. One category is obscenity. Obscenity receives no protection, unless it holds political, social, or artist value (Bobbit, 2007:19).

The next category of expression is commercial expression. Commercial expression is “expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services” (U.S. Healthcare v. Blue Cross, 1990). The First Amendment does allow some regulation on commercial speech. These regulations would include false advertising. However, regulations on commercial expression are somewhat relaxed (Pittsburgh Press v. Human Rel., 1973).

The final category of expression is political expression. Political expression is minimally regulated, and whatever regulation exists must meet “strict scrutiny,” the highest level of judicial review. The Supreme Court has created judicial tests to determine when political speech can be regulated. One such test holds that political speech can be regulated when “directed at inciting or producing imminent lawless action” and when the speech is “likely to incite or produce such action” (Brandenburg v. Ohio, 1969).

The three categories of expression above allow for robust debate and only include minimal regulation. Accordingly, the American public can strive and develop in accordance with the theories detailed previously. For this reason, the American free expression jurisprudence can be considered the standard and one that the European Union should follow as it develops its own free expression jurisprudence. So far, the EU developments in this area have been weak.

First, one can look to the proposed constitution of the European Union. The constitution includes the right to free expression, found in Article II-71: “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” (EU Constitution, 2004). This provision appears to allow for a robust expression regime and would fall under the theories mentioned above, but other articles of the proposed constitution may potentially be in conflict with the provision. For example, Article II-61 states, “human dignity is inviolable. It must be respected and protected” (EU Constitution, 2004). The notion may potentially create a conflict with Article II-71, for, at times, expression may offend human dignity. For example, if two individuals get into an argument and one expresses to the other some harsh sentiments, the offended party may claim that the harsh sentiments have violated his dignity and may attempt to take action against the expresser for violating his human dignity in accordance with Article II-61.

A similar situation could arise under articles II-63, which states, “everyone has the right to respect for his or her physical and mental integrity” (EU Constitution, 2004). The individual could simply claim that the expresser of the harsh sentiments had disrespected his mental integrity and because of this, again, try to take action against him.

There appears to be one more conflict, found in Article II-82 “The Union shall respect cultural, religious and linguistic diversity” (EU Constitution, 2004). As an example of a conflict that could arise between Article II-71 and this article, we could examine a hypothetical investigative exposé of a particular religion. For example, if the European Union were to sponsor
an anthropological study on a particular religion, and the contents of the report were not liked by
the members of that religious group, the followers of the religion could potentially make a claim
against the Union for violating their Article II-82 rights.

It is not clear in any of the above situations which Article of the proposed constitution
would supersede the others. However, one article appears to suggest that the free expression
clause of Article II-71 would lose out. Article II-112 states “Any limitation on the exercise of the
rights and freedoms recognized by this Charter must be provided for by law and respect the
essence of those rights and freedoms. Subject to the principle of proportionality, limitations may
be made only if they are necessary and genuinely meet objectives of general interest recognized
by the Union or the need to protect the rights and freedoms of others” (EU Constitution, 2004).
Article II-112 highlights the general essence of the charter. It appears that the general essence of
the charter has less to do with free expression and more to do with protecting human dignity. So,
Articles II-61 (Human Dignity), 63 (Right to Integrity of the Person), and 81 (Non-
discrimination) appear to have precedence over Article II-71, Freedom of Expression and
Information.

Additionally, Article II-112 supports limiting rights when the limitations meet another
interest of the European Union. Again, it is clear, although not necessarily correct, that the
constitution favors the interest of dignity over the interest of expression. Accordingly, the policy
marketers of the European Union would have an easy time limiting free expression by claiming
their actions are justified as they protect human dignity or cultural diversity.

Finally, the last section of Article II-112 seems to state that the constitution is more
concerned with protecting passive individuals as opposed to active individuals. That is to say, the
constitution is more concerned with protecting an individual’s right not to be subjected to certain
expression, than to protect an individual’s right to pronounce that expression. This can be
deduced from the language of “others.” This language seems to give predominance to the passive
individual and not to particular active actors.

The topics discussed show the internal conflicts that the European Union Constitution has
when it comes to the issue of free expression. However, those are not the only problem the
European Union faces on the issue. The European Court of Justice has also rendered some
rulings that are not favorable towards free expression. First, consider the case of Magoora sp.
zoo v Dyrektor Izby Skarbowej w Krakowie (2007). This case relates to the issue of criminal
proceedings against a journalist regarding “dissemination of information about a medicinal
product by a third party acting on his own initiative” (European Court Ruling, 2009), which the
Court had ruled was akin to advertising, a violation of European Union medicinal law (European
Commission, 2001). The information the journalist had published was a review for the health
food product Hyben Total. Provided that a simple review of a product can violate such a law, or
even having such a law, is absurd and can have long reached effects on journalism. One article
claims that the court decision, “may entail extensive consequences for journalists, writers,
doctors and others making statements on drugs” and then proceeds to offer a counter-example,
“It is hard to imagine many statements that do not aim at promoting the prescription, dispensing,
sale or consumption of a drug. If my uncle praises a drug, he will, in effect, be promoting
consumption” (Ekstrand, 2009). Another article notes, the ruling may create, “a culture of fear,
that journalists will decline from giving natural health products the coverage they had previously
been able to give” (European Court Ruling, 2009). With this “culture of fear” in place, reporters
will be unable to provide health food products reviews.
This example raises issues regarding the public debate theory, discussed above. If there are laws that limit the free expression right to advertise, review, or advocate for certain health foods, those foods do not get their fair spot in the marketplace of ideas. Overall, as a result of such laws, health food products are stuck with a competitive disadvantage.

This case also speaks to the expressivist theory. The journalist in this case was a health product expert and had published several times on the subject. This ruling may force the journalist to find a new career (European Court Ruling, 2009), a career that she is not passionately drawn to, as she is to that of health products. Such development would, in effect, limit her personal expression and therefore limit her positive self development.

*Magoora sp. zoo v Dyrektor Izby Skarbowej w Krakowie* is not the only case in which freedom of expression was limited by the European Court of Justice. One can also consider the 2001 case of Bernard Connolly. Connolly had written an article critical of monetary integration, entitled “The Rotten Heart of Europe.” The article resulted in a European Court of Justice opinion that stated the commission could restrict dissent in order to “protect the rights of others” and punish individuals who “damaged the institution’s image and reputation,” essentially outlawing criticisms of the European Union (Evans-Pritchard, 2001).

Again, this speaks to both theories discussed above. First, the public debate theory. During an important policy debate on monetary integration, all ideas should be allowed into the marketplace. If some ideas are left out of the marketplace and the entire spectrum of ideas are not represented, the best policy may not be selected and a market failure may occur. To further an example from above, it is widely accepted that Alexander Hamilton’s proposed idea of a very strong monarch-like president had made James Madison’s concept of the presidency look moderate and lead to it being accepted (Stewart, 2007:151-162). One can see how even radical ideas, such as Hamilton’s or Connolly’s, which appear to have little value or support, may play a large role in shaping public opinion and the outcomes of certain debates.

The Connolly case also has expressivist theory implications: if Connolly was not permitted to write these articles, he would have to find another career, that perhaps would limit his positive self-development.

The theories that proclaim a robust free expression regime produces an overall good for society and the individual should be codified into legal systems. The United States has succeeded in doing this. As this paper has demonstrated, the European Union has thus far largely failed. The EU policy makers and legal scholars should therefore follow the American example in order to provide the EU citizens with a more robust free expression environment.

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