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Table of Contents

Introduction ..................................................................................................................pg. 3

Cyber Civilians as Combatants .............................................................................pg. 4

Money and Judges: Contours of Judicial Bribery in Medieval Jewish and
Canon Law ................................................................................................................pg. 23

Futility Determinations of Newborns at the Edge of Viability: A Comparison
of Relevant Law in the United States and the United Kingdom......................pg. 41

It’s Genocide, Now What: The Obligations of the United States Under the
Convention To Prevent and Punish Genocide Being Committed at the Hands
of ISIS .......................................................................................................................pg. 70

21st Century Terrorism Business Model: ISIS v. Al-Qaeda .................pg. 91
INTRODUCTION

Volume 8 Issue 1 of the Creighton International and Comparative Law Journal features several excellent articles. The featured articles discuss the implications of varying personnel conducting cyber warfare as well as judicial bribery in Medieval Jewish and Canon Law. The issue also features exceptional student articles on the difference between infant futility standards in the UK and United States, the obligations the United States incurs in the face of ISIS’s genocide, and the financial structure of ISIS.

As the world grows more interconnected it is important to have a wide base of knowledge in order to understand the past and help shape the future. By providing a platform for these issues to be discussed we hope to increase awareness of the critical questions which impact the world.

I would like to thank the board of editors, staff, writers, and our faculty advisor Raneta Lawson Mack for their hard work in making this issue a resounding success. Each contributor spent countless hours researching, writing, and reviewing their articles in order to assemble this issue. I owe each person a debt of gratitude for their work, I hope this thank you suffices.

–Andrew Rubin, Editor-in-Chief, Creighton International and Comparative Law Journal
Cyber Civilians as Combatants

By: Christopher E. Bailey

I. CYBER WARFARE: AN EMERGING AREA OF STATE PRACTICE

The United States, like many other countries, has used increased numbers of government civilians to accompany and support deployed military forces over the past decades. In fact, there is evidence that sensitive cyber operations require personnel with advanced skills working against a target set over a long period of time, suggesting that civilians may be better suited for certain roles over military personnel subject to rotational service personnel policies. This raises the issue

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whether the use of civilians, as agents of a belligerent nation-state, to conduct cyber operations in international armed conflict violates international humanitarian law (IHL).\(^4\) If a civilian serving as an intelligence officer at the National Security Agency (NSA), the U.S. Cyber Command (CYBERCOM), or a deployed location conducts an otherwise lawful cyber operation, is that person, if later captured, entitled to prisoner of war (POW) status and combatant immunity?\(^5\) This article argues that government civilians can serve in such combatant roles without violating international law. Indeed, this article argues that civilians serving as cyber-combatants may be better positioned than military personnel to meet the requirements of military necessity,\(^6\) while respecting the rights of non-combatants and regulating the conduct of the parties to the conflict.\(^7\)

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\(^4\) In the U.S. view, the established principles of IHL apply in cyberspace, even though there may be disagreement on its application in certain situations. Harold Hongju Koh, Legal Adviser to the U.S. Department of State, at the U.S. CYBERCOM Inter-Agency Legal Conference, Ft. Meade, MD (Sept. 18, 2012) available at [http://www.state.gov/s/l/releases/remarks/197924.htm](http://www.state.gov/s/l/releases/remarks/197924.htm). See also U.S. Dep’t. of Defense, Office of the General Counsel, 997 Law of War Manual (June 2015) (recognizing that IHL provides only a general guide in emerging, technologically advanced areas of State practice such as cyber warfare). See generally, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt, ed., New York: Cambridge University Press, 2013) (the Tallinn Manual, a multi-year collaborative effort by a group of international experts sponsored by the NATO Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia, offers a persuasive restatement of IHL in a cyber-context; the manual provides extensive commentary on each “rule,” with majority and minority opinions on each point).

\(^5\) The use of loosely connected civilians in cyber militias or a volunteer corps would raise separate and distinct legal issues under the 1949 Geneva Conventions, and is outside the scope of this article. See, for example, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), Art. 4(A)(2), Aug. 12, 1949, 75 U.N.T.S. 135 (which requires that such groups be commanded by a person responsible for his subordinates, to have a fixed distinctive sign, to carry arms openly, and to conduct their operations in accordance with the laws and customs of war).

\(^6\) According to the International Committee of the Red Cross, “the destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.” Int’l Comm. of the Red Cross, Customary International Humanitarian Law, Volume I: Rules, Rule 50 (Cambridge, 2005).

\(^7\) The general principles underpinning IHL (jus in bello) are necessity, distinction and proportionality. The principle of necessity requires that:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
This article focuses on the use of civilians as cyber-combatants in armed conflict between belligerent nation-states, as defined by the 1949 Geneva Conventions. Indeed, it is important to identify the timing and types of operations that might be conducted by civilian cyber practitioners. First, international armed conflict could involve stand-alone cyber operations, as well as cyber operations that precede and support conventional attacks. In one example, civilian cyber-combatants may be permitted to conduct certain collection activities during peacetime or a period of tensions which might not be permissible for them to later conduct "during” an armed conflict.

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I), Art. 52(2), June 8, 1977, 17512 U.N.T.S. 3. The principle obligating attackers to distinguish between combatants/military objectives and civilians/civilian objects is embodied in the Additional Protocol I, Article 48. The proportionality principle requires parties to refrain from launching any attack that may be expected to cause incidental injury or collateral damage that “would be excessive in relation to the concrete and direct military advantage anticipated ….” Id., Article 57 (2)(iii). While the United States is not a signatory to Additional Protocol I, the principles regarding the protection of civilians likely reflect customary international law. See generally Nils Melzer, Int’l. Comm. Of the Red Cross, Interpretive Guidance on The Notion of Direct Participation in Hostilities Under International Humanitarian Law, (Feb. 2009); Michael Matheson, Deputy Legal Adviser, U.S. Dep’t. of State, Remarks at Sixth Annual American Red Cross-Washington College of the Law Workshop (Jan. 22, 1987).


In the 2008 conflict over South Ossetia, Russia reportedly conducted small-scale computer network attacks against Georgia over a two-month period preceding conventional military operations. In such a situation, a victim-state would have difficulty characterizing such preliminary attacks as a “use of force” under Article 2 (4) of the Charter of the United Nations, as well as attributing the attacks to state sponsorship. Heather Harrison Dinniss, Cyber Warfare and the Laws of War, 54-5 (Cambridge, UK: Cambridge University Press, 2012).
In addition, some cyber operations—especially ones with a limited effect during a period of tensions before a conflict—might be considered as falling short of the use of force threshold warranting the application of IHL. Second, many intelligence activities that might be conducted during the armed conflict (e.g., cyber collection and exploitation) might also be non-destructive in character and would not necessarily raise the same level of concerns as either attacks or defensive actions that result in the spread of terror, injury to people, or damage to property. In other words, what is the permissible range of cyber activities for a civilian cyber practitioner during an international armed conflict?

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10 Simon Chesterman, The Spy Who Came in from the Cold War: Intelligence and International Law, 27 MICH. J. INT’L L. 1071 (2006) (arguing that certain peacetime intelligence activities—like collection (espionage)—do not violate international law, but its constitutive acts may violate foreign domestic laws). See also Jeffrey H. Smith, Keynote Address, State Intelligence Gathering and International Law, 28 MICH. J. INTL. L. 543 (2007). However, members of the armed forces, in time of armed conflict, who fall “into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.” Additional Protocol I, supra note 7, Art. 46 (1). In a like manner, a person who enters a foreign nation while in civilian disguise for the purpose of carrying out acts of sabotage could be treated as either a criminal or an unlawful combatant. See Ex Parte Quirin, 317 U.S. 1 (1942) (eight Nazi saboteurs had landed by submarine and had changed into civilian clothes before capture; all were treated as unlawful combatants). Clearly, a civilian intelligence officer conducting a range of offensive cyber operations—entirely from friendly territory—cannot be considered as a spy or a saboteur, at least in the classic sense of the term, but there are questions about how to characterize that person’s activity during an international armed conflict.

11 U.N. Charter art. 2(4). Article 51 further recognizes the inherent right of self-defense, if an “armed attack” occurs. This raises a question about the transition point from jus ad bellum (conflict management) to jus in bello (the application of IHL); at what point does a cyber attack become serious enough that a breach of peace has occurred that warrants an armed response? See also Michael N. Schmitt, Computer Network Attack and the Use of Use in International Law: Thoughts on a Normative Framework, 37 COLUM. J. OF TRANSNAT’L L. 885 (1998-99) (analyzing the nature of cyber computer network operations under international law and positing the need for an alternative normative framework based upon an assessment of the consequences caused by such operations).

12 Additional Protocol I, supra note 7, Art. 51, provides that the “civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” Article 51 (2) provides that the “civilian population as such, as well as individual civilians shall not be the object of attack.” Article 51 (5) proscribes indiscriminate attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”
Cyber operations may involve either offensive (attack) or defensive actions. The term “cyber attack” is used here to refer to “deliberate actions to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information and/or programs resident in or transiting these systems or networks.” Cyber attacks may range from a Distributed Denial of Service (DDoS) attack with temporary effects, such as the recent service outage in North Korea, to a broader, more destructive attack as in the 2010 Stuxnet attack against the Iranian nuclear facilities. Cyber defensive actions may be entirely passive or involve some level of response (e.g., a counter attack or a proportionate countermeasure) against attacking enemy systems. In

13 NAT’L RESEARCH COUNCIL, TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBER ATTACK CAPABILITIES 20 (William A. Owens, Kenneth W. Dam & Herbert S. Lin, 2009). Additional Protocol I, supra note 7, Art. 49 (1), defines “attacks” as “means of violence against the adversary, whether in offense or in its defense.” Under the Tallinn Manual, Rule 30, a “cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.” Schmitt, Tallinn Manual, supra note 4. This opens up a broad range of computer network operations against civilian objects—all with temporary effects—that may be conducted by civilian cyber practitioners during an international armed conflict without necessarily violating the prohibition against direct participation in hostilities. Dinniss, Cyber Warfare, supra note 9, at 196-202.

14 A DDoS attack is a “technique that employs two or more computers, such as bots of a botnet, to achieve a denial of service from a single or multiple targets.” Schmitt, Tallinn Manual, supra note 4, at 259.


16 Michael B. Kelley, The Stuxnet Attack On Iran’s Nuclear Plant Was ‘Far More Dangerous’ Than Previously Thought, BUSINESS INSIDER (Nov. 20, 2013), http://www.businessinsider.com/stuxnet-was-far-more-dangerous-than-previously-thought-2013-11. See also PAUL K. KERR ET AL., CONG. RESEARCH SERV., R41524, THE STUXNET COMPUTER WORM: HARBINGER OF AN EMERGING WARFARE CAPABILITY (2010). The Stuxnet attack, unlike the temporary effects in the earlier 2007 cyber attack on Estonia or the 2008 cyber attack on Georgia, raises the jus ad bellum issue whether the attack was a “use of force” in violation of Article 2(4) of the Charter of the United Nations and whether Iran had the right to respond to an “armed attack” under Article 51.

17 “A State injured by “an internationally wrongful act may resort to proportionate countermeasures, including cyber countermeasures, against the responsible State.”” Schmitt, Tallinn Manual, supra note 4, Rule 9. The commentary to Rule 9 then notes that two separate tests of proportionality have been advanced, one that the countermeasure must be proportionate to
any case, from the victim’s perspective, it is often difficult to distinguish a cyber collection activity that maps out a friendly system for later attack, from a cyber exploitation that delivers a payload to that system (e.g., malware or a logic bomb) designed to activate at a later date, and from an attack that is actually intended to impair that system on either a temporary or permanent basis.\(^{18}\)

Cyber operations are an emerging and revolutionary area of State practice; the belligerents in a future armed conflict are unlikely to forsake its advantages. Cyber operations offer technologically advanced belligerents a means to bring about favorable outcomes short of costly, labor and resource intensive, conventional military operations.\(^{19}\) Moreover, during an armed conflict, cyber operations offer a valuable complement to broader on-going conventional operations, especially in making such operations more efficient and effective. Even so, with the complex, inter-connected and dual-use\(^{20}\) nature of the Internet in a technologically advanced country, it means that cyber attackers will have to spend increased time and resources in the planning and conduct of operations. Indeed, cyber practitioners must consider not only the direct

the breach and the second that the countermeasure must be commensurate to the injury suffered. *Id.* at Comment 7.

\(^{18}\) According to the National Research Council, cyber attack and cyber exploitation require a “vulnerability, access to that vulnerability, and a payload to be executed—the only difference is in the payload to be executed.” Owens, *supra* note 13. According to one report, computer network exploitation involves data extrapolation or manipulation, while computer network attack is the military parlance for offensive operations; the report indicates that the concepts are closely related and sometimes indistinguishable. CATHARINE A. THEOHARY & ANNE I. HARRINGTON, CONG. RESEARCH SERV., R 43848, CYBER OPERATIONS IN DOD POLICY AND PLANS: ISSUES FOR CONGRESS 16 (2015).

\(^{19}\) Some nation-states may prefer the strategic ambiguity offered by cyber offensive operations, combined with plausible deniability, as a means of projecting coercive force against adversaries with greater conventional military power. Indeed, attackers have a range of tactics that can combine the structure and vulnerabilities of the Internet with secretive techniques, such as tunneling, data log destruction and false flag activities, that greatly complicate attribution to the responsible parties. Scott J. Shackelford & Richard B. Andres, *State Responsibility For Cyber Attacks: Competing Standards for a Growing Problem*, 42 GEO. J. INT’L L. 4 (Summer 2011).

\(^{20}\) This term is not defined in international law. Dinniss notes that once an object meets the definition of a military objective it becomes liable to attack despite its concurrent military and civilian usage. Dinniss, *Cyber Warfare, supra* note 9, at 193. However, the civilian aspects of a dual-use system (e.g., an integrated power grid that supports a hospital and a military installation) are considered in the proportionality analysis. This problem is also complicated by the fact that military forces often use communications systems that under private sector control, making it difficult for an attacker to know whether a system is used by the military and to what extent.
effects of a proposed attack, but also the so-called “knock-on”—the second and third order—effects of an attack. A cyber practitioner must, therefore, conduct a sophisticated reconnaissance and analysis of a proposed target to ensure that the target is properly identified, and that injury to civilians and damage to civilian objects is minimized over a broad period. This leads to issues regarding the permissible range of cyber operations that may be conducted by civilian cyber practitioners. In other words, when does a civilian practitioner become a cyber-combatant and what kinds of things can that person do without violating international law?

II. INTERNATIONAL HUMANITARIAN LAW

A. INTRODUCTION

International law does not prohibit civilians from participating in cyber operations during an international armed conflict. Nonetheless, the nature and extent of a person’s participation does have legal consequences in terms of his targetability, POW status, and right to immunity from prosecution for otherwise lawful acts of war (i.e., combatant immunity) by the capturing belligerent. However, the principles and rules of IHL have developed from centuries of State practice and international agreement, and have been largely focused on conventional, kinetic operations by uniformed military forces. Cyber operations raise new and revolutionary issues, not necessarily answered by existing law. Indeed, some aspects of inter-state cyber operations may call for a reexamination of State practice and may suggest a need for new understandings in customary international law.

B. COMBATANT STATUS: PRISONERS OF WAR & COMBATANT IMMUNITY

21 Id. at 207-9.
22 Id. at 206-7.
The 1949 Geneva Conventions (Geneva III) creates two legal classifications for individuals within the context of an international armed conflict; people can be classified as either combatants or civilians.\textsuperscript{24} Article 4, as applicable to international armed conflict, defines legal combatants as:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2-3) …

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5-6) …\textsuperscript{25}

Here, civilian cyber practitioners, even if located in the United States at places like the NSA headquarters at Fort Meade, Maryland, could be considered as persons “who accompany the armed forces.” In fact, it is public knowledge that the NSA is a combat support agency of the Department of Defense (DoD)\textsuperscript{26} that conducts a range of important national intelligence missions, to include support of deployed forces through reach back operations.\textsuperscript{27} In that sense, the headquarters with its entire military/DoD civilian workforce is a valid military objective for an opposing state-actor and its destruction would severely impair U.S. military operations during an international armed conflict. In any case, civilian employees working at that location could be targeted by an adversary based upon the principles of necessity, distinction, and proportionality.

\textsuperscript{24} Geneva Convention III, \textit{supra} note 8.

\textsuperscript{25} \textit{Id.} at Art. 4.

\textsuperscript{26} 10 U.S.C. § 193 (Combat Support Agencies: Oversight).

\textsuperscript{27} U.S. DEP’T. OF DEFENSE, \textit{JOINT AND NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS} (JOINT PUBLICATION 2-01), at B-21 to B-25 (Oct. 7, 2004).
The 1977 Additional Protocol I, to which the United States is not a signatory, provides additional guidance on combatant status and, in many areas, likely reflects customary international law. 28 Article 43 (1) provides that:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. 29

Article 43 (3) then allows for a slightly more expansive definition of the term “combatant”; it can permit the inclusion of civilians into the “armed forces”: “Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.” 30 While civilian employees of the Department of Defense may not be members of a uniformed military service, the employees are part of the “groups and units which are under a command responsible” for their conduct. The civilian cyber practitioners of the Department, especially at “paramilitary” combat support agencies such as the NSA and U.S. CYBERCOM and which have senior level military leadership, can be “incorporated” into the armed forces. 31 The senior level military leadership can ensure that cyber operations meet mission

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29 Additional Protocol I, *supra* note 7, Art. 43. Articles 43-45 likely also reflect customary international law regarding the combatant distinction between “Members of the armed forces” and “persons who accompany the armed forces ….” Matheson, *supra* note 7.
30 Additional Protocol I, *supra* note 7, Art. 43 (3).
31 There is a split of opinion on whether this provision applies to intelligence or other government agencies not having a law enforcement function. The majority of the International Group of Experts that drafted the *Tallinn Manual* did not believe that a party could incorporate such agencies, while a minority of experts disagreed. Schmitt, *Tallinn Manual, supra* note 4, Rule 26, at Comment 15. In a like manner, there is a split of opinion regarding the prohibition against the use of mercenaries, a term that could be applied to a limited class of civilian cyber practitioners who conduct offensive cyber operations. Matheson, *supra* note 7. Under Additional Protocol I, *supra* note 7, Art. 47, a mercenary is defined as a person recruited to fight in an armed conflict who takes part in hostilities, but “(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; [and] (e) is not a member of the armed forces of a
requirements consistent with IHL, using the best qualified personnel—military or civilian—to accomplish that mission.

This extension of existing law is supported by a 2013 reported decision of the German Federal Prosecutor General when considering criminal charges in which a drone strike—allegedly conducted by the Central Intelligence Agency (CIA)—killed a German national (B.E.) in Afghanistan.\(^{32}\) Initially, the Prosecutor General found that B.E. had been killed in a non-international armed conflict and that he had been killed consistent with the principles of necessity, distinction and proportionality. The Prosecutor General then held that the CIA officers, even if the drone lacked military markings, qualified as members of the armed forces under Additional Protocol I, Article 43.\(^{33}\) The Prosecutor General noted that the CIA officers were not integrated into the military command structure, but did act under “responsible command” and were a “unit comparable to, and closely connected with the regular military in terms of their objectives, armament, and organization.”\(^{34}\) The Prosecutor General explained that this functional definition of the term “armed forces” was also consistent with the notion that the officers performed a “continuous combat function”\(^{35}\) and were integrated into the armed forces on a \textit{de facto} basis.

This informed opinion by the Prosecutor General could be applied with greater force and effect to the use of DoD civilian cyber practitioners at the NSA, the U.S. CYBERCOM, and at deployed locations with the U.S. military. The NSA and the Command are currently co-located at Fort Meade, with the NSA providing the Command with support for “target and access


\(^{33}\) The court noted that the conflict was non-international in character, raising the applicability of Additional Protocol II. Nonetheless, the court found that Additional Protocol I, Article 43, was applicable to non-international armed conflicts. \textit{Id. at 758.}

\(^{34}\) \textit{Id.}

\(^{35}\) The ICRC uses the “continuous combat function” test to assess a person’s participation in a non-international armed conflict. According to the ICRC, “Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.” Melzer, \textit{supra} note 7, at 34.
development, enabling DoD cyberspace operations and execution." This statement implies that the NSA currently provides a broad range of combat support activities, while the Command conducts the actual operations. According to press, there is “lasting integration” between the two organizations, “with personnel moving freely between the two” operations centers. Indeed, the dual-hatted role of the NSA Director and Commander, U.S. CYBERCOM, ensures that the work of the two organizations is closely coordinated and that personnel—both DoD civilian and military—work together to perform operational missions. In effect, government civilians and contractors are likely already performing support functions just short of the combat functions of the CIA officer operating a drone. At deployed locations, the relationship between the civilian and military personnel is likely stronger, with civilians integrated into military organizations from supervisory-level to work unit and subject to discipline by senior military officers, with all personnel sharply focused on the mission. This means that, consistent with the object and purpose of Article 43, civilian cyber practitioners can provide a broader range of “combat functions” whether at reach back or deployed locations.

Article 44 (3) provides additional guidance on the distinction problem in cyber warfare; it initially obligates combatants “to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.” Article 44 (3)(a) then recognizes that there situations in where, “owing to the nature of the hostilities an armed combatant cannot so distinguish himself,” but requires that he carry his arms openly “during each engagement” and “during such time as he is visible to the adversary while engaged in a military deployment preceding launching of an attack in which he is to participate.” However, a cyber-

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39 Additional Protocol I, supra note 7, Art. 44 (3).
40 Id. at Art. 44 (3)(a). This exception originated with the concern for guerrilla groups and insurgents in enemy-occupied territory. Watts, supra note 24, at 7. Unlike the “lawless” bands
combatant employs “arms” that are by necessity concealed within near instantaneous electronic transmissions and “he” is rarely “visible” to the adversary “during each engagement.” Thus, Article 44 (3)(a) recognizes that there are some situations in which an “armed” combatant cannot distinguish himself, although it retains two archaic State practices that are not relevant for cyber warfare.

Clearly, neither the 1949 Geneva Conventions nor the 1977 Additional Protocol I were written with consideration for the requirements of cyber warfare. In practice, offensive cyber operations are conducted with great speed and by necessity on an anonymous basis, with the adversary often not even realizing that he is under cyber attack, much less with any understanding that the person sitting at a keyboard half a world away might or might not be “distinguishing” himself through the wearing of a uniform or by carrying arms openly. A person’s status as a legal or an illegal combatant should not turn on considerations not visible to the adversary; in other words, the principle of distinction that originated with the wear/non-wear of a uniform and other symbols visible to an adversary on the battlefield who would be obligated to make his own good faith targeting decisions, is outmoded in the “remote, over-the-horizon engagements” endemic in cyber war.  

Professor Sean Watts argues that “[f]ar more than the outward appearance of individuals conducting [computer network attacks], distinction in CNA demands attention to the actual conduct of the attack—the target chosen, pathways of entry, the means used to achieve destruction or harmful effects.”

Instead, scholars and practitioners should consider a functional (“continuous combat function”) test to assess whether certain civilians are part of the “armed forces” by the nature and purpose of their activities. Cyber-combatants serving under responsible command and conducting State sponsored and directed cyber operations consistent with IHL should be considered legal combatants without regard to military or civilian status. In part, this functional test would further

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that sometimes operate on the battlefield, government civilians, whether working in the United States or at deployed locations, are subject to U.S. criminal law, as well as agency disciplinary regulations.

Watts, supra note 24, at 15.

Id.

Press reporting indicates that the Director of the NSA, traditionally a serving general/flag officer in the U.S. military, will remain “dual-hatted” as the Commander, U.S. CYBERCOM for the foreseeable future. Sean Gallagher, White House: NSA and Cyber Command to stay under
the interests of IHL by ensuring that the best qualified personnel are conducting sensitive, technical operations and are doing so consistent the principles of necessity, distinction and proportionality. In part, this functional test would also eliminate a “uniformed” recognition test that has no practical meaning to an adversary who defends against cyber attacks mounted by practitioners who are not, in any case, physically present and “distinguishable” in a traditional sense.

C. COMBATANT STATUS: DIRECT PARTICIPATION IN HOSTILITIES

Civilian cyber practitioners often perform a broad range of functions in support of military operations, raising an important question about the threshold between combatant and non-combatant activities. The parties to an armed conflict are obligated to observe the general principle of distinction; that is, in an effort to respect and protect the civilian population and civilian objects, the parties must at all times direct operations only against military objectives. The 1977 Additional Protocol provides that civilians shall not be the object of an attack “unless and for such time as they take a direct part in hostilities.” This means that a civilian cyber practitioner who is not participating in hostilities is entitled to a protected status, like any other civilian. This also means that a civilian who does participate in hostilities can become a lawful target, at least for such time as he directly participates in hostilities.

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44 ICRC, Customary International Humanitarian Law, supra note 6, Rule 1 requires that the “parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” See also Additional Protocol I, supra note 7, Art. 48 (“the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”).
45 Additional Protocol I, supra note 7, Art. 51 (3). This point likely reflects customary international law. Matheson, supra note 7.
The concept of direct participation in hostilities (DPH) has raised nettlesome questions that have bedeviled practitioners, academics, and jurists. In many cases, it may be difficult to assess whether certain preparatory steps, to include cyber reconnaissance of an enemy system or the preparation of the malware, constitutes “participation” in or has a direct causal relationship to hostile acts. In other cases, it may be difficult to decide whether a cyber practitioner has employed a “weapon,” especially if that attack uses an inherently dual-use “object” like software code to produce non-destructive effects. Some scholars have even suggested that DPH involves not only “the delivery of violence,” but also actions aimed at protecting personnel, material and facilities. Thus, one must ask what cyber activities can be construed as DPH?

The International Committee of the Red Cross (ICRC) defines the “constitutive elements” of DPH as:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or

47 An analogous debate has focused on persons supporting the employment of improvised explosive devices (IEDs) by insurgents who are often not clad in military uniforms, albeit in non-international armed conflict. Here, a person’s activities might range from a less direct connection to an attack, such as the financing of bomb-makers and the actual making of bombs, to more direct connections in delivering the bomb to the attack location and manning the observation point while waiting for the target to appear. This situation, sometimes referred to the farmer-by-day, fighter-by-night, or a revolving door, problem centers on persons who hide among the civilian population, claiming its protective status, while waiting for an opportune time to attack. This also raises questions about the “duration” of a person’s DPH. Clearly, there is often a subtle transition, open to competing interpretations, regarding the transition from civilian to combatant status. See, for example, GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR 44-54 (New York: Oxford University Press, 2009).

48 Gary D. Brown & Andrew O. Metcalf, Easier Said Than Done: Legal Reviews of Cyber Weapons, 7 J. NAT’L SEC. L. & POL’Y 115 (2014) (concluding that an effort to treat all cyber techniques as weapons is impractical and that practitioners should instead focus on how the cyber capability will be used in a particular context). While international law bans certain weapons, such as poison gases and biological weapons, Additional Protocol I obligates States to conduct an Article 36 assessment of all new weapons, means and methods of warfare. Thus, the question arises whether certain lines of software code, to include even minor changes to an existing code, constitute a new “weapon” and require a legal review. See also INT’L COMMITTEE OF THE RED CROSS GENEVA, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF THE ADDITIONAL PROTOCOL I OF 1977, (Jan. 2006).

49 Dinniss, Cyber Warfare, supra note 9, at 163.
destruction on persons or objects protected against direct attack (threshold of harm), and

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).  

This three-part conjunctive test, focused on the threshold of harm, direct causation, and the belligerent nexus, provides a useful starting point for assessing whether and to what extent a civilian cyber practitioner is conducting combatant activities.

The key issue involves the nature of the cyber activities that civilian practitioners may engage in during an international armed conflict without violating the prohibition against DPH. In practice, a broad range of non-destructive cyber activities, to include intelligence collection, exploitation, and passive defense activities, especially ones not reaching the threshold of harm or having a direct causal relationship to such harm, probably would not violate the prohibition. On the other hand, cyber attacks, as well as counter-attacks and proportionate (defensive) countermeasures, could well constitute hostile acts that would have an adverse, direct effect on an adversary’s on-going military operations or overall military capacity. Here, even temporary effects and non-destructive activities, such as part of a DDoS attack, could provide friendly forces with a momentary advantage that could be exploited with well-timed conventional operations. Heather Dinniss, a research fellow at the Swedish National Defense College, also notes that less direct civilian assistance in the design and execution of cyber attacks could constitute DPH where it could be linked to a particular attack.

In practice, hostile acts committed by a civilian cyber practitioner would result in that person losing his protected status as a civilian—making him a combatant—and permit the

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50 Melzer, supra note 7, at 16.
51 This three-part test has also been adopted by the International Group of Experts for application to cyber warfare. Schmitt, Tallinn Manual, supra note 4, Rule 35.
52 Dinniss, Cyber Warfare, supra note 9, at 167.
adversary to target him, his facilities and activities under the principle of necessity. This analysis highlights the point that certain activities can transform a civilian cyber practitioner into a cyber-combatant; this analysis does not, however, answer the question of whether that cyber practitioner is a legal or an illegal combatant. And, the fact that a civilian may have participated in hostilities through cyber attacks does not necessarily mean that his acts are punishable as war crimes.

D. THE RULE AGAINST PERFIDY

The rule against perfidy, that is acts inviting an adversary’s detrimental reliance on a protected status, has been a traditional concern under international law; the rule also raises important distinction issues for cyber practitioners.\(^{53}\) Does it violate the rule for a “civilian” to conduct a cyber attack? Or, for that matter, can military personnel portray themselves as enemy “civilians” to cause an adversary to do something that he would not otherwise do? Does it violate the rule for a practitioner—military or civilian—to conduct an attack through the use of a “civilian” object? The key issue here is the extent to which the rule is an anachronism no longer applicable to modern cyber warfare.

The rule has its roots in the 1907 Hague Regulations, Article 23 (b), which provides that it is forbidden “to kill or wound treacherously individuals belonging to the hostile nation or army ….”\(^{54}\) The 1977 Additional Protocol I, Article 37, expanded on the basic rule, proscribing a range of activities to include the feigning of surrender, incapacitation, civilian status, or a protected status involving the “signs, emblems or uniforms” of U.N. personnel or neutral parties with the intent (i.e., a mens rea) to betray that confidence.\(^{55}\) Article 39 then proscribes the use of neutral flags, emblems, insignia or uniforms, or that of the enemy while engaging in attacks. Ruses, on the other hand, are defined as acts intended to mislead (deceive) an enemy, but do not misuse a protected status or symbol; ruses are not prohibited.\(^{56}\) Hence, one could argue that cyber practitioners are

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\(^{54}\) Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, IHL-19-EN.


\(^{56}\) *Id.* at Art. 39 (2).
misusing a protected status, that belonging to civilians and/or civilian objects, when conducting cyber attacks and are therefore subject to prosecution for perfidy.

In a sense, all cyber operations involve some level of secrecy and deception, largely in an effort to gain a decision advantage over an adversary. A digital attacker does not distinguish himself as a “combatant,” enabling an attacker to disguise his identity and make it difficult for a defender to know if a transmission is actually a treacherous attempt to kill him. One tactic could involve hacking into a militant cell phone network to send false text messages from one militant to one of his colleagues (e.g., making allegations that a third colleague is not actually pious or has committed some other sinful act, especially against the group). The use of this tactic can sow confusion, distrust or hatred within a network, even bringing about its collapse. A second tactic might involve web spoofing, the posting of false messages on an adversary’s website. By hacking into a group’s website, the cyber attacker could send false messages to a terrorist leader, directing him to a meeting site with a “colleague” but where he might actually be “meeting” with (i.e., be captured or killed by) a uniformed special operations team. This example could, however, constitute an act of perfidy if the special operations team had actually planned to ambush and kill the terrorist leader, especially if the kill team had been clad entirely in civilian mufti. Thus, it might be more accurate to say, from the victim’s perspective, that a cyber attacker has neither military nor civilian status; the identity of the person behind a cyber persona is an unknown and that a recipient who trusts unencrypted communications or suspicious transmissions does so at his own peril.

The use of a civilian object to conceal a cyber weapon (e.g., the data contained on a thumb drive) could be considered a lawful ruse in at least two different ways. First, the cyber attack could be permissible if it were treated like the permissible use of civilian clothing by a combatant to mask his approach to an enemy soldier, but still showing some kind of combatant “insignia” (e.g., something analogous to an “armband” worn by French partisans in World War II) in the period

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58 Id.
immediately preceding and during the attack.\textsuperscript{59} Here, it might be an acceptable ruse to mark the bait as something that would have military applications, such as “engineering texts,” “tools program,” or a Windows update. Second, the cyber attack could be permissible if the “weapon” was not used to “kill or wound” individuals treacherously; in other words, if the attack had been designed to capture someone or if the attack was not the proximate cause of a person’s death or wounding, it could be treated as a ruse. Like the identity of the cyber attacker, the status of the “object” is generally an unknown and cannot be trusted until verified. In any case, it would likely violate the rule against perfidy by using a thumb drive, disk or other device that is marked as “U.N. Inspections Guide,”\textsuperscript{60} “Red Crescent,”\textsuperscript{61} or as something clearly non-military such as an update to a popular iTunes app.

In a certain sense, the rule against perfidy seems like an anachronism, reminiscent of the pre-cyber battlefields, especially when one considers that the rule developed because of actions like the misuse of a white flag of surrender or the use of medical vehicles to mount a direct kinetic attack. Nevertheless, cyber warfare imposes new and challenging requirements for practitioners, often requiring changes in State practice with an evolving understanding of legal obligations. Thus, while existing law still allows a range of novel ruses, many of which can be analogized to acceptable past practices, other practices, such as a treacherous killing or the misuse of a protected symbol like that of the Red Crescent, will still be proscribed.

E. ASSESSMENT

Civilian cyber practitioners can serve in a range of combatant roles, while retaining combatant immunity, without violating the rule against perfidy. This proposed expansion of State practice is consistent with the continuous combat function test used by the ICRC and is supported

\textsuperscript{59} W. Hays Parks, \textit{Special Forces’ Wear of Non-Standard Uniforms}, 4 CHICAGO J. OF INT’L LAW 493, 521-24 (2003), http://chicagounbound.uchicago.edu/cjil/vol4/iss2/16 (explaining that the wear of civilian clothing by special operations personnel can constitute an act of perfidy if done for the purpose and result of “killing treacherously”).

\textsuperscript{60} Additional Protocol I, \textit{supra} note 7, Art. 37 (1)(d).

\textsuperscript{61} The perfidious misuse of the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun would be a war crime under Geneva Convention I, \textit{supra} note 8, Art. 53; such misuse would also be a grave breach under the 1977 Additional Protocol I, \textit{supra} note 7, Art. 85 (3)(f).
by the informed decision of the German Federal Prosecutor regarding combat operations conducted by CIA officers in Afghanistan/Pakistan. This functional test would also change the focus from a “uniformed” recognition test that has no practical meaning to an adversary who defends against cyber attacks conducted by practitioners who are not “distinguishable” in a traditional sense. Instead, practitioners should ensure that the best qualified personnel—military or civilian—are used in the design and delivery of offensive and defensive cyber operations to effectuate the underlying principles of necessity, distinction and proportionality during operations. This proposed practice could provide enhanced mission effectiveness, and also respect and protect the rights of non-combatants and non-belligerents.

III. TOWARD A MODERN CYBER WARRIOR

The modern cyber warrior, as an agent of a belligerent power in an international armed conflict, can be a serving military member or a civilian government employee consistent with and based upon a good faith extension of existing law. IHL, based on both customary international law and treaty, has evolved over the centuries, largely in response to changes in State practice and the contemporary sense of obligations (opinio juris) in modern warfare. Many important principles, such as necessity, distinction and proportionality, must now be adapted to the new and unique requirements of technologically advanced cyber warfare. The fundamental problem for cyber-combatants, military or civilian, is the principle of distinction. A “functional” (e.g., a continuous combat function) test should be used to determine whether certain civilians are part of the “armed forces.” This would allow cyber civilians to serve in combatant roles while also furthering the object and purpose of the 1949 Geneva Conventions and the 1977 Additional Protocol I—respecting and protecting the rights of non-combatants and non-belligerents—in international armed conflicts. Finally, this expanded view of the civilian cyber practitioner should also help the U.S. CYBERCOM in its efforts to recruit and retain a highly skilled workforce.
Money and Judges: Contours of Judicial Bribery in Medieval Jewish and Canon Law

By: Shlomo Pill

I. INTRODUCTION

Judicial ethics is a central concern of all legal systems. The law owes its viability to the courts that apply and enforce it, and the efficacy of the courts depends on people’s willingness to submit their disputes to them and accept their rulings. Judicial ethics laws aim to engender public confidence in the courts by assuring litigants that their disputes will be resolved by judges with professionalism, erudition, and integrity. During the middle ages, bribery was one of the main focuses of judicial ethics in both Jewish and Canon law. These systems in particular relied on the good will of their adherents for their own viability, and each took measures to earn that trust by trying to curtail the impression of judicial corruption that results from jurists taking money from the litigants they are judging.

This paper explores the Jewish and Canon law prohibitions on judicial bribery during the medieval period. In discussing the halakhic, or Jewish law, doctrine, this paper draws on the Talmud, as well as rabbinic scholarship such as codifications and restatements of the law, and

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4 See Robert Kirschner, Rabbinic Responsa of the Holocaust Era 4 (1985) (“Halakha is the collective rabbinic term for the prescriptive laws of Judaism. . . . Halakhah defined the course of day-to-day Jewish existence, and was in turn defined by it.”).
responsa dating from the 10th century until the mid-16th century. In presenting the Canon law approach to judicial bribery, this paper relies principally on two articles written by Richard Helmholz in which the author surveyed and explicated various aspects of medieval Canon law judicial ethics.5

Part II of this paper explores the theoretical underpinnings that animated the rules governing judicial bribery in Canon and Jewish law during the Middle Ages. Part III next considers the substance of the Jewish and Canon law doctrines, focusing on how scholars within each system distinguished between permitted and prohibited payments to judges in order to leave open adequate avenues for judges to earn a living from their work. Finally, Part IV briefly discusses some of the procedural implications of a judge’s taking a bribe in Jewish and Canon law, including a bribed judge’s obligation to recuse himself from a case, and the legal effect of rulings he issued in violation of this duty.

II. JUDICIAL BRIbery: THEORETICAL FOUNDATIONS AND ANIMATING PRINCIPLES

This Part explores the respective jurisprudential theories underlying medieval Jewish and Canon bribery law. Essentially, it asks the question: Why did these legal systems prohibit judicial bribery. For contemporary lawyers, judges, and scholars, the answer might seem obvious; the law prohibits bribery because bribes tend to bias judges in favor of the bribing party, leading to judge’s making decisions based on personal preferences rather than the law, and undermining litigants’ rights to a fair hearing by an impartial judge and a ruling consonant with accepted legal norms.6 In fact, however, maintaining impartiality was only one of the two bases for prohibiting bribery in medieval Canon law. An alternative theory held that bribery constituted the sin of simony, and was proscribed for that reason. Jewish law, however, offered an entirely different theory that held

prohibited was prohibited because it made the bribed judge a virtual party to the case he was deciding, thus negating the court’s proper third-party arbitral role.

Part II.A explicates the two principle theories of judicial bribery offered by medieval canonists. Part II.B turns to explore the role-preservation rationale that animated Jewish bribery rules.

A. CANON LAW AND JUDICIAL IMPARTIALITY

Medieval Canon law prohibited judicial bribery. It was not the bribe itself that was problematic. A bribe was viewed as a proxy for the presence of a deeper substantive problem that the proscription of bribery aimed to prevent. Two principle theories seem to have animated Canon law rules governing the permissibility of judges receiving remuneration from litigants. One theory emphasized the necessity of judicial impartiality, and therefore condemned bribery because it would result in bias favoring the bribing litigant. Another theory prohibited bribery independent of its effect on judges’ impartiality because by accepting payment for adjudicating a case a jurist committed the sin of simony, the sale of a holy thing.

Several medieval canonists prohibited bribery because they viewed it as a form of simony. According to Richard Helmholz, Gratian wrote that judicial bribery amounted to the sale of justice and a fraud against God. On this view, justice was a gift of God, and a judge’s task was to clarify and dispense God’s justice. Because justice belonged to God, the judge was to dispense it freely out of a genuine love for the actualization of God’s will on earth rather than in return for corporeal gains. Bribery thus amounted to a judge’s selling what belonged to God for his personal gain, the quintessential definition of simony.

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10 See Helmholz, *supra* note 3, at 311 (*quoting* Gratian “He who takes a reward in recompense perpetrates a fraud upon God.”).
11 See. Brundage, *supra* note 9, at 384 (citing medieval canonists for the proposition that judges were understood to be God’s special emissaries and ministers in the dispensation of justice).
12 See Helmholz, *supra* note 3, at 311-12. This view was adopted by other canonists as well. See id. at 311 (“[According to] the Decretals Gregorii IX (1234) and the Liber Sextus (1298) . . . In
An alternative theory prohibited bribery because it resulted in judicial bias favoring the briber over his opponent. In Canon law jurisprudence, it was axiomatic that adjudicatory rulings should be based on the judge’s view of what the law requires under the facts of the case rather than on the basis on the presiding judge’s extra-legal preferences. Judges were therefore obligated to recuse themselves from cases in which their decisions would stem from personal bias. Bribery, an exchange of consideration between a judge and litigant, was understood to create a serious risk of bias, and was therefore prohibited. On this view, illegal bribery was merely a proxy for determining the presence of improper judicial partiality; the problem with bribery lay “in the corruption of the judge through a bribe, not on the simple fact that money . . . changed hands.”

B. JEWISH LAW AND THIRD-PARTY ADJUDICATION

Jewish law prohibits judicial bribery because a judge who receives consideration from a litigant becomes a virtual party to the case, thereby undermining the court’s role as a detached, third party arbiter. Thus, while other doctrines in Jewish legal ethics insure judicial impartiality, the bribery rules aim to insure that judges maintain the required third-party vantage relative to the litigants and subject matter of each case.

Jewish law requires adjudication to be a third-party process. Jewish tradition characterize God as chessed, “selfless actions calculated to impart good unto others.” God’s greatest act of kindness was His creating Man as a free-willed being capable of emulating the divine by choosing order that justice should be rendered ‘freely and with all purity,’ it was unlawful for judges to take ‘a charge or anything else’ from the parties who appeared before them.”).

13 See, e.g., 2 Hostiensis, Lectura, at 141 va to X2.25.5§11 (quoted in BRUNDAGE, supra note 9, 383) (“Note that a judge should be so impartial that he injures no one. Neither hatred nor favor, fear nor money should sway his judgment or cause him to do anything detrimental to a party. Accordingly, he should deny justice to no one . . . however detestable they may be . . . Let the judge keep fair play ever before his eyes.”).

14 See BRUNDAGE, supra note 9, at 385.


16 See Yosef Karo, Shulchan Aruch: Choshen Mishpat §§7-8, 12.


18 Id.

19 Id. at 530.
to suppress his natural tendency towards self-interested action in favor of acting with *chessed*.\textsuperscript{20} Jewish thought further maintains that the Torah, God’s revealed will, instructs Jews as to what actions constitute *chessed* and which do not.\textsuperscript{21} Thus, Jewish law “functions primarily as a means of enabling its adherents to develop their humaneness through self-transcendence, by . . . instructing them to choose to adopt God’s *chessed*-focused will as their own.”\textsuperscript{22}

The transformation of Man from self-interested homo-sapien to selfless human being requires other-referentiality, the adoption of externally-dictated, rather than internally-devised behavioral norms and values.\textsuperscript{23} In the Jewish tradition, choosing how to act based on one’s own moral compass is an act of self-indulgence; however, making that same determination based on the command of an external authority – in this case, God – is a morally ennobling act of self-transcendence.\textsuperscript{24} Thus, as a moralizing medium, Jewish law relies primarily on the process of Jews choosing to subjugate their naturally self-interested preferences to God’s own value judgments embodied in the *halakha*.\textsuperscript{25} As Maimoides notes in his seminal Jewish law codification, Mishnah


\textsuperscript{21} See *Law, Politics, and Morality in Judaism* 8 (Michael Walzer ed., 2008); Robert Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. Contemporary L. Issues 1, 17 (1989) (“[The Jewish legal system] is based on the value of encouraging individuals to expand their narrow self-centeredness and reach out to a level of consideration of others.”).

\textsuperscript{22} Pill, *supra* note 17, at 532.

\textsuperscript{23} See *id.* at 532.

\textsuperscript{24} See *id.* at 533 (“When one performs a good act because his own conscious dictates he do so, his conduct stems from self-referential instinct; when he does the same act because it is commanded by an external moral authority, however, the performance becomes a self-transcending, moralizing act.”).

Torah, it is important that the law is obeyed because it is God's command, rather than as a result of a person's own personal reasoning, judgment, and moral discernment.  

The possibility of accepting externally declared legal rules is problematic in cases of interpersonal disputes where litigants often reasonably disagree about what God’s law requires. In such instances, neither party is willing to accept the other’s opinion about what the law requires, and even one was willing to do so, accepting the legal view of an opposing interested party would negate Jewish law’s moralizing purpose because that conception of what the law requires would be self-referential. The Jewish adjudicatory process remedies this problem by providing disputants with a court’s external, third-party determination of what God’s law requires. Courts thus enable “self-focused litigants . . . [to] . . . transcend their personal priorities by adopting a court’s disinterested judgment as their own standard [of conduct], thereby morally ennobling their conduct consonant with Torah ideals,” and courts are able to fulfill this vital “precisely because they are not parties to the cases they decide.”

Jewish law preserves the third-party institutional character of its courts by disqualifying judges who are in effect parties to the cases they are supposed to decide. Bribery is one of the conditions that transform a judge from jurist to litigant, thereby compromising the courts requisite disinterested position. The Talmud relates that bribery is called shochad in Hebrew because it

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26 See Maimonides, Mishnah Torah, The Laws of Kings and their Wars 8:11 ("Whoever accepts the Seven Noahide Laws, and is careful to observe them, is among the pious people of the nations of the world. . . . But this is only if he accepts and observes them because God has commanded them . . . . But is he does so due to his own reasoning . . . he is not one of the pious people of the nations of the world, nor one of their wise men."); see Aharon Lichtenstein, Communal Governance, Lay and Rabbinic: An Overview, in RABBINIC AND LAY COMMUNAL AUTHORITY 20 (Suzanne Last Stone & Robert S. Hirt eds., 2006) (“Action in response to the halakhic call is superior to the same act voluntarily undertaken.”).

27 Pill, supra note 17, at 534-35.

28 Id.

29 See generally id. at 538-43.

30 Other conditions that compromise the third-party position of the court include a judge’s financial interest in the outcome of a case, his being closely related to an interested party, and his having previously issued an advisory opinion on the matter at hand. See Id.
makes the judge and bribing litigant like one.\textsuperscript{31} Thus, a bribed judge is disqualified because the bribe makes him a party to the case, leaving him legally incapable of representing the third-party court in that case.\textsuperscript{32}

**III. SUBSTANTIVE REGULATION OF JUDGES AND MONEY**

In working to distinguish illegal bribes from permissible gifts and compensation, medieval canonists and halakhic scholars had to wrestle with several interrelated issues. The first concerned the logical implications of the various theories animating the prohibition on bribery. Canonists has to decide which payments to a judge constituted simony, and which were likely to result in judicial bias; Jewish decisors had to determine which exchanges between a litigant and his judge made the judge a virtual party to the case. The second consideration related to the relationship between bribery and procedural efficiency. If a payment was classified as a bribe it warranted the receiving judge’s recusal.\textsuperscript{33} Removing a judge, in turn, would result in procedural delays, adding time and expense to an already slow and costly litigation process. Because both Canon and Jewish law were concerned with making adjudication as quick and inexpensive as possible,\textsuperscript{34} legal scholars had to define illegal bribes so as to adequately prevent the ills associated with paying judges while also taking care not to provide unnecessary ground for recusal, which could lead to procedural inefficiency and injustice.\textsuperscript{35} Finally, jurisprudents striving to define illegal bribery had

\textsuperscript{31} See Babylonian Talmud, Kesubos 105a. The Talmud takes shochad to be a conjunction of two words, shehu chad, which means “it unites” or “it makes several things one.” See Pill, supra note 17, at 538-43.

\textsuperscript{32} See Yonasan Eibeshutz, Tumim 37:1 and sources cited therein (reasoning that a bribed or financially interested witness or judge cannot truly be categorized as disqualified because due to their connection to the matter they were “never within the legal definition” of a witness or judge).

\textsuperscript{33} See BRUNDAGE, supra note 9, at 389; Yosef Karo, Shulchan Aruch: Choshen Mishpat 13:7-9 (describing procedures and burdens of proof for removing a presiding judge).

\textsuperscript{34} See BRUNDAGE, supra note 9, at 449-51 (describing a form of summary procedure instituted in Canon law courts in recognition of the need to make the process of adjudicating civil actions more efficient and streamlined); Yecheil ben Asher, Arbah Turim: Choshen Mishpat 1:2; 13:3-6 (urging judges not to impose excessive costs on litigants by employing unnecessary scribes or other court officials).

\textsuperscript{35} Cf. See BRUNDAGE, supra note 9, at 443-46.
to grapple with the practical need of judges to earn a living from their work while also preventing the evils associated with judicial bribes.

Part III.A explores some of the ways in which medieval canonists developed a nuanced bribery doctrine that addressed these concerns. Part III.B explains the same with respect to Jewish law scholars.

A. ILLEGAL BRIBERY AND APPROPRIATE GIFT-GIVING IN MEDIEVAL CANON LAW

Medieval canonists developed a complex doctrine to distinguish between an illegal bribe and a permissible gift or compensation. The doctrine did not consist of a comprehensive set of rules, but rather an array of often conflicting factors that might be considered in deciding whether any particular exchange of consideration between a litigant and judge was permitted. These factors represented the imperfect results of an attempt to balance the three competing concerns related to defining judicial bribery.

On the view that bribery prohibited bribery as a form of simony, canonists distinguished between payments compensating judges for doing justice, and payments offered for other reasons. Because Canon law defined simony in terms of the parties’ intent to buy and sell a holy thing, canonists identified illegal bribery by reference to the apparent intentions of the parties. A payment best explained as a purchase of God’s justice was illegal, but a payment apparently offered “out of the donor’s liberality,” or as a gift signifying respect for the judge’s office was permitted. Thus, judges could not take payments for performing their judicial duties, but could accept compensation for travel expenses or other costs related to their, since such payments were

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36 See Helmholz, supra note 3, at 316.
37 Panormitanus, Commentaria Super Quinque Libros Decretalium, ad X 3.1.10, no. 10 (1517) (quoted in Helmholz, supra note 3, at 316 (2001)); see also Brundage, supra note 9, at 390 (“Judges . . . could also accept token gifts (xenia), provided that these were offered freely and spontaneously.”).
38 See Helmholz, supra note 3, at 316.
clearly not made to purchase justice.\textsuperscript{39} Similarly, judges could not accept valuable gifts,\textsuperscript{40} but could accept food and drink, items they “could readily consume within a short time,”\textsuperscript{41} and incidental gifts because such offerings were understood to be mere social conventions rather than the purchase price for God’s justice.\textsuperscript{42} Despite these permitted forms of remuneration, judicial bias remained a separate concern. Thus, judges could only accept non-bribe gifts if both parties participated equally in the giving, lest the acceptance of a gift from only one litigant result in bias.\textsuperscript{43}

The view that prohibited bribery as an incidental measure to prevent judicial bias permitted forms of payment that were unlikely to “influence the judge’s mind.”\textsuperscript{44} Thus whether a particular exchange between a judge and litigant was a bribe was a highly fact-specific determination; no objective, fixed sum “turned a gift into a bribe.”\textsuperscript{45} Instead, determining whether a gift was a bribe entailed considering the objective value of the gift and its relative worth in comparison to the wealth of the litigants and judge, local customs concerning gift-giving and court procedure, as well as other factors.\textsuperscript{46} Canonists thus held that a judge could accept equal gifts from each litigant in a case because such offerings were unlikely to result in bias favoring one party,\textsuperscript{47} and also that large gifts were prohibited while small offerings were generally permissible.\textsuperscript{48}

\textsuperscript{39} See BRUNDAGE, \textit{supra} note 9 at 389-90 (“[J]udges-delegate were entitled to claim compensation from the parties for modest travel expenses . . . [and] they could claim compensation for casualty losses if, for example, they were robbed or one of their horses died while they were on the road to hear a case, or if the illness of one of their attendants required them to tarry away from home longer than anticipated.”).

\textsuperscript{40} See id. at 390 (referring to gifts of robes, books, or silver vessels).

\textsuperscript{41} \textit{Id.}; see also Helmholz, \textit{supra} note 3, at 317.

\textsuperscript{42} See Helmholz, \textit{supra} note 3, at 316.

\textsuperscript{43} See BRUNDAGE, \textit{supra} note 9, at 390.

\textsuperscript{44} Helmholz, \textit{supra} note 3, at 316.

\textsuperscript{45} \textit{Id.} at 317.

\textsuperscript{46} See \textit{Id.}; Helmholz, \textit{supra} note 15, at 396-97.

\textsuperscript{47} See Helmholz, \textit{supra} note 3, 320 (If both sides gave something to a judge [Hostiensis] speculated, money might not pervert [the judge’s] judgment.”); Helmholz, \textit{supra} note 15, 397 (“If both sides give small gifts to the judges, those gifts do not have any necessary influence on the outcome of the case.”).

\textsuperscript{48} See Helmholz, \textit{supra} note 15, at 397 (referencing the view of William of Drogheda).
In defining the scope of prohibited bribery, canonists also considered the need to provide judges with a means of earning an adequate livelihood from their work. The need to assure adequate avenues of judicial compensation was likely not a serious problem for much of early medieval history. According to James Brundage, most Canon law jurists did not ascend to the bench until after having already enjoyed a profitable career as an advocate, or having otherwise “accumulated enough benefices and other appointments to support himself comfortably.”

Additionally, until at least the mid-twelfth century, the caseload of ecclesiastical courts was fairly light, and the vast majority of cases were handled directly by bishops and other ecclesiastical officials, whose holdings provided them with substantial revenue, rendering the issue of judicial compensation largely moot.

As the size of the professional judiciary increased, and more jurists without adequate external sources of income ascended to the bench, the need for permissible avenues for judicial compensation grew. The two dominant theories of Canon bribery law suggested that litigants could compensate judges for their labor – as distinct from paying them for dispensing God’s justice – and that judges could receive forms of remuneration that were not likely to produce bias. Thus, canonists held that judges could recover for the costs they incurred while judging cases because “no man can be compelled to use his property for the benefit of others.” This led to more general approval of judicial compensation on the theory that “it is not just for a man to labor without reward.” Such payments did not amount to simony because they compensated judges for their physical and mental labor rather the justice they dispensed, and they did not raise concerns about judicial bias, since typically each litigant would contribute an equal amount.

Some canonists also permitted litigants to compensate judges if in a particular locale it was customary for them to do so. The fact that such payments were regularly made as a matter of course rebutted any presumption that an exchange of funds between a litigant and his judge constituted

49 Brundage, supra note 9, at 391-92.
50 See id. at 373.
51 See Helmholz, supra note 3, at 318.
52 Id. at 317.
53 Id. at 317, 320.
54 See id. at 320.
simony or would result in bias.\textsuperscript{55} Canonists also suggested that while payments made upon a judge’s demand would constitute bribery, a judge’s receipt of a voluntary payment made by a litigant was not prohibited.\textsuperscript{56} This distinction established that “justice would not have been sold [or the judge’s impartiality affected] . . . unless the money was something like a quid pro quo demanded by the judge as the price of his learning and his consideration.”\textsuperscript{57} Finally, legal writers suggested that the canons and decretals prohibiting bribery might be applied more permissively to judges in need of livelihood; wealthy judges who could survive without being paid for their work were almost categorically prohibited from accepting any remuneration from litigants, but poor jurists whose livelihoods relied on gifts from litigants were able to accept limited offerings.\textsuperscript{58}

B. THE SCOPE AND LIMITS OF ILLEGAL BRIBERY IN MEDIEVAL JEWISH LAW

Medieval Jewish law maintained an expansive definition of prohibited bribery that included virtually any conveyance of money, goods, or services from a litigant to a judge. This broad scope was a logical consequence of Jewish law’s prohibition bribery in order to preserve courts’ third-party vantage; on this view, any exchange between a judge and a litigant bound the two together, making the judge a virtual party to the case. The general halakhic rule was thus a categorical prohibition on virtually all valuable donations from a litigant or other interested party to a presiding judge.

In medieval Jewish law, bribery included virtually all valuable goods or services conveyed by an interested party to a judge while the donor’s case was docketed in the judge’s court.\textsuperscript{59} Even relatively invaluable or intangible gifts could also constitute bribery.\textsuperscript{60} Thus, the Talmud records that Jewish judges held themselves disqualified in numerous seemingly innocuous circumstances, such as were a litigant brushed a feather from a judge’s robes, where a party kicked some dirt to cover spittle that lay at the judge’s feet, and where a litigant who was also the judge’s sharecropper

\textsuperscript{55} See id. at 319-20.
\textsuperscript{56} See id. at 320.
\textsuperscript{57} See Id.
\textsuperscript{58} See id. at 317-18 (2001); see also BRUNDAE, supra note 9, at 389.
\textsuperscript{59} See Yosef Karo, Shulchan Aruch, Choshen Mishpat 9:1-2.
\textsuperscript{60} See Yosef Karo, Shulchan Aruch, Choshen Mishpat 9:1-2; Yehiel b. Asher, Arbah Turim, Choshen Mishpat 9:1 (“Not only is financial bribery prohibited, but even verbal bribery.”).
delivered the year’s crop to the judge shortly before it was due.\(^6\)\(^1\) Drawing on these Talmudic examples, some medieval authorities held that a judge was disqualified if a litigant said “good morning” to him or offered other salutations or compliments, unless such comments were typical between the specific judge and litigant.\(^6\)\(^2\) Jewish law also disqualified judges who borrowed household goods from neighbors who were also parties to a pending case.\(^6\)\(^3\)

One of the most telling illustrations of Jewish bribery law’s concern for maintaining courts’ third-party institutional vantage is the rule prohibiting a judge from receiving equally valuable gifts from each of the litigants appearing before him.\(^6\)\(^4\) Although such even-handed donations were unlikely to result in improper bias for one party, they were nevertheless held to be illegal because the bribed judge would become a virtual party to the case.\(^6\)\(^5\) Medieval authorities also stressed that bribery included a party’s giving something of value to a judge in exchange for the judge’s rendering a verdict that was in any case legally correct.\(^6\)\(^6\) Halakhic writers understood the biblical injunction against distorting the law to prohibit payments made to induce a judge to issue a legally

\(^{61}\) See Babylonian Talmud, Kesubos 105b.

\(^{62}\) See Maimonides, Mishnah Torah, The Laws of the Sanhedrin 23:3; Yosef Colon Trabatto, Responsa Maharik § 16. But see Tosfos to Kesubos 105b (s.v. Lo) (ruling that offering salutations does not fully disqualify the receiving judges, though the judge should nevertheless voluntarily remove himself from the case).

\(^{63}\) See Yosef Karo, Shulchan Aruch, Choshen Mishpat 9:1 (“Any judge that borrows something is disqualified from judging the lender.”).

\(^{64}\) See Babylonian Talmud, Kesubos 105a.

\(^{65}\) See Yehoshua Falk, Drisha to Arbah Turim, Choshen Mishpat 9:1; Yehoshua Falk, Sefer Meiros Einayim 9:2; see also Pill, supra note 17, at 542.

\(^{66}\) See, e.g., Yechiel b. Asher, Arbah Turim, Choshen Mishpat 9:1 (“A judge must be very, very cautious not to take any manner of bribe, even to find in favor of the party who is legally in the right.”).
In order to avoid textual redundancy, the separate proscription on bribery was thus taken to prohibit even payments made to secure a legally correct ruling.

Facilitating judicial compensation presented a somewhat harder problem for halakhic scholars than it did for canonists because in Jewish law, the exchange of value itself constituted a bribe. Jewish law scholars thus could not provide judges with a means of earning a livelihood from their work by identifying types of payments that did not constitute the substantive ills bribery was supposed to prevent; in Jewish law, bribery was the ill. Jewish scholars therefore had to develop methods of paying judges that would not make the receiving judge a party to the case.

The Talmud suggested that judges could be compensated with equal payments from each litigant. Medieval authorities confirmed this rule, but held that such payments could only be used to compensate a judge for wages from his regular employment that he lost while adjudicating a case, provided his regular job was well-known. Thus, the preeminent restatement of medieval Jewish law provided:

> All the rulings of a judge who is proven to have taken a bribe are void . . . However, if he only took payment for his lost time, it is allowed – provided it is apparent to everyone that he is only taking money for his lost time, such as when it is known that he has another job to do during the time that he is judging a case and he told the litigants, “Pay me the my lost wages for the time I spend judging your case”; and also provided that he takes equal amounts from each of the litigants.

This avenue for permitting judicial compensation was seriously limited because the conditions to be satisfied in order to permit a payment likely foreclosed this route of compensation for most judges. A judge’s full time job might not be well known, and his regular rate of compensation was

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67 See Babylonian Talmud, Kesubos 105a:

> “And you shall not take a bribe” [Exodus 23:8]. What is Scripture teaching us; if it is telling us that a judges should not wrongly exonerate the liable party or wrongly find against the party with the more meritorious legal claim, but Scripture has already instructed “Do not pervert judgement” [Deuteronomy 16:19]. Rather, it is teaching us that a judge may not take a bribe even to find for the party with the legally meritorious claim or to find against the legally liable party.”

See also Yoel Serkis, Bayis Chadash to Choshen Mishpat 9:1.

68 See Babylonian Talmud, Kesubos 105a; R. Yehoshua Falk, Sefer Meiros Einayim 9:2.

69 See Babylonian Talmud, Kesubos 105a; Yosef Karo, Shulchan Aruch: Choshen Mishpat 9:5.

70 Yosef Karo, Shulchan Aruch: Choshen Mishpat 9:5.
even less likely public knowledge, thus proscribing this method of paying judges. Additionally, this model could only work if judges maintained other paying jobs in addition to their judicial work. During the middle ages, however, Jewish communities developed a highly organized system of relatively autonomous internal governance.\footnote{See generally Louis Finkelstein, Jewish Self Government in the Middle Ages (1924).} The local \textit{beis din}, or law court, was a major arm of the Jewish communal structure, and which was usually staffed by at least one full time \textit{halakhic} decisor whose job it was to remain available to answer community members’ religious personal questions and resolve their interpersonal disputes in accordance with Jewish law.\footnote{See generally Aaron M. Schreiber, Jewish Law and Decision Making: A Study Through Time 320-24 (1979); see also Moshe Sofer, Responsa Chasam Sofer, \textit{Choshen Mishpat} \textsection{}164 (“The community is obligated to select for themselves at least one person who will be available at all times to anyone who need to inquire about God’s law so that such people may find him to answer their queries at any time, and the community must establish a salary for him to keep him sustained and in great honor.”).} By definition, this full time judge did not have another source of employment; he could therefore not be compensated using the Talmudic model, and an alternative method was required.

In response to this need, medieval Jewish scholars held that judges could be compensated by a communal fund set of for this purpose and supported through general taxes levied upon the local Jewish population.\footnote{See Yechiel ben Asher, Arbah Turim: Choshen Mishpat 9:4; see also See generally Aaron M. Schreiber, Jewish Law and Decision Making: A Study Through Time 322-23 (1979).} Thus, Rabbi Yosef Karo, wrote in his 16$^{th}$ century restatement of Jewish law: “We are accustomed to establish for the court a public fund which distributes money for the judges’ livelihood . . . and in this there is no violation of the laws of bribery, for the Jewish people are obligated to financially support their judges and scholars.”\footnote{Yosef Karo, Shulchan Aruch: Choshen Mishpat 9:3.} Rabbi Moshe Isserles, who wrote the principle gloss on Karo’s work further advised that “it is best to collect the taxes for this fund [and disperse the funds to the judges] at the start of each year so that the judges should not feel any need to curry favor with any man [through their rulings].”\footnote{Moshe Isserles, Rema to Shulchan Aruch: Choshen Mishpat 9:3.}

V. THE PROCEDURAL CONSEQUENCES OF JUDICIAL BRIBERY
Rules prohibiting judicial bribery do little to improve the efficacy of and the public’s confidence in the judicial system unless the system also provides for some means of enforcing those rules. Medieval Jewish and Canon law provided procedural consequences for bribery. These enforcement mechanisms focused on two main questions. The first issue addressed by these laws was the status of a judge who is proven to have taken a bribe. The second question concerned the status of rulings issued by a bribed judge that was not removed from a case before resolving it. Part IV.A discusses Canon law procedural responses to occurrences of judicial bribery, and Part IV.B explores the same issue from the Jewish legal perspective.

A. PROCEDURAL CONSEQUENCES OF BRIbery IN CANON LAW

Ideally, medieval Canon law jurists were supposed to discipline themselves, and a judge who has accepted an illegal bribe was expected to voluntarily recuse himself from the case.\textsuperscript{76} Relying on judges’ self-enforcing ethics requirements in good faith proved to be ineffective in practice, however.\textsuperscript{77} While the ecclesiastical court system did not maintain any systematic method for policing its judges, the Church relied on litigants complaining about judges’ conduct to identify, investigate, and resolve allegations of judicial misconduct.\textsuperscript{78}

A litigant who believed his judge had taken a bribe could present a written exception to the court alleging that the judge had violated the rules against bribery.\textsuperscript{79} Once the exception was filed, the challenged judge was barred from proceeding further on the underlying case, and had to step aside until the merit of the complainant’s exception was determined by a panel of disinterested arbiters chosen by both parties.\textsuperscript{80} If the investigators decided that the litigant’s allegations of judicial bribery were well-founded, the challenged judge was removed from the case. If, however, the arbiters determined that the exception was without merit, the judge could resume the underlying proceedings, at times with detrimental consequences to the complaining party.\textsuperscript{81}

\textsuperscript{76} See Helmholz, \textit{supra} note 15, at 386, 396; \textit{BRUNDAGE, supra} note 9, at 385.
\textsuperscript{77} \textit{BRUNDAGE, supra} note 9, at 385.
\textsuperscript{78} See \textit{id.} at 384-85.
\textsuperscript{79} \textit{Id.} at 385, 388.
\textsuperscript{80} See Helmholz, \textit{supra} note 15, at 389-90.
\textsuperscript{81} \textit{BRUNDAGE, supra} note 9, at 385-87.
If a judge decided a case after having taken a bribe, medieval canon law maintained that the judge’s ruling was not a legal nullity. A bribed judge remained a judge – albeit not a very honest one – and his rulings had to be obeyed until they were overturned by a higher tribunal on appeal.\textsuperscript{82} If an aggrieved litigant did take an appeal to a higher court alleging that the trial judge had been bribed, the appellate court might or might not overturn the lower court’s ruling. This determination typically turned on the substantive correctness of the challenged disposition. Since bribery was prohibited either because it was sinful or because it tended to result in biased judging, a bribed judge’s ruling would only be overturned on appeal if it was legally incorrect; the existence of a bribe itself did not provide an adequate reason to overturn a judge’s otherwise legally correct decision.\textsuperscript{83}

B. PROCEDURAL CONSEQUENCES OF BRIBERY IN JEWISH LAW

The procedural effects of a judge accepting a bribe under medieval Jewish law were an outgrowth of the underlying theory that animated halakhic bribery rules. Jewish law held that a judge who accepted a bribe became a virtual party to the case. As a party to the suit, a bribed judge literally ceased being a jurist, and any actions he took in hearing the case could not be attributed to the court and were void.\textsuperscript{84}

Medieval Jewish law provided procedures for a litigant to challenge a judge he believed had taken a bribe. A litigant could present a motion alleging that the presiding judge had accepted a bribe. If the moving party supported his claim with the testimony of at least two valid witnesses, the judge was automatically disqualified from proceeding any further on the case.\textsuperscript{85} Normative halakha does not create an organized hierarchical court system, and thus there was not always an internal mechanism in place to forcibly remove disqualified jurists from the bench.\textsuperscript{86} Jewish law thus provided that the rulings of a judge disqualified for bribery are null and void; if a judge

\begin{footnotes}
\item[82] See Helmholz, supra note 3, at 313.
\item[83] See Helmholz, supra note 3, at 313-15.
\item[84] See Pill, supra note 17, at 535.
\item[85] See Yosef Karo, Beis Yosef: Choshen Mishpat 13:7 (referring to Babylonian Talmud, Sanhedrin 23a).
\item[86] See generally J. David Bleich, The Appeal Process in the Jewish Legal System, 34 Tradition 17 (1993) (exploring the lack of a hierarchical court structure in the Jewish legal system, and the consequential inability of courts to formally supervise each other’s decisions).
\end{footnotes}
wrongly refused to disqualify himself when required to do so, the aggrieved litigant in the case could simply choose to ignore any further proceedings before that judge. Not only did Jewish law invalidate the rulings made by a judge after he was disqualified, but the law even retroactively voided all the judicial actions taken by a judge from the time he accepted a bribe until the time he was ultimately disqualified.\textsuperscript{87} This penalty was a particularly harsh means of discouraging judges from accepting bribes because Jewish law maintained that a judge who issued a patently incorrect ruling – which would include a decision issued under the influence of a bribe – must compensate the losing litigant for any losses he suffered as a result of the judge’s ruling.\textsuperscript{88}

\textbf{VI. CONCLUSION}

The Jewish and Canon law systems of the Middle Ages maintained sophisticated and nuanced doctrines governing judicial bribery that demonstrate many of the meta-characteristics expected in legitimate legal regimes. Both systems prohibited bribery for specific theoretical reasons. These theoretical foundations provided judges and litigants with an important degree of predictability about what kinds of payments did and did not constitute illegal bribery. Like any system that must work in the real world, however, Canon and Jewish bribery laws were not entirely divorced from practical considerations. By limiting the impact of their respective theoretical models in order to promote procedural efficiency and insure judges an adequate source of livelihood, the Jewish and Canon law doctrines insured that their bribery rules not only made jurisprudential sense to scholars in the university, but also worked for judges, lawyers, and litigants in the real world. Finally, both systems developed methods of enforcing bribery rules and punishing violations. Like the rules themselves, these enforcement methods represented a hybrid of theoretical consistency and practical necessity. By translating a theoretical model into practical regulations enforceable by logically consistent and practically efficient methods, the Jewish and

\textsuperscript{87} \textit{See} Yosef Karo, \textit{Shulchan Aruch}: Choshen Mishpat 9:2. This rule merely created a presumption that all of the judges past rulings were issued under the influence of bribes. This presumption could be rebutted, however, upon proof that with respect to any particular decision the judge had in fact not accepted any illicit payments from the litigants appearing before him. \textit{See id.}

\textsuperscript{88} \textit{See} Yosef Karo, \textit{Shulchan Aruch}: Choshen Mishpat 25:1-3.
Canon legal systems of the Middle Ages engendered public confidence in their abilities to justly resolve disputes, thereby ensuring their viability.
Futility Determinations of Newborns at the Edge of Viability: A Comparison of Relevant Law in the United States and the United Kingdom

By: Austin Graves

I. INTRODUCTION

The full term for a normal pregnancy is forty weeks; and yet, a child can be delivered at just twenty-two weeks of gestation and still have a viable chance at life. Infants born at such an early age may face such a myriad of complications that medical treatment may be futile in some cases. In the grey area of determining futility, parents and health care professionals face the harrowing decision of whether or not to withhold treatment; thus the question arises: what result if they disagree? Both the United States and the United Kingdom employ the courts to make the ultimate determination in such cases. Both apply a standard that primarily considers the child’s best interests; however, the United States only considers the child’s medical diagnosis, while the

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1 Juris Doctorate Candidate, 2018, Creighton University School of Law
5 See infra note 67 (discussing the court’s responsibility in the United Kingdom to decide the proper course of treatment regarding an extremely premature newborn); See infra note 239 (discussing the court’s responsibility in the United States to decide the proper course of action regarding an extremely premature newborn).
United Kingdom considers factors beyond the medical diagnosis. The “best interest” standard, as applied in the United States, breaks down when applied to cases where there is no clear futility determination. The solution is to follow the precedent set by courts in the United Kingdom and consider a broader scope of factors than just the child’s medical diagnosis when applying the best interests standard.

The following Article first provides background concerning the medical landscape in regard to difficulties faced by children born extremely premature. Next, the case law regarding the best interests standard in both the United Kingdom and the United States is discussed. Then, academic criticism of the standard is explored. Finally, this Article advances the claim that the best interests standard in the United States fails when stretched to its analytical limits, and that the scope of the standard, as applied in the United States, should be widened to match the case law in the United Kingdom.

II. BACKGROUND
A. THE MEDICAL LANDSCAPE

Science has advanced so rapidly that society has struggled to form a cohesive ethical basis for decision making in regard to terminally ill patients. The American Academy of Pediatrics (“AAP”) has stated that prior to withdrawing life support, it must be determined that the patient’s case is “futile”. Given the current medical landscape of pediatrics, rapid scientific advancements meeting seemingly untenable physical conditions, defining medical futility is very difficult.

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7 Id.
8 See infra note 268.
9 See infra note 14.
10 See infra note 67.
11 See infra note 161.
12 See infra note 268.
15 Conway, supra note 4, at 1117 (discussing the difficulty in defining medical futility).
One commentator, Michael Ewer, M.D., has supplied a retrospective definition of medical futility: “[when] a terminally ill patient for whom everything even remotely plausible . . . was tried . . ., and who, despite all efforts (and not because of them) died.”16 The medical futility of a patient’s case is not a static concept as this retrospective definition may suggest; rather, it exists on a continuum.17 Such determinations regarding newborns, particularly premature newborns, are inherently speculative and based upon many statistical and physiological variables.18 As such, rather than using a rigid definition of futility, another method is to view futility in terms of reasonableness.19 Such a method entails determining a point at which continued treatment is not reasonable.20

The AAP does not endorse a rigid definition of futility.21 In fact, AAP guidelines state that resuscitation of an infant is not ethical if the physician believes that the child has no chance of survival.22 The guidelines recognize that a premature birth at the gestational age of less than twenty-two weeks is likely indicative of a futile case.23 Births as early as twenty-two to twenty-four weeks, however, are not necessarily deemed hopeless.24

Modern medicine has advanced to such an extent that an infant born at a gestational age of twenty-two weeks may receive life-saving treatment.25 Disabilities these babies face are extreme, and successful treatment is a possibility, not a guarantee.26 Among the most common disabilities premature babies face are those caused by an under developed respiratory system.27 The respiratory system does not begin its essential gas exchange function until after birth.28 In fact, the

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16 Id.
17 Id. at 1118.
18 Id.
19 Id. at 1119.
20 Id.
21 See AAP/AHA, supra note 1.
22 AAP/AHA, supra note 1.
23 Id.
24 Id.
25 Id.
26 See Conway, supra note 4, at 1115-16 (discussing the likelihood of survival and long term disability for babies born between twenty-two and twenty-seven weeks of gestation).
28 Id.
system is not fully developed until the week immediately preceding birth. Thus, a baby born premature is born with lungs that are not anatomically developed to sustain the child outside the womb without medical assistance.

The issue, and thus the focus for treatment, concerns the bronchioles and alveoli in the lungs. The bronchioles are tubular branching airways that carry inhaled oxygen to small sacks in the lungs called alveoli. These small sacks are where the gas exchange that oxygenates the blood actually occurs. The earlier the baby is born, the less surface area for gas exchange exists because fewer alveoli have formed. Airway branching may begin to develop as early in fetal development as five weeks, but alveoli generally do not begin until twenty-four weeks, and they continue to form even after a full term birth. Furthermore, there are cells in the lungs that secrete surfactant, a liquid substance that allows the airways in the lungs to remain expanded. Cells that secrete surfactant generally do not begin to form until twenty-four weeks of gestation.

There are a number of very serious medical conditions for premature infants that are caused by underdeveloped lungs. Respiratory Distress Syndrome ("RDS") is one such condition that is caused by a lack of surfactant. Almost one half of low birth weight infants will develop RDS. The effects of RDS on the lungs can be so pronounced that the x-ray of a child so effected can show images of lungs that look like ground up glass. The condition is treated by artificial

29 Id.
30 Id.
32 Id.
33 Hill, supra note 28.
34 Id.
35 Id.
36 AAP, supra note 3.
37 Hill, supra note 28.
38 AAP, supra note 3.
39 See AAP/AHA, supra note 2.
41 Id.
surfactant to expand the airways, and a mechanical ventilator to essentially breathe for the child. AAP guidelines suggest the consideration of use of surfactant for any child born at thirty weeks of gestation or less. Another common disability of the lungs is Bronchopulmonary Dysplasia (“BPD”). This is a long term lung disease that is caused by use of the ventilator; it inflames the lungs, causing them to stiffen so that they cannot expand correctly. The lungs of a child with BPD may appear spongy on an x-ray. There is no immediate cure for this condition. The stiffened lung tissue will never work at optimal capacity but new healthy tissue might grow.

There are other health concerns, besides issues with the lungs, that infants born premature often face. Apnea and Bradycardia are conditions where there is a pause in the breathing due to immature neural functioning. They can be treated by caffeine and respiratory support, such as being put on the ventilator. Retinopathy of Prematurity is a condition that a premature infant may be effected by because they have fragile vessels in their eyes that are at a high risk of bleeding. The bleeding causes scarring of the retina and retinal detachment, which can cause blindness. Laser therapy or cryotherapy (cooling the eye) might successfully prevent blindness; although, even successful treatment will affect the child’s peripheral vision. Necrotizing Enterocolitis (“NEC”) is a bacterial infection in the intestinal lining that causes death of intestinal tissue and widespread infection. It is treated by antibiotics and surgical removal of the section

42 AAP, supra note 3.
43 AAP/AHA, supra note 2.
44 AAP, supra note 3.
45 Nemours Fond. supra note 41.
46 Id.
47 Id.
48 Id.
49 AAP, supra note 3.
51 Id.
53 Id.
54 Id.
of dead bowel.\textsuperscript{56} It affects one to eight percent of infants in Neonatal Intensive Care Units ("NICU") in the United States, and has a mortality rate of ten to fifty percent, accounting for at least 1,000 deaths annually.\textsuperscript{57}

Yet another disability that a premature infant might face is an Interventricular Hemorrhage ("IVH").\textsuperscript{58} This is where there is bleeding in the brain that is the result of fragile blood vessels in the brain.\textsuperscript{59} Ninety-five percent of IVH episodes occur within seventy-two hours after birth, with over fifty percent of them occurring within the first twenty-four hours.\textsuperscript{60} There are four grades of bleeding, of which grades one and two are relatively minor, but grades three and four may lead to brain tissue damage.\textsuperscript{61} Furthermore, a grade four bleed can cause hydrocephalus, fluid on the brain, which requires that a shunt be surgically inserted to continuously drain excess fluid that accumulates in the cranium.\textsuperscript{62} Bleeding and excess fluid may cause brain damage, which may lead to poor neurological outcomes, including developmental delays.\textsuperscript{63}

B. THE BEST INTERESTS STANDARD: THE UNITED STATES AND THE UNITED KINGDOM

When determinations by physicians and parents come into conflict, regarding whether to withhold or withdraw life support from a seriously disabled infant, the ultimate decision of the appropriate course of treatment is often made by the courts.\textsuperscript{64} In cases of possible medical futility of a newborn, the best interests standard may be employed to determine what the appropriate

\textsuperscript{56} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Nehama Linder et al., *Risk Factors for Intraventricular Hemorrhage in Very Low Birth Weight Premature Infants: A Retrospective Case-Control Study*, 111 PEDIATRICS 590, 590 (2003) (discussing the prominence of intraventricular hemorrhages as a cause of morbidity and mortality in very low weight infants).
\textsuperscript{61} Lee, supra note 59.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} In re Truselo, 846 A.2d 256, 269 (Del. Fam. Ct. 2000).
course of treatment is for the child.\textsuperscript{65} This standard has been applied, though not with complete uniformity, by courts in both the United States and the United Kingdom.\textsuperscript{66}

\textbf{1. The United Kingdom}

In the United Kingdom, it is the court’s responsibility to decide the proper course of treatment for a disabled newborn when the parents and physicians disagree with one another.\textsuperscript{67} Typically, parents have a duty to give or withhold consent to medical treatment in the best interests of their child, and physicians have a duty to provide medical care to the child, subject to parental consent.\textsuperscript{68} When the two come into disagreement over whether to withdraw care, the courts assume the responsibility to make the ultimate decision in the interests of the child.\textsuperscript{69} The courts have this responsibility pursuant to the doctrine of \textit{parens patriae}, which states that as sovereign, the government is obligated to protect its subjects, especially children unable to protect themselves.\textsuperscript{70}

The paramount consideration is the child’s best interest.\textsuperscript{71} The best interests of the child includes: social, emotional, and welfare issues in addition to medical interests.\textsuperscript{72} Respect for the sanctity of life imposes a strong presumption in favor of preservation of life; however, the presumption is rebuttable.\textsuperscript{73} Various other principles of the best interest standard have been gleaned from decisions by the English courts.\textsuperscript{74}

\textsuperscript{65} Conway, \textit{supra} note 4, at 1132 (discussing the issue of when life should be preserved versus when further medical treatment need not be provided).

\textsuperscript{66} See, \textit{e.g.}, \textit{In re K.I., B.I. and D.M.}, 735 A.2d 448, 455 (App. D.C. 1999) (comparing the best interests standard as against the substituted judgment test); \textit{See also} \textit{In Re J (A Minor) (Wardship: Medical Treatment) [1991] 2 W.L.R. 140 (AC) 52-53} (appeal taken from Eng.) (rejecting the notion that there is an absolute rule that human life must be preserved).

\textsuperscript{67} \textit{In Re J (A Minor) (Wardship: Medical Treatment) [1991] 2 W.L.R. 140 (AC) 52-53} (appeal taken from Eng.).

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} \textit{Id}.

\textsuperscript{70} \textit{Id} at 50.

\textsuperscript{71} \textit{Id} at 52-53.

\textsuperscript{72} David W. Meyers, \textit{Wyatt and Winston-Jones: who decides to treat or let die seriously ill babies?}, 9 \textit{EDINBURGH L. REV}. 307, 315 (2005) (Eng.).

\textsuperscript{73} \textit{In Re J (A Minor) (Wardship: Medical Treatment) [1990] 2 W.L.R. 140 (AC) 52-53} (appeal taken from Eng.).

\textsuperscript{74} Meyers, \textit{supra} note 73, at 310.
One such principle is that the views of the parents are to be afforded great deference but are not dispositive of whether treatment should be withheld or withdrawn. In fact, the court may overturn parental judgment when it finds that said judgment is not in the child’s best interests. In the case *in Re B*, the child was born with two independent disabilities: Down’s syndrome and an intestinal blockage that required surgery. The parents refused to consent to the surgery on the basis that it would be unkind to save the child’s life and subject the newborn to a life of physical and mental retardation. The Court of Appeal determined that the views of the parents and the physicians are important but they are not dispositive; instead, the decision ultimately devolves onto the court. The court then proceeded to hold that the child must undergo the surgery.

Another principle that has arisen from the case law in the United Kingdom is that the best interests of the child is to be determined by weighing the benefits and the burdens of continued treatment or non-treatment; as viewed from the baby’s perspective, and as a reasonable and responsible parent would approach such a decision. In the case of *in Re B* the court stated that the best interests are determined by whether there is evidence that the child’s short life would be an intolerable one. The court determined that the child should undergo the surgery because living with Down’s Syndrome for an expected life span of twenty to thirty years would not be an intolerable life.

The court is entitled to approve recommendations to ease suffering rather than provide treatment aimed at prolonging life. In the case *in Re C*, the Court of Appeal approved of the physicians recommendation that the only care to be provided to the child should be to provide

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75 *In Re B (A Minor) (Warship: Medical Treatment) [1981] 1 W.L.R. 1421 (AC) 1424 (appeal taken from Eng.).*
76 *In Re Z (A Minor) [1996] 2 W.L.R. 88 (AC) 2 & 31 (appeal taken from Eng.).*
77 *In Re B (A Minor) (Warship: Medical Treatment) [1981] 1 W.L.R. 1421 (AC) 1422 (appeal taken from Eng.).*
78 *Id.*
79 *Id.* at 1424.
80 *Id.*
81 Meyers, *supra* note 72, at 310.
82 *In Re B (A Minor) (Warship: Medical Treatment) [1981] 1 W.L.R. 1421 (AC) 1424 (appeal taken from Eng.).*
83 *Id.*
84 *In Re C (A Minor) (Wardship: Medical Treatment) [1989] 3 W.L.R. 240 (AC) 27 & 33 (appeal taken from Eng.).*
comfort and not to attempt to prolong the child’s life. The case was found to be distinguishable from *in Re B* because C was terminally ill and there was no medical procedure that could provide a cure, whereas, B’s life could be extended by the surgical removal of an intestinal blockage. Ultimately, the trial court found, and the appellate court affirmed, that “[C’s] life will be demonstrably awful and intolerable.”

The scope of benefits and burdens that must be weighed to determine the best interests of the child has expanded to include factors beyond the child’s clinical prognosis. In the seminal case of *in Re J*, the Court of Appeal focused on the child’s clinical prognosis, holding that the pain, suffering, and quality of a prolonged life must be weighed; as well as the pain and suffering caused by the proposed treatment itself. Furthermore, the court held that the presumption for protecting life must be factored into the decision. The court explained that the attitude of a responsible parent must be adopted when deciding the best interests of the child.

Subsequent to *in Re J*, the court has recognized that the balance of the interests of the child must be construed by an assessment that is broader than just considering what clinical options are available. In the case *in Re T*, the mother of T refused to consent to a liver transplant for T, despite a unanimous medical opinion that the child would not live but for a transplant. The mother and T were out of the country at the time when a liver became available for a transplant, and the doctors in England that had treated T challenged the denial to give consent by the mother on the grounds that she was not acting in T’s best interests. The lower court ruled in favor of the doctors, finding that the strong presumption for preserving human life outweighed the factors of

85 *Id.* at 33-34.
86 *Id.* at 30.
87 *Id.* at 35.
88 *In Re T* (A Minor) (Wardship: Medical Treatment) [1997] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.).
89 *In Re J* (A Minor) (Wardship: Medical Treatment) [1990] 2 W.L.R. 140 (AC) 46 (appeal taken from Eng.).
90 *Id.* at 52.
91 *Id.* at 50.
92 *In Re T* (A Minor) (Wardship: Medical Treatment) [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.).
93 *Id.* at 243.
94 *Id.*
T’s post operation quality of life and the pain and suffering that the operation would cause because T would surely die without the transplant.\textsuperscript{95}

The Court of Appeal overturned the ruling and held in favor of the mother.\textsuperscript{96} The court opined for the necessity of considering the broader context of the circumstances beyond the child’s clinical prognosis; namely, the commitment of the parent, who would be placed in the crucial role of providing care to the child in the aftermath of the treatment.\textsuperscript{97} On the facts of this case, the court stressed the “need for the confidence in and the commitment to the proposed treatment by the principle carer . . .”\textsuperscript{98} The presumption for preserving life would not be realized at the expense of other important considerations because the preservation of life is not the sole objective of the court.\textsuperscript{99}

More recently, English courts have applied the best interest’s standard to withhold treatment from infant’s whose cases were deemed futile by doctors.\textsuperscript{100} In the cases of Wyatt and Winston-Jones, the parents disagreed with the unanimous agreement by doctors that treatment should be withheld.\textsuperscript{101} In each case, the courts relied upon in Re J in holding that the child’s best interests would be served by not using a mechanical ventilator to keep them alive.\textsuperscript{102} In Wyatt, the court sought to avoid treatment that it deemed to be intolerable to the child.\textsuperscript{103} In Winston-Jones, the court found that the presumption for preserving life was not applicable in cases where further treatment would be futile because the child’s prolonged life would not be worth living.\textsuperscript{104}

\textsuperscript{95} Id. at 247.
\textsuperscript{96} In Re T (A Minor) (Warship: Medical Treatment) [1996] 1 W.L.R. 242 (AC) 253\textit{Id.} at 253. (appeal taken from Eng.).
\textsuperscript{97} Id. at 251.
\textsuperscript{98} Id. at 252.
\textsuperscript{99} Id. at 252-53.
\textsuperscript{100} Meyers, \textit{supra} note 73, at 313-14.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 313.
\textsuperscript{104} Id. at 313-14.
The core presumption of the best interests standard in the United Kingdom is that life should be preserved.\textsuperscript{105} That presumption however, can be rebutted.\textsuperscript{106} In applying the standard to determine whether a child’s life must be preserved, the considerations of the court should be broader than just the child’s clinical prognosis.\textsuperscript{107}

2. \textit{The United States}

In the United States the best interests standard is often applied when making treatment decisions regarding premature infants, albeit with some controversy.\textsuperscript{108} There has been federal involvement regarding medical treatment of infants through the Child Abuse Prevention and Treatment Act (“CAPTA”).\textsuperscript{109} Also, surveying court decisions of different states reveals certain commonalities regarding how the best interests standard is applied and what the standard entails.

CAPTA requires “medically indicated treatment” where it is likely to effectively ameliorate the child’s conditions.\textsuperscript{110} There are however three exceptions to this rule.\textsuperscript{111} They exist when it is the treating physician’s reasonable medical judgement that: the infant is in a coma; any treatment would merely prolong death and would not correct the life-threatening conditions; or the treatment would be otherwise futile in regard to the infant’s survival.\textsuperscript{112} States must abide by this rule and its exceptions to receive child abuse funding from the federal government.\textsuperscript{113}

At least one state court has interpreted CAPTA to mean that the parents of an infant are prohibited from deciding to withhold treatment from that child.\textsuperscript{114} In \textit{Montalvo v. Borkovec}, the Court of Appeals of Wisconsin held that refusing treatment was essentially a “death sentence”,

\textsuperscript{105} \textit{See} \textit{In Re J (A Minor) (Wardship: Medical Treatment)} [1990] 2 W.L.R. 140 (AC) 52-53 (appeal taken from Eng.) (discussing preliminary undisputed principles that have been adopted by the court when ruling on whether to give treatment to prolong a child’s life).

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{In Re T (A Minor) (Warship: Medical Treatment)} [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.) (discussing the appropriate considerations to be weighed by the court when determining the child’s best interests).

\textsuperscript{108} Conway, \textit{supra} note 4, at 1133.

\textsuperscript{109} 42 U.S.C.A. §§ 5101-5119(c) (West 2014).

\textsuperscript{110} 42 U.S.C.A. 5106(g) (West 2014).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} Loretta M. Kopelman, Award Address at the 2007 AAP National Conference and Exhibition Section on Bioethics Program: A New Analysis of the Best Interests Standard and Its Crucial Role in Pediatric Practice (2007).

\textsuperscript{114} \textit{Montalvo v. Borkovec}, 647 N.W.2d 413, 419 (Wis. Ct. App. 2002).
and that it was not a decision a parent could make under CAPTA.\textsuperscript{115} Although in \textit{Montalvo} the court found that CAPTA bars parents from deciding to withdraw medical support from their baby, that limitation does not apply to all the courts throughout the many different states.\textsuperscript{116} Furthermore, the AAP guidelines stipulate that when a baby is at a high risk of death, the parents should take a part in the decision making process.\textsuperscript{117}

In regard to how the best interests standard is applied, the beginning presumption is that parents have the best interests of the child in mind because of the natural bonds of affection that ordinarily exist between a parent and their child.\textsuperscript{118} Furthermore, parents have a legal right to make decisions for their children; that right includes decisions regarding appropriate medical treatment.\textsuperscript{119} Parents are generally charged with deciding whether to withdraw life prolonging support.\textsuperscript{120} The AAP has stated that parents and guardians should be fully involved in decision-making with the medical staff.\textsuperscript{121}

Another important principle gleaned from the case law is that a patient has the right to forego medical treatment, and that right is not lost when the patient is incompetent.\textsuperscript{122} Refusing medical treatment is a constitutional right that is derived from the right to privacy.\textsuperscript{123} In \textit{Matter of Quinlan}, the Supreme Court of New Jersey found that a patient’s right to refuse treatment could be exercised by the patient’s guardian.\textsuperscript{124} Similarly, in cases regarding the decision of whether or

\textsuperscript{115} \textit{Id.} at 420.
\textsuperscript{116} \textit{See In re Truselo}, 846 A.2d at 268 (stating the general principle that parents have the right to make medical decisions for their children); \textit{In re K.I.}, 735 A.2d at 454 (discussing the fundamental liberty interests a parent has in the care of their child).
\textsuperscript{118} \textit{In re L.H.R.}, 321 S.E.2d at 722.
\textsuperscript{119} \textit{In re Truselo}, 846 A.2d at 268.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} Diekema & Botkin, \textit{supra} note 15, at 815 (discussing cases where the burdens of further treatment outweigh the benefits).
\textsuperscript{122} \textit{In re L.H.R.}, 321 S.E.2d at 719.
\textsuperscript{124} \textit{Id.} at 664
not to withdraw support from an incompetent newborn, the parent’s may assert their child’s constitutional right to privacy and refuse treatment on the child’s behalf.\(^{125}\)

In one such case the Supreme Court of Georgia supported the notion that, in some circumstances, the parents of an incompetent child can assert that child’s right to forego medical treatment.\(^{126}\) In that case, the child, L.H.R., suffered a post-birth medical catastrophe that left the infant in a chronic vegetative state, without any hope of recovery.\(^{127}\) L.H.R.’s parents and the hospital’s medical staff agreed that life support should be withdrawn and, after seeking the lower court’s permission, life support was withdrawn and L.H.R. passed away.\(^{128}\) The lower court added the state Attorney General as a party in the case to prosecute an appeal so that guidelines for future like cases could be set.\(^{129}\) On appeal, the Court held that the parents may make the decision regarding the child’s medical treatment in cases such as these.\(^{130}\) The Court found that the state has no compelling interest to intervene to preserve the child’s life when there is no reasonable possibility that further treatment will restore cognitive function.\(^{131}\)

The presumption that the parents have the child’s best interests in mind is not absolute; the decision is always subject to the court’s review.\(^{132}\) It is even reviewable when the parents and the medical staff have come to an agreement as to the proper course of treatment.\(^{133}\) Under the states parens patriae power, the state may interfere with the decision making process.\(^{134}\) The state’s role is to provide the relief that is necessary to protect the child’s best interests and to ensure the child’s safety and well-being.\(^{135}\) The parens patriae power is invoked when the child is already within the jurisdiction of the court, the parents have failed in their responsibilities toward the child, or there is suspicion of abuse or neglect toward the child.\(^{136}\)

\(^{125}\) In re L.H.R., 321 S.E.2d at 718-19.
\(^{126}\) Id. at 723
\(^{127}\) Id. at 717
\(^{128}\) In re L.H.R., 321 S.E.2d at 718.
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id. at 723.
\(^{132}\) In re Truselo, 846 A.2d at 269.
\(^{133}\) Id.
\(^{134}\) Miller ex rel. Miller v. HCA, Inc., 118 S.W.3d 758, 766 (Tex. 2003).
\(^{135}\) In re K.I., 735 A.2d at 454; In re Truselo, 846 A.2d at 269.
\(^{136}\) In re Truselo, 846 A.2d at 269.
In regard to what the best interest standard entails in the courts of the United States, it should first be noted that said standard has often been used by courts in place of the competing standard called the “substituted judgment test.” Under the substituted judgment test, the patient’s guardian or surrogate is permitted to make medical decisions for the patient, but only so long as those decisions are based upon what the patient would have chosen had they been competent and able to make the decision. The standard originally arose in regard to incompetent adults; where their prior statements, expressed wishes, and values could be considered. The standard cannot logically be applied to infants because they have never been competent, thus, it would be impossible to ascertain their wishes and values. Therefore, the best interests standard is the preferable standard in cases regarding infants.

The paramount consideration of the best interest standard in the United States is the best interests and well-being of the child. The AAP has stated that the child’s interests are primary in all decision making that is regarding appropriate treatment. This interest supersedes any interests the parents might have. There is a presumption that continued life is in the child’s best interests, however, that presumption can be rebutted.

The determination of what is in the child’s best interest is done by balancing the burdens of continued life and the benefits and rewards of furthering life. The AAP has stated that withholding or withdrawing medical treatment is supported if the burdens of the treatment

137 See In re Christopher I., 131 Cal.Rptr.2d 122, 131 (2003) (discussing the application of the best interests standard over the substituted judgment test in cases regarding infants). In re Truselo, 846 A.2d at 271-72 (discussing the context in which the substituted judgment standard is applicable), In re K.I., 735 A.2d at 455 (discussing the applicability of the best interests standard and the substituted judgment test in regard to incompetent infants).

138 In re Christopher, 131 Cal.Rptr.2d at 133.

139 In re Truselo, 846 A.2d at 271.

140 In re K.I., 735 A.2d at 455-56.

141 See In re Christopher I., 131 Cal.Rptr.2d at 131; In re Truselo, 846 A.2d at 271-72; K.I., 735 A.2d at 455.

142 In re K.I., 735 A.2d at 454.

143 Diekema & Botkin, supra note 15, at 819 (summarizing the principles regarding when it is ethically permissible to withdraw support from an infant).

144 In re K.I., 735 A.2d at 454.

145 Montalvo, 647 N.W.2d at 421.

146 In re Truselo, 846 A.2d at 274.
outweigh the benefits to the child.\textsuperscript{147} According to the AAP, it may be ethically permissible to withhold treatment in cases where the patient is in a persistent vegetative state, the patient is in a minimally conscious state, the patient is suffering from a congenital malformation, or the patient is suffering from a prenatal injury.\textsuperscript{148} It is further noted that this is a determination that withholding treatment is morally permissible, but not morally required.\textsuperscript{149} In other words, it is not ethically binding on the parents.\textsuperscript{150}

Different jurisdictions may provide slightly different factors as a framework for weighing the benefits and burdens of treatment, but generally the central factor is the medical prognosis for the child or the perceived futility of further treatment.\textsuperscript{151} For example, in \textit{Trusello} the Family Court of Delaware in Newcastle County adopted the following list of factors:

- Evidence about the patient’s present level of physical, sensory, emotional, and cognitive functioning;
- the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively;
- the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment;
- the life expectancy and prognosis for recovery with and without treatment;
- the various treatment options; and
- the risks, side effects, and benefits of each of those options.\textsuperscript{152}

In \textit{Christopher}, the Court of Appeals of California adopted a list of factors even more expansive than in \textit{Truselo}, but the court ultimately relied most heavily on the medical findings and opinions of the treating physicians and one independent physician that examined Christopher.\textsuperscript{153} Each of

\textsuperscript{147} Diekema & Botkin, \textit{supra} note 15, at 816 (discussing when it may be ethically permissible to withhold treatment from an infant because the burdens of prolonged life would outweigh the benefits of treatment).
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 817.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{See In re Truselo,} 846 A.2d at 272 (discussing the factors courts consider when determining the best interests of the child); \textit{Christopher,} 131 Cal.Rptr.2d at 134-35 (listing the factors the court should consider when determining the child’s best interests); \textit{K.I.,} 735 A.2d at 465 (discussing the factors to be considered when conducting a best interests analysis).
\textsuperscript{152} \textit{In re Truselo,} 846 A.2d at 272.
\textsuperscript{153} \textit{Christopher,} 131 Cal.Rptr.2d at 136.
the physicians were unanimous in finding that Christopher was in a persistent vegetative state, and that no treatment would restore cognitive function. Accordingly, the *Christopher* court held that the lower court did not error when it determined that continuing treatment to prolong Christopher’s life was not in his best interests.

In both the United States and the United Kingdom, the best interests standard is primarily concerned with determining what is in the best interests of the child. In both countries, the application of the standard involves considering factors that provide a framework to weigh the benefits and burdens of continued treatment. In the United States, those factors are generally directly related to the child’s medical prognosis. In contrast, the English courts have expanded the factors to include considerations beyond the child’s medical prognosis.

C. CRITICAL ANALYSIS OF THE BEST INTERESTS STANDARD

The best interests standard is widely accepted in pediatrics in the United States; however, use of the standard to determine the best interests of a child in possible futility cases has given rise to critical analysis by academics. The debate between supporters and critics of the best interests standard has often focused on whether it is too vague and subjective to provide any actual utility as an analytical device in the decision making process. Proponents of the theory argue that the standard has both objective and subjective elements, thus making it an adequate standard for

154 *Id.*

155 *Id.* at 136-37.

156 See *In Re J (A Minor) (Wardship: Medical Treatment)* [1990] 2 W.L.R. 140 (AC) 52-53 (appeal taken from Eng.) (discussing the preliminary principles the court applies when determining whether or not to continue treatment to prolong life); *In re K.I.*, 735 A.2d at 454 (discussing the appropriate considerations of the court when exercising its jurisdiction to determine the child’s best interests).

157 See *In Re J (A Minor) (Wardship: Medical Treatment)* [1990] 2 W.L.R. 140 (AC) 46 (appeal taken from Eng.) (discussing the need for a balancing exercise when determining the best interests of a child); *In re Truselo*, 846 A.2d at 274 (discussing the physician’s findings regarding the child’s poor clinical prognosis weigh in favor of a do not resuscitate order).


159 See *In Re T (A Minor) (Wardship: Medical Treatment)* [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.) (discussing the scope of factors to be weighed when determining the child’s best interests).

160 Conway, *supra* note 4, at 1133.

161 Kopelman, *supra* note 114.
decision making in regard to cases concerning infants at the fringes of futility. 162 In contrast, critics argue that the standard is uninformative when pushed to its analytical limits because it is inherently subjective. 163 One proponent of the standard, Loretta Kopelman, has analyzed and broken the standard down into three necessary and sufficient conditions. 164

The first condition Kopelman lays out is that it is the decision maker’s duty to use the best available information to assess the patient’s interests to make a decision that maximizes their long-term benefits and minimizes their burdens. 165 Kopelman asserts that this condition is both subjective and objective. 166 It is subjective because the decision maker will have to rank potential benefits and risks to determine what are the best interests of the patient; this will depend on what personal values the decision maker holds. 167 The standard is also objective because the information used for the determination is based upon scientific, medical, or other rational grounds. 168

One prominent critic of the best interest standard, Sadath Sayeed, argues that the judgment of so called “objective” grounds essentially requires a normative judgment about the value of human life. 169 Any analysis of futility will necessarily rely upon an assumption about what gives life value. 170 Other critics have sounded the same point, stating that the problem with futility analyses is that a determination of futility fundamentally exists in the eyes of the beholder. 171 As such, the parents and physicians might reasonably differ in their determinations concerning the futility of treatment for the child. 172

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162 Id.
163 Sayeed, supra note 6, at 605-06 (discussing the inherent subjectivity of the best interests standard as an analytical device).
164 Kopelman, supra note 114.
165 Id.
166 Id.
167 Id.
168 Kopelman, supra note 114.
169 Sayeed, supra note 6, at 604 (discussing the moral ambiguity parents and physicians face in decision making regarding extremely disabled infants).
170 Id.
171 Meyers, supra note 73, at 315.
172 Id.
Sayeed argues that the standard necessarily devolves into vague and subjective assignments of value to different benefits and burdens.\textsuperscript{173} Even given objective facts, individuals may vary in how they assign value.\textsuperscript{174} Essentially, the balancing involves the value of sheer existence versus the quality of existence.\textsuperscript{175} Individuals could reasonably differ in how they strike a balance between these two fundamental values.\textsuperscript{176} Conflicting subjective determinations might be made, each of which supposedly being patient subjective.\textsuperscript{177} Thus, the standard struggles when pushed to analytical limits where reasonable minds may differ.\textsuperscript{178}

The theory of vitalism has been used as an example by critics to illustrate how individuals may reasonably come to different conclusions depending on what belief system they subscribe to.\textsuperscript{179} Central to vitalism is the “belief that every individual life should be preserved at all costs regardless of quality-of-life concerns.”\textsuperscript{180} The core concept is that life is a good that is worth preserving in and of itself.\textsuperscript{181} Thus, one who subscribes to vitalism will aggressively defend a person’s biological existence.\textsuperscript{182} Furthermore, vitalism is often a value system that is held in conjunction with another religious or moral belief system.\textsuperscript{183}

In opposition, a non-vitalist approach, or even a moderately vitalist approach, advocates analyzing an individual’s quality of life.\textsuperscript{184} This approach asserts that allowing a patient to die can be okay in some circumstances.\textsuperscript{185} It is the potential for human relationships, not just mere existence, which is of central importance.\textsuperscript{186} Thus, life is not viewed as a value that is to be

\textsuperscript{173} Sayeed, supra note 4, at 605 (discussing the likelihood of disagreements in decision making at the edge of viability).
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 606-07.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 605.
\textsuperscript{179} Conway, supra note 4, at 1108 (discussing the role of vitalism in making life or death decisions).
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 1122 (discussing the vitalist view that life is an intrinsic good).
\textsuperscript{182} Id. at 1123.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 1124.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
preserved in and of itself.\textsuperscript{187} Rather, it is a value to be preserved as a precondition to other values, and should only be preserved so long as those other values remain tenable.\textsuperscript{188} These other values essentially regard human relationships.\textsuperscript{189} Therefore, if the potential for human relationships is lost, the life need not be preserved.\textsuperscript{190}

Kopelman’s second condition of the best interests standard is that the decision maker must “meet a minimum threshold of acceptable care.”\textsuperscript{191} The threshold is “judged in relation to what reasonable and informed persons of good will regard to be acceptable were they in the person’s circumstances.”\textsuperscript{192} As such, the standard is not excessively individualistic because there is an objective minimum threshold that must be met.\textsuperscript{193} Although the decision will be subjective in that it will be shaped by the personal values of the one making the decision; it will also be objective because the determination must not fall below the reasonable minimal threshold.\textsuperscript{194}

Sayeed agrees with Kopelman that the analytical device used for decision making should verify that the choices made, all things considered, are reasonable and not unacceptable.\textsuperscript{195} He asserts however, that the best interest standard fails to do so.\textsuperscript{196} Kopelman relies on the presumption that non-treatment in some cases is inherently reasonable, with or without a unanimous finding of futility.\textsuperscript{197} Sayeed believes this to be problematic because there can be a variety of conclusions made by different individuals, even given the same objective facts.\textsuperscript{198} He states that it is in fact the case that counseling between physicians and doctors, regarding treatment for disabled infants, often does not rely upon a resolute determination of futility.\textsuperscript{199} Furthermore, in cases where physicians suggest treatment, it is not unreasonable for a parent to oppose said treatment because they do not want to provide intensive care to the child for the rest of that child’s

\textsuperscript{187} \textit{Id.} at 1124-25.
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} Kopelman, \textit{supra} note 114.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} Sayeed, \textit{supra} note 6, at 607.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} Kopelman, \textit{supra} note 114.
\textsuperscript{198} Sayeed, \textit{supra} note 6, at 607.
\textsuperscript{199} \textit{Id.}
life. The onus of caring for an extremely disabled child would be thrust upon the parent for the sole reason that medical technology presents a possibility of survival. Kopelman’s third condition of the best interests standard is that “decision makers should make choices compatible with duties to incompetent or incapacitated individuals.” Subsequent policies regarding how others should be treated will ground the standard to give it clarity and avoid the charge that it is too vague.

The critical response to the best interests standard is that it fails as a conceptual standard. First, it is alleged that futility determinations fail to gain any substantive ground in ambiguous cases, thus, the determination does not inform the analysis. Second, the standard does not adequately ensure that a decision is reasonable and acceptable. Some critics hold that these problems must be addressed by allowing considerations other than mere chance at life to enter the decision making process. Such a change would align the United States with the United Kingdom; where the standard is now understood to include: social, emotional, and welfare issues in addition to medical interests.

III. ARGUMENT

The general consensus in both the United Kingdom and the United States is that the best interests standard is the appropriate standard to apply to cases regarding disagreements as to the appropriate medical treatment of disabled newborns. This close similarity only seems to diverge

200 Id.
201 Id.
202 Kopelman, supra note 114.
203 Id.
204 Sayeed, supra note 6, at 607.
205 Id. at 604.
206 Id. at 607.
207 Id. at 609 (asserting that considerations beyond mere chance at life must enter the ethical calculus to address the problems faced by the best interests standard).
208 Meyers, supra note 73, at 315.
209 See In Re J (A Minor) (Wardship: Medical Treatment) [1990] 2 W.L.R. 140 (AC) 52-53 (appeal taken from Eng.) (discussing the preliminary principles the court applies when determining whether or not to continue treatment to prolong life), In re K.I., 735 A.2d at 454 (discussing the appropriate considerations of the court when exercising its jurisdiction to determine the child’s best interests).
in that courts in the United Kingdom have applied factors beyond clinical diagnosis when weighing benefits and burdens to determine the child’s best interests.\(^{210}\) Although the best interests standard is the consensus, it is limited as an analytical device by its inherent subjectivity in cases where a futility determination is ambiguous.\(^{211}\)

Jurisdictions in the United States should mirror the policy in the United Kingdom and expand the best interests analysis to include factors beyond the child’s clinical diagnosis.\(^{212}\) An expanded scope of factors will better situate the best interests standard to supply an analysis in difficult cases because the extra factors would decrease the inherent subjectivity of the standard.\(^{213}\)

The following compares the best interests standard as it is used in the United States with how it is used in the United Kingdom; analyzes the shortcomings of the best interests standard in the United States; considers the counter position that extra factors would not decrease the subjectivity of the standard; and explains why additional factors would decrease the standards subjectivity.\(^{214}\)

A. **Comparison of the Best Interests Standard in Both Countries**

The best interests standard is, in large part, applied the same in both the United States and the United Kingdom.\(^{215}\) The difference lies in the scope of the factors that courts in either country use to weigh the benefits and burdens of treatment in deciding what is in the best interests of the child.\(^{216}\) The scope of factors used in the United Kingdom is broader than those used in jurisdictions throughout the United States.\(^{217}\)

\(^{210}\) *See* In Re T (A Minor) (Warship: Medical Treatment) [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.) (discussing the scope of factors to be weighed when determining the child’s best interests).

\(^{211}\) Sayeed, *supra* note 6, at 604.

\(^{212}\) *Id.* at 609.

\(^{213}\) *Id.*

\(^{214}\) *See infra* notes 291 and 292.

\(^{215}\) *See* In Re J (A Minor) (Wardship: Medical Treatment) [1990] 2 W.L.R. 140 (AC) 46 & 52-53 (appeal taken from Eng.); *In re K.I.*, 735 A.2d at 454; *See also* In re Truselo, 846 A.2d at 274.

\(^{216}\) *Compare* In re Truselo, 846 A.2d at 272 (discussing the factors courts apply when determining the child’s best interests), *and* Christopher, 131 Cal.Rptr.2d at 134-35 (asserting what factors must be considered in the best interests analysis), *with* In Re T (A Minor) (Wardship: Medical Treatment) [1997] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.) (discussing the expanded scope of considerations in regard to the best interests standard).

\(^{217}\) *Id.*
There are many similarities to how both countries apply the best interests standard. In both countries, the courts have the final say regarding the treatment decisions in controversial cases that concern disabled infants. It is generally presumed that parent’s decisions are in the best interests of the child. Also, parental judgment is given great deference, but said judgment is not dispositive in either country.

Another commonality is that the paramount consideration of the best interests standard is determining what are the child’s best interests. The initial presumption in both countries is that life should be preserved, but that presumption can be rebutted. The determination of the child’s best interests requires weighing the benefits and burdens of treatment. Courts in both countries primarily consider the medical diagnosis for the child. That includes considerations regarding: pain, suffering, the quality of prolonged life, and the pain and suffering that is caused by the treatment itself.

The difference in the application of the best interests standard in the United States and the United Kingdom is that courts in the latter uniformly consider factors beyond the child’s medical diagnosis. Case law in the United Kingdom has evolved to include a list of factors to be

218 See In Re J (A Minor) (Wardship: Medical Treatment) [1991] 2 W.L.R. 140 (AC) 46 & 52-53 (appeal taken from Eng.); In re K.I., 735 A.2d at 454; See also Truselo, 846 A.2d at 274.
219 See In Re J (A Minor) (Wardship: Medical Treatment) [1990] 2 W.L.R. 140 (AC) 41 (appeal taken from Eng.) (discussing the duties each party owes to the child in the decision making process); Miller, 118 S.W.3d at 766 (discussing the role of the parents, physicians, and the court in the decision making process).
220 Meyers, supra note 73, at 315; In re L.H.R., 321 S.E.2d at 445.
221 See Meyers, supra note 73, at 310 (discussing principles that have been expounded in regard to withholding treatment to disabled infants); In re Truselo, 846 A.2d at 269 (discussing the nature of the parental right to make decisions for the child).
223 See In Re J (A Minor) (Wardship: Medical Treatment) [1990] 2 W.L.R. 140 (AC) 52-53 (appeal taken from Eng.), Montalvo, 647 N.W.2d at 421 (discussing the presumption that life is to be preserved).
224 See Meyers, supra note 73, at 310, In re Truselo, 846 A.2d at 270.
226 Id.
227 Compare In re Truselo, 846 A.2d at 272 (discussing the factors courts apply when determining the child’s best interests), Christopher, 131 Cal.Rptr.2d at 134-35 (asserting what factors must be considered in the best interests analysis), with In Re T (A Minor) (Warship:
considered that are broader than just the child’s diagnosis.\textsuperscript{228} For example, the \textit{in Re T} court considered the likely parental disposition toward supplying future care for an extremely disabled child when said parent did not consent to treatment.\textsuperscript{229} The Court also considered the fact that the mother and the baby were out of the country when the issue was before the Court.\textsuperscript{230}

In contrast, decisions by courts in the United States generally rely upon the child’s clinical diagnosis, including futility determinations.\textsuperscript{231} It should be noted that there is at least one exceptional case in this regard.\textsuperscript{232} In \textit{Christopher}, the California Court of Appeals applied an extensive list of factors that included: opinions of the family, and the motivations of the family.\textsuperscript{233}

The United Kingdom has made a uniform move toward incorporating the consideration of factors beyond the child’s clinical diagnosis.\textsuperscript{234} With at least one exception, the jurisdictions in the United States constrain the best interests standard to considerations of factors connected to the child’s clinical diagnosis.\textsuperscript{235} Thus, the United States and the United Kingdom apply the best interests standard in a nearly uniform manner.\textsuperscript{236} The only divergence being that the United Kingdom generally applies a broader scope of factors in determining the child’s best interests.\textsuperscript{237}

\textsuperscript{228} See \textit{In Re T (A Minor) (Wardship: Medical Treatment)} [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.) (discussing the expanded scope of considerations in regard to the best interests standard).
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} See, \textit{e.g.}, \textit{In re Truselo}, 846 A.2d at 272.
\textsuperscript{232} \textit{Christopher}, 131 Cal.Rptr.2d at 134-35.
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{In Re T (A Minor) (Wardship: Medical Treatment)} [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.).
\textsuperscript{235} See, \textit{e.g.}, \textit{In re Truselo}, 846 A.2d at 272.
\textsuperscript{237} \textit{Compare In re Truselo}, 846 A.2d at 272 (discussing the factors courts apply when determining the child’s best interests), and \textit{Christopher}, 131 Cal.Rptr.2d at 134-35 (asserting what factors must be considered in the best interests analysis), \textit{with In Re T (A Minor) (Wardship: Medical Treatment)} [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.) (discussing the expanded scope of considerations in regard to the best interests standard).
B. **Problems with the Best Interests Standard in the United States**

The best interests standard, as applied in the United States, is put to the test in cases where the determination of the futility of further treatment is uncertain.\(^{238}\) The standard is helpful for decision making when the circumstances of a particular case clearly indicates whether or not further treatment of the child would be futile.\(^{239}\) In the more ambiguous cases, the standard is not informative because it devolves into a subjective valuation of human life.\(^{240}\) Given that a society has a diversity of religious and moral beliefs that entail their own value systems, there will always be a possibility that reasonable minds may differ on how they assign value to human life and prolonging said life in the absence of a firm futility determination.\(^{241}\) Therefore, the best interests standard, as it is currently applied in the United States, is wanting because it restricts the determination of the child’s best interests to only those factors that regard the child’s clinical diagnosis.\(^{242}\)

Many cases regarding extremely disabled infants lack a resolute determination of futility, and it is these cases that challenge the best interests standard.\(^{243}\) For example, babies born extremely premature face a litany of possible medical conditions that make survival seemingly impossible.\(^{244}\) However, modern medicine has rapidly advanced to provide the possibility of survival in the face of such dire circumstances.\(^{245}\) Life-saving treatments, such as use of surfactant and mechanical ventilators, allow a baby born at just twenty-two weeks of gestation to breathe, where they would otherwise suffocate because their lungs are physiologically unable to remain expanded.\(^{246}\)

\(^{238}\) Sayeed, *supra* note 6, at 605.

\(^{239}\) See *In re Truselo*, 846 A.2d at 274.

\(^{240}\) Sayeed, *supra* note 6, at 605.

\(^{241}\) *Id.*

\(^{242}\) *Id.* at 609

\(^{243}\) *Id.* at 608

\(^{244}\) See AAP, *supra* note 3 (discussing the many different health conditions faced by premature babies).

\(^{245}\) See *In re L.H.R.*, 321 S.E.2d at 742.

\(^{246}\) See AAP, *supra* note 3; AAP/AHA, *supra* note 2 (discussing the appropriate practice of medicine in regard to premature infants).
Highly advanced medical treatments that allow a chance of survival do not, in turn, ensure survival. Rather, they make it so that a baby born at twenty-two weeks of gestation is not necessarily a hopeless case. Furthermore, many life-saving treatments will have detrimental effects that may, and often do, last for the rest of the child’s life. Thus, cases inevitably arise where a clear determination of futility does not exist; in other words, the case is not hopeless. It is in such cases that the inadequacies of the best interests standard may be recognized.

Kopelman defends the best interests standard by stating that it ensures decisions that are acceptable because the standard is both subjective and objective in nature. Any decision made must meet a minimum threshold of objective care; thus, objectivity is injected into the decision making process to ensure acceptable results.

Kopelman’s argument rests on the premise that non-treatment may be inherently acceptable. Such a premise is not necessarily accepted by all value systems. For example, a strict vitalist believes that human life is a good that should always be preserved, so non-treatment could not be an acceptable decision. In contrast, a non-vitalist may hold that life is a means that should be preserved only to the extent that other primary values, like viable human relationships, remain tenable. As such, belief systems held by different individuals in a society may contradict one another at a fundamental level, rendering Kopelman’s premise a problematic theoretical basis for the standard. Individuals could be presented with the same objective facts but engage in decision making from differing value systems and arrive at contradictory conclusions.

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247 See AAP/AHA, supra note 2.
248 Id.
249 Nemours Fond., supra note 41.
250 AAP/AHA, supra note 2.
251 Sayeed, supra note 6, at 605.
252 Kopelman, supra note 114.
253 Id.
254 Sayeed, supra note 6, at 607.
255 Conway, supra note 4, at 1108.
256 Id.
257 Id. at 1124-25
258 Id.
259 See Conway, supra note 4, at 1124-25, Meyers, supra note 72, at 315.
A vitalist would likely be inclined to reject a decision to withhold care as failing to meet the minimum threshold of care. Such a determination might be simultaneously viewed as meeting the minimum threshold by a non-vitalist. In such circumstances, the objective threshold devolves into a subjective value judgment. Therefore, when stretched to its limits in difficult cases, the best interests standard does not ensure an objectively reasonable and acceptable result.

C. COUNTERARGUMENT: INADEQUACY OF ADDED FACTORS TO THE STANDARD

To address the inherent subjectivity of the best interests standard, courts in the United States should follow the precedent that has been set in the United Kingdom; namely, that considering factors beyond the child’s clinical prognosis is appropriate in determining a course of treatment. Considering extra factors, such as the parental disposition toward providing life-long care to the extremely disabled child, will help the standard better approach objectivity.

The counterargument to the above stated position is that any considerations beyond clinical diagnoses would be similarly plagued by subjectivity. At bottom, additional factors would be terms to be weighed, and they would be subject to the same individual subjective value systems while they are weighed. Introducing more factors will not provide clarity; rather, it would simply increase the terms over which individuals might reasonably disagree, while at the same time claiming to be “patient subjective.” Thus, the margin of reasonable disagreement would actually widen.

In response, the same criticism that applies to the current best interests standard would not extend to factors that would be added to the standard. The current factors are inherently

260 But see Kopelman, supra note 114.
261 Conway, supra note 4, at 1124-25.
262 Sayeed, supra note 6, at 605.
263 Id. at 605-606
264 See In Re T (A Minor) (Wardship: Medical Treatment) [1996] 1 W.L.R. 242 (AC) 251 (appeal taken from Eng.).
265 Id. at 252.
266 Kopelman, supra note 114.
267 See Sayeed, supra note 6, at 605.
268 See Id. at 606.
269 Contra Id. at 609 (asserting that additional considerations are needed to overcome inherent subjectivity).
270 See Id.
subjective because they require a valuation of life itself.\textsuperscript{271} As noted above, such a valuation is fraught with fundamental disagreements because different value systems are applied.\textsuperscript{272} Such disagreements are rooted in the religious beliefs and moral codes that are central to one’s personhood.\textsuperscript{273} There can be no compromise when all of the relevant variables are directly rooted in the fundamental moral makeup of the individual.\textsuperscript{274} Such a compromise would first require an internal revolution so that fundamental beliefs can come into agreeance concerning life.\textsuperscript{275}

Additional factors regarding social, emotional, and welfare issues are not analogous to the existing factors that only concern the child’s life and quality of life.\textsuperscript{276} The additional factors are not as deeply rooted in subjective religious and moral beliefs because they do not directly concern a determination of the value of life itself.\textsuperscript{277} Therefore, the problem of subjectivity does not similarly apply to social, emotional, and welfare issues.\textsuperscript{278} Agreements in these arenas are mutually desirable and attainable because they would facilitate individuals in their pursuit of what they deem to be of fundamental importance to their own lives (e.g. what gives life value).\textsuperscript{279}

D. ADDITIONAL FACTORS TO THE BEST INTEREST STANDARD

If social, emotional, and welfare considerations are added as factors to the best interests standard, the resulting analysis will realize greater objectivity.\textsuperscript{280} As noted above, the existing medical interests that are considered under the current standard are inherently subjective because they concern the value of life and the quality of life.\textsuperscript{281} Placing a bare value on life directly implicates one’s subjective value system.\textsuperscript{282} Social, emotional, and welfare considerations

\textsuperscript{271} See In re Truselo, 846 A.2d at 274.
\textsuperscript{272} Conway, supra note 4, at 1124-25; Meyers, supra note 73, at 315.
\textsuperscript{273} Conway, supra note 4, at 1123.
\textsuperscript{274} See Id.
\textsuperscript{275} See Id.
\textsuperscript{276} See In re Truselo, 846 A.2d at 274.
\textsuperscript{277} See Sayeed, supra note 6, at 604.
\textsuperscript{278} See Sayeed, supra note 6, at 604, Meyers, supra note 72, at 315.
\textsuperscript{279} Thomas M. Scanlon, Jr., Rawls’ Theory of Justice, 121 U. Pa. L. Rev. 1020, 1023 (1973) (discussing the terms that individuals in society would agree upon if they were situated within John Rawls’ “Original Position”).
\textsuperscript{280} See Meyers, supra note 73, at 315.
\textsuperscript{281} See In re Truselo, 846 A.2d at 274.
\textsuperscript{282} See generally Conway, supra note 4.
implicate subjective values, but not to the same extent as attempting to value life itself.\textsuperscript{283} This is so because a subject’s concept of what is of fundamental importance in life, or the value of life itself, is antecedent to any social, emotional, or welfare concerns they may have.\textsuperscript{284} As such, the additional factors would not bring complete objectivity to the standard, but it would effect a move toward objectivity.\textsuperscript{285} The effect being that members of society, with wholly different value systems, would be equipped with factors for consideration that are at least a step removed from their most fundamental subjective beliefs.\textsuperscript{286}

IV. CONCLUSION

The best interests standard, as applied in the United States, breaks down in difficult cases due to its inherent subjectivity.\textsuperscript{287} The standard is inherently subjective because its application is restricted to only those considerations regarding the child’s medical diagnosis.\textsuperscript{288} Premature infants inevitably face numerous conditions that possibly render any further treatment to be futile.\textsuperscript{289} When parents and physicians disagree about whether to withdraw care, the courts must make the ultimate decision; thus, it is important that the best interests standard includes considerations beyond the child’s medical diagnosis, so that the court may arrive at a decision that is at least objectively acceptable.\textsuperscript{290} It might be argued that considerations beyond a medical diagnosis would similarly devolve into a wholly subjective analysis; however, this is not so because considerations of social, emotional, and welfare factors are not directly tied to valuations of human life.\textsuperscript{291}

Moving forward, courts in the United States should adopt the precedent that has been set by the English courts in regard to the best interests standard. Although considerations of the child’s diagnosis will remain primary, courts will face the difficulty of fettering out how much weight

\textsuperscript{283} See Conway, supra note 4 at 1122-23 (discussing the role of vitalism in valuing human life).

\textsuperscript{284} Scanlon, supra note 280, at 1023.

\textsuperscript{285} See Sayeed, supra note 6, at 609.

\textsuperscript{286} Id. 604.

\textsuperscript{287} Id. at 605.

\textsuperscript{288} Id. at 609.

\textsuperscript{289} See AAP, supra note 3.

\textsuperscript{290} See In Re T (A Minor) (Wardship: Medical Treatment) [1996] 1 W.L.R. 242 (AC) 252 (appeal taken from Eng.).

\textsuperscript{291} Conway, supra note 4, at 1122-23.
should appropriately be assigned to social, emotional, and welfare factors. Facing this challenge is necessary because a child’s life hangs in the balance. We must do our best to exhaust all possible avenues of thought and consideration before we condemn a child to die, or to live a life not worth living.
It’s Genocide, Now What: The Obligations of the United States Under the Convention To Prevent and Punish Genocide Being Committed at the Hands of ISIS

By: Caroline E. Nabity

I. INTRODUCTION

"Recognizing that at all periods of history genocide has inflicted great losses on humanity, and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required…" In March of 2016, the United States’ Secretary of State, John Kerry, declared crimes being committed by the Islamic State of Iraq and Syria (‘ISIS’) in Iraq and Syria against minorities were genocide. The big question now is, what are the obligations of the U.S. to stop the genocide from continuing? This article sets out to answer the question of what obligations, under the International Convention on the Prevention and Punishment of the Crime of Genocide (the ‘Genocide Convention’), does the U.S. have to prevent and to punish the genocide taking place in Syria and Iraq at the hands of ISIS? Under the Genocide Convention the U.S. has an obligation to prevent and to punish the genocide taking place in Syria and Iraq at the hands of ISIS. However, the convention provides no mandatory mechanism to effectuate these obligations, leaving it up to the U.S. to decide what actions to take next.

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This article analyzes the obligations of the U.S as a signatory of the Genocide Convention to take action against ISIS now that the U.S. has deemed ISIS’ actions genocide. First, the article will provide background into the issue looking at ISIS, ISIS’s acts, and the obligations under the Genocide Convention that bind member states. Second, the obligations under the Genocide Convention will be applied to the situation occurring in Iraq and Syria by looking at the legal obligations that arise under the Genocide Convention and how the U.S. reacted in other situations to genocide. The article concludes by looking at the next steps for the U.S. in dealing with the genocidal acts occurring in Iraq and Syria. The conclusion, details the results inaction will have on the Genocide Convention.

II. BACKGROUND

A. THE ISLAMIC STATE OF IRAQ AND SYRIA (ISIS)

ISIS started as an offshoot of al-Qaeda with the aim of creating an Islamic caliphate across Iraq, Syria, and other States by implementing Sharia law representative of the region’s ancient past. To further the group’s message, ISIS uses “social media to promote reactionary politics and religious fundamentalism.” ISIS’ strategy to obtain money to fund its efforts include oil production and smuggling, taxes, ransom demands, selling stolen artifacts, extortion, and controlling crops. As of a 2016 United Nations (the ‘UN’) report, ISIS is believed to be holding 3,500 people as slaves, the majority of whom are women and children from the Yazidi community. Around the world, ISIS is known for its brutality by carrying out public executions, crucifixions and other egregious acts.

6 *Infra* section III Argument.
7 *Infra* section II Background.
8 *Infra* section III Argument.
9 *Infra* section III Argument.
10 *Infra* section IV Conclusion.
12 *Id.*
13 *Id.*
15 CNN Library, *supra* note 11.
The current leader of the group is Abu Bakr al-Baghdadi who is based in Syria, although the U.S. has not been able to confirm whether a U.S. airstrike killed the leader or not. The group had its early beginnings in 2006 when the then leader Abu Musab al-Zarqawi tried “to ignite a sectarian war against the majority Shia community” in Iraq, but was killed as a result of a U.S. strike. After the death of its leader, the group selected a new leader who subsequently announced the birth of the Islamic State of Iraq. Al-Bagdadi rose to power in 2010 and after the absorption of other militant groups in the region, he declared in 2013 the group would be known from then on as the Islamic State of Iraq and the Levant.

By the middle of 2014 the UN estimated ISIS had forced 1.2 million Iraqis from their homes. From 2014 to the present ISIS has carried out numerous public executions, posted them online for the world to view, and has claimed responsibility for various massacres or mass killings throughout the world. Finally, in 2016 Secretary Kerry along with other world leaders, deemed the acts committed against various minority groups within Syria and Iraq by ISIS to be genocidal acts.

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16 Id.
17 Id.
18 Id.
19 Id. The group is referred to as ISIL or ISIS. The region known as al-Sham, or English term the Levant encompasses the states of Syria, Lebanon, Israel and Palestine, and Jordan. See Helen Lock, ISIS vs ISIL vs Islamic State: What do They Mean and Why does it Matter?, UK Independent (Sept. 14, 2014) http://www.independent.co.uk/news/world/middle-east/isis-vs-isil-vs-islamic-state-what-is-in-a-name-9731894.html.
20 Id.
21 CNN Library, supra note 11. ISIS has claimed responsibility for the following mass killings since 2015: Paris, France were 129 people were killed at six coordinated locations and hundreds more were wounded; Homs and Southern Damascus where during multiple attacks at least 122 were killed; 44 people were killed and more than 230 were injured in a bombing at the Istanbul Ataturk Airport in Istanbul, Turkey; Dhaka, Bangladesh where gunmen killed 20 hostages and two police officers at a café; Baghdad, Iraq where car bomb kills at least 292 and injures 200; and Brussels, Belgium where a suicide bomb at the airport and in the subway killed 32 people and wounded more than 300.
22 supra note 3.
23 CNN Library, supra note 11.
B. **THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE**

1. **Crimes Constituting Genocide Under the Genocide Convention**

The Genocide Convention defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing Members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.\(^\text{24}\)

ISIS has been targeting religious minority groups, including Yazidis, Christians, and Shia Muslims.\(^\text{25}\) “Shia Muslims, Christians and Yazidis were targets of genocide, but also . . . Sunni Muslims, Kurds and other minorities experienced crimes against humanity and ethnic cleansings at the hands of ISIS.”\(^\text{26}\) The crimes alleged to have been committed against the minority groups include: murder, subjugation, forced emigration, and grievous bodily and psychological harm.\(^\text{27}\) These crimes have been carried out in a systematic and calculated manner.\(^\text{28}\) Illustrative of these crimes is the documented reports of Christians and members of other religious groups being killed, tortured, raped, and driven out of their homes.\(^\text{29}\) ISIS is known to take women and girls as sex slaves and force children and teenagers into battle at unprecedented rates.\(^\text{30}\)

\(^{24}\) *Genocide Convention*, *supra* note 2.

\(^{25}\) *Holpuch et al.*, *supra* note 3.

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) *Id.*

\(^{29}\) *Id.* One example of these crimes is an incident that occurred in August 2014. “[A]t least 40,000 members of the Yazidi sect were trapped on Mount Sinjar, where they faced slaughter by ISIS if they fled, and dehydration if they stayed.”

\(^{30}\) *Id. See also*, Nebehay, *supra* note 14.
It is not known for certain what crimes have been committed against different minority groups, how many minorities have been affected, or who is actually doing the killing. In a statement to the press, Secretary Kerry expanded on this issue stating, “ongoing conflict and lack of access to key areas has made it impossible to develop a fully detailed and comprehensive picture of all that Daesh (the Arabic acronym for ISIS) is doing and all that it has done.” Secretary Kerry believes a competent tribunal must conduct an independent investigation and fair trial. One report acknowledges that during ISIS’ tenure as a terrorist organization, between 2003 and 2014, 1,131 Christians have been killed in the region.

In June of this year, a UN panel detailed the genocidal acts that have been committed against religious minorities in Iraq and Syria at the hands of ISIS. The panel investigated mass killings of men and boys of the Yazidi faith who were either shot in the head or had their throats slits because the males would not convert to Islam. The report details how this was often done in front of family members with corpses often just left on the roadside. Also in the report, the panel after producing eleven other reports on the matter finally concludes what ISIS is doing is genocide. In a statement the chairman of the panel Paulo Sergio Pinheiro stated, “ISIS has subjected every Yazidi woman, child or man that it has captured to the most horrific atrocities. ISIS permanently sought to erase the Yazidis through killing, sexual slavery, enslavement, torture, inhuman and degrading treatment, and forcible transfer causing serious bodily and mental harm.”

The panel concluded the acts committed by ISIS clearly demonstrate an intent to destroy the Yazidi population in Iraq and Syria in whole or in part. After detailing the findings of the panel the

31 Holpuch et al., supra note 3.
32 Id.
33 Id.
34 Enos & Phillips, supra note 5.
36 Id.
38 Id.
39 Cumming-Bruce, supra note 35.
40 Id.
chairman called for stronger action on the part of the international community highlighting the obligation for member states of the Genocide Convention.41

2. **Obligations of Member States Under the Genocide Convention**

“The Contracting Parties confirm that genocide, whether committed in time of power or in time of war, is a crime under international law which they undertake to prevent and to punish”.42 The drafters of the Genocide Convention did very little to clarify what specific measures states had to take to comply with the duties under the Convention.43 The obligations under the Genocide Convention have been developed and elaborated on by judicial organs including the International Court of Justice, the International Criminal tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.44 The Genocide Convention compels those member states that recognize and designate acts as genocide to prevent and to punish the perpetrators and those involved in carrying out the crimes.45 However, although the signatories have an obligation to prevent and punish those responsible, there is no mandatory duty to intervene into the area where the genocide is taking place.46 The International Court of Justice held in the case *Bosnia-Herzegovina v. Serbia Montenegro* in 1993 and 2007, “undertaking to prevent in the Genocide Convention is ‘normative and compelling,’ unqualified and bears direct obligations on state parties.”47

The first article of the Genocide Convention establishes two distinct obligations, the obligation to prevent and the obligation to punish.48 The obligation to prevent is commonly understood as stopping something from ever occurring; however, the question with genocide is, can you prevent something which has already started?49 The obligation to prevent is restricted to

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41 Id.
42 Genocide Convention, supra note 2.
43 Ntoubandi, supra note 4.
44 Id.
45 Holpouch et al., supra note 3.
46 Id.
48 Ntoubandi, supra note 4.
49 See Mayroz, supra note 47, at 80.
the specific evil of genocide, whose elements and acts are laid out in Articles II and III of the Convention. 50 “Temporal jurisdiction of genocide covers the period when a state ‘learns of, or should have learned of, the existence of a serious risk that genocide will be committed’, and failed to take all necessary measures that were within its power to prevent its occurrence.” 51 The obligation to prevent also calls for member states to not only prevent genocide from occurring within its territory, but also prevent it from occurring outside the state’s borders. 52

The obligation to prevent is measured by action, not by outcome. 53 “Violation of the duty to prevent is therefore the result of omission, or the mere failure to adopt and implement suitable measures to prevent genocide from being committed.” 54 The parameters by which compliance with the obligation is measured are both material and/or mental. 55 One parameter is the capacity of the state to effectively influence the action of the persons involved in committing the genocide. 56 The following elements are evaluated in making this decision: the geographical distance of the state concerned from the scene of the events; the strength of the political and other links between the state and the main actors in the events; the state’s legal position vis-à-vis the situation and persons facing the danger or reality of genocide; and the state’s level of awareness of the imminence of the crime. 57 The Genocide Convention allows for member states to adopt their own initiatives in order to abide by their obligations to prevent genocide. 58 “If genocide occurs in spite of the enforcement of such preventive measures, the second form of obligation is activated, which obliges that state concerned to punish the perpetrator thereof.” 59

The Genocide Convention also makes binding upon signatories an obligation to punish. 60 “The first part of this Article obliges State Parties in the territory of which genocide or any other

50 Ntoubandi, supra note 4.
51 Id.
52 Id.
53 Mayroz, supra note 47, at 83.
54 Id.
55 Id.
56 Ntoubandi, supra note 4.
57 Id.
58 Id.; See also Genocide Convention, supra note 2.
59 Id.
60 Id.
acts of genocide has been committed to establish criminal courts to prosecute the perpetrators thereof.\textsuperscript{61} There is a clear indication in the Genocide Convention that there is a primary obligation to punish genocidal crimes within the area of a member state’s territory.\textsuperscript{62} If a member state wants to punish acts of genocide within the territory of another state, it must have in place national legislation providing for the prosecution of genocide committed outside the territory of the state.\textsuperscript{63} Article VI recognizes member states have the power to set up international tribunals that would have jurisdiction over genocide, as a method of fulfilling states’ obligations to punish genocide.\textsuperscript{64} Dr. Faustin Z. Ntoubandi described in his article that the obligations to prevent and to punish make up the core legal obligations within the convention stating:

\begin{quote}
The ‘obligation to prevent’ and the obligation to punish’ constitute therefore the core legal obligations the violation of which would render other articles of the Convention meaningless. They are the matrix of the Genocide Convention in that they inform and shape the contours, meaning and implications of other provisions of the Convention. In addition, they provide an indication of the concrete measures that State shall adopt in order to liberate mankind from the odious scourge of genocide.\textsuperscript{65}
\end{quote}

The Genocide Convention imposes these obligations on states, which in the given situation have the power to contribute to restraining the commission of genocide.\textsuperscript{66} The duty to prevent and the duty to act arise when a state learns of the fact that there is a serious risk that genocide will be committed within another state, or the state should have learned of the risk.\textsuperscript{67} “From that moment on, a state that has means which are likely to have a deterrent effect on would-be perpetrators is under the duty to make use of them as the circumstances permit.”\textsuperscript{68}

\begin{flushleft}
\textsuperscript{61} Id. In conformity with Article VI of the Genocide Convention, after the Rwandan genocide, Rwanda set up courts in its country that were competent to hear cases involving genocidal acts that occurred in Rwanda.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Genocide Convention, supra note 2.
\textsuperscript{65} Ntoubandi, supra note 4.
\textsuperscript{66} Mayroz, supra note 47, at 83.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\end{flushleft}
C. THE UNITED STATES DECLARES ISIS IS COMMITTING GENOCIDE

On March 17, 2016 the U.S. Secretary of State, John Kerry, declared ISIS was committing genocide against religious minorities including the Yazidis, Christians, and Shia Muslims. Secretary Kerry stated ISIS was, “genocidal by self-proclamation, by ideology and by actions, in what it says, in what it believes, and to what it does.”

Other countries, world leaders, and U.S. leaders have followed suit condemning the actions of ISIS as genocide. The declaration from Secretary Kerry came on the heels of a unanimous vote from the U.S. House of Representatives in favor of classifying ISIS’s atrocities as genocide. The European Parliament also classified the vicious crimes committed by ISIS as genocide. Pope Francis is quoted as saying, “[i]n this third world war, waged piecemeal, which we are now experiencing, a form of genocide is taking place.” Secretary Kerry towards the end of his statement suggested the designation is a “commendable first step”, but the designation must be followed by action in order to stop the violence from occurring against the minority populations.

III. ARGUMENT

The obligations under the Genocide Convention are clear; member states are bound to prevent and punish genocide. The duties arise when the member state has the capacity or power to contribute to restraining the genocidal acts. As mentioned above, the drafters of the Genocide Convention left the document vague as to how member states were to carry out these obligations, and left it to member states to decide what mechanisms to use to fulfill their obligations. The next step in determining what must be done by the U.S. as a result of the designation of ISIS’ acts as genocide, is deciding whether the U.S. has an obligation to prevent the genocide from continuing.

69 Holpuch et al., supra note 3.
70 Id.
71 Id.
72 Id. Every member of Parliament unanimously backed the resolution to classify ISIS’ acts as genocide.
73 Id.
74 Enos & Phillips, supra note 5.
75 Genocide Convention, supra note 1.
76 Mayroz, supra note 47, at 83.
77 Id. at 81.
and punish those associated with ISIS for the perpetration of these crimes.\textsuperscript{78} The final lingering question, since there is no mandatory mechanism that must be used to abide by the obligations, is what must the U.S. do in order to fulfill its obligations under the Genocide Convention?\textsuperscript{79}

A. OBLIGATIONS OF THE UNITED STATES UNDER THE CONVENTION

As a signatory to the Genocide Convention, the U.S. is bound by the dual obligations to prevent and to punish genocide.\textsuperscript{80} The issue is what mechanism the U.S. must use and to what extent must it fulfill these obligations.\textsuperscript{81} Many scholars question whether the obligations binding the member states to prevent and punish genocidal acts have been successful in achieving their sought after results.\textsuperscript{82} After looking at past massacres and genocides and looking at the reaction these events garnered from around the globe, the author of the article, Lee Steven, stated “[p]revention has been virtually non-existent.”\textsuperscript{83} In most if not all these occasions, Steven found the international community failed to respond to any of the events in a “timely manner to prevent the escalation of the killing.”\textsuperscript{84}

The application of the convention to the genocide occurring in Syria and Iraq is unfamiliar territory because the convention was written under the assumption that states commit the crime of genocide.\textsuperscript{85} Cameron Hudson, director of the Simon-Skjodt Center for the Prevention of Genocide at the U.S. Holocaust Memorial Museum, poignantly suggested the notion, “[n]ow that we’re acknowledging that ISIS, a non-state group, has the power and the intention to commit this crime, it represents a very new challenge to how we treat terrorist groups and what our policy is for combatting it, because it’s not simply about defeating ISIS now, it’s also about holding them for account for these crimes.”\textsuperscript{86}

\textsuperscript{78} Id. at 81-83
\textsuperscript{79} Id.
\textsuperscript{80} Ntoboundi, supra note 4.
\textsuperscript{81} Mayroz, supra note 47, at 81-83.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 427.
\textsuperscript{85} Holpuch et al., supra note 3.
\textsuperscript{86} Id.
Moving forward with the application of the convention to the current genocide, the
convention gives jurisdiction to the domestic courts of the state where the genocidal acts are
committed.\(^{87}\) However, given the situation of the two states involved, Syria and Iraq, “it is highly
unlikely that [the states] will tolerate a prosecution for the very crimes it has affirmatively directed
or allowed.”\(^ {88}\) As Steven further explains in the article, because genocide is usually a crime
committed by the state or at the hands of its actors, it is highly unlikely that the same government
officials who perpetrate or condone the genocidal acts allow for a fair prosecution of the crimes.\(^ {89}\)

Another way tribunals in other states may obtain jurisdiction is through the universality
principle.\(^ {90}\) This principle is predicated on the egregious and heinous nature of the offenses being
committed and the fact that the international community has a common interest in the suppression
of these types of crimes, no matter where the crimes are committed or who has committed the
crimes.\(^ {91}\) “Genocide which has been described as ‘the ultimate crime and the gravest violation of
human rights it is possible to commit,’ is universally recognized as a crime under international law
over which a state may exercise universal jurisdiction.”\(^ {92}\) These kinds of crimes “threaten to
undermine the very foundations of the enlightened international community as a whole.”\(^ {93}\) The
crimes for which countries have universal jurisdiction include war crimes, crimes against
humanity, and genocide.\(^ {94}\) Genocide is also considered a *jus cogens* which gives rise to obligations
that bind the international community as a whole.\(^ {95}\) A *jus cogens* is “a norm accepted and
recognized by the international community by states as a whole as a norm for which no derogation
is permitted and which can be modified only by a subsequent norm of general international law
having the same character.”\(^ {96}\)

\(^{87}\) Steven, *supra* note 82, at 428.
\(^{88}\) Id. at 429.
\(^{89}\) Id.
\(^{90}\) Id. at 433.
\(^{91}\) Id.
\(^{92}\) Id. at 437.
\(^{93}\) Id.
2011) (discussing the definition of *jus cogens* and their binding force upon states).
\(^{95}\) Id.
\(^{96}\) Id.
Although genocide is considered to be a *jus cogen*, the question remains whether international law requires the exercise of universal jurisdiction by individual states.97 “Perpetrators of such offenses are *hostis humani generis* - enemies of all people – and therefore ‘any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses.’”98 International cooperation to suppress these crimes requires an affirmative obligation to prosecute or extradite those responsible for committing such serious crimes as war crimes, crimes against humanity, and genocide.99

As mentioned above, the drafters of the Genocide Convention intentionally left vague the legal steps needed to be taken after the invocation of genocide.100 The states who invoke the convention by declaring another state is committing genocide are responsible to prioritize the needs of the inflicted state so that further genocide will be prevented and the perpetrators will be punished.101 Applying this idea to the genocide being committed by in Iraq and Syria, the authors of the article *Next Steps for Addressing ISIS Genocide*, suggest the U.S. should “prioritize the safety and protection of the victims of genocide by evaluating and considering the use of the military, legal, and refugee-related capabilities that it possesses to prevent and punish genocide.”102

However, if the U.S and other signatories of the convention who have declared that ISIS is committing genocide do nothing, the failure to act would invalidate the designation of the ISIS atrocities as genocide.103 “Future and past perpetrators alike should understand the severity of the designation and recognize that a declaration of genocide will be followed by actions that punish perpetrators and protect victims. As the preeminent global promoter of freedom, “the U.S. has an interest in doing so.”104 At this point in time, Secretary Kerry has hinted to at least some action on the part of the U.S. being taken in order to prevent further genocide through potential military

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97 Steven, * supra* note 82, at 440.
98 *Id.*
99 *Id.* at 440.
100 Enos & Phillips, * supra* note 5.
101 *Id.*
102 *Id.* As the next legal and obligatory steps after the invocation of genocide are vague, the U.S. is able determine what needs it will prioritize.
103 *Id.*
104 *Id.*
action and an evaluation of the legal responses the U.S. could take.\textsuperscript{105} While this promise comes from Secretary Kerry, other top U.S. military, counter-terrorism, and intelligence officials have made degrading and defeating ISIS a top national security priority.\textsuperscript{106}

The obligations under the Genocide Convention arose when the U.S. learned of the genocide being committed by ISIS in Syria and Iraq.\textsuperscript{107} From the moment that U.S. learned of the genocide it was bound by the duty to prevent and to punish the genocide occurring because the U.S. has “means which are likely to have a deterrent effect on would-be perpetrators.”\textsuperscript{108} As discussed below, the U.S. has many tools in its arsenal to combat the perpetration of genocide.\textsuperscript{109} While the determination of the mechanisms by which the U.S. fulfills its obligations to prevent and to punish genocidal acts are up to the U.S., failing to do anything will degrade the validity of the Genocide Convention.\textsuperscript{110}

B. HOW THE UNITED STATES HAS FULFILLED ITS OBLIGATIONS UNDER THE CONVENTION IN THE PAST

Even with the strong rhetoric and language coming from many international law scholars, U.S. case law and federal statutes have yet to affirm international law as the national law of the U.S.\textsuperscript{111} The U.S has a history of using military commissions and other forums to mount criminal sanctions against nationals and foreigners for violation of the law of armed conflict.\textsuperscript{112} However, the Supreme Court previously stated that a crime committed against all nations gives rise to “the duty of all to seek out and punish offenders.”\textsuperscript{113} “Thus, not only is the duty to extradite or prosecute individuals who perpetrate serious breaches of international law an obligatory duty under

\begin{footnotes}
\footnote{Holpuch et al., supra note 3.}
\footnote{Enos & Phillips, supra note 5.}
\footnote{Mayroz, supra note 47, at 83.}
\footnote{Id. at 84.}
\footnote{Id. at 84.}
\footnote{Id. at 84.}
\footnote{Enos & Phillips, supra note 5.}
\footnote{Id.}
\footnote{Steven, supra note 82, at 443.}
\footnote{Id.}
\footnote{Id.}
\end{footnotes}
customary international law, it is a duty that the United States itself has recognized and embraced in the past.”

Comparisons can be drawn between how the U.S. reacted to the Genocide in Darfur in 2004 and how the U.S. should react to the current genocide taking place. In September 2004, then Secretary of State Colin Powell issued a statement that there had been an official determination that genocide was taking place in Darfur. Leaders from around the world and scholars thought at the time of the determination the opportunity to prevent the genocide from occurring was gone, but questions remained regarding the legal obligations of the U.S. It remained undecided what legal duties states had in the face of ongoing genocide and what political actions were mandated by the legal duties of the state.

After Secretary Powell declared what was occurring in Darfur genocide, there was no follow through by the U.S. because there was a belief that there was no legal obligation to act. The decision to use the word genocide was also made on the erroneous belief that by calling the act genocide the U.S. would get other states to act. These two factors were just some of the many that contributed to the determination genocide was occurring in Darfur. “[A]dministrations alike were influenced more by what they believed a genocide determination would mean . . . .” In making the conclusion that the U.S. was not legally obligated to take further actions, Secretary Powell relied heavily on Article 8 of the Genocide Convention. Article 8 states:

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114 Id. at 445.
115 Mayroz, supra note 47, at 91.
116 Id.
117 Id.
118 Id.
120 Id.
121 Id.
122 Id.
“[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”

Secretary Powell believed the U.S. had done this by providing money for humanitarian assistance, engaging diplomatic negotiations and talks, and working with the other members of the UN Security Council to find a resolution to the crisis.

Secretary Powell’s declaration shifted the burden of preventing genocide from individual states to the UN, which arguably is not what the drafters of the Genocide Convention intended. “Secretary Powell’s testimony removed a roadblock that had not been discussed since the passage of the Convention – the obligation of sovereign states to use force to stop genocide.” The world was not satisfied with the response of the U.S., Eyal Mayroz, author of The Legal Duty to ‘Prevent’: After the Onset of ‘Genocide’, stated:

Powell’s remark that his genocide determination on Darfur did not oblige the U.S. to move beyond current policy dealt a harsh blow to widespread assumptions about the political consequences of invoking the UN Convention on the Prevention and Punishment of the Crime of Genocide. It also indicated the existence of knowledge gaps in relation to the mutual influences between international legal obligations and political responses to genocide.

C. What Is The Next Step?

In the face of the harsh reality of the future of the convention if the U.S. fails to act as it did with Darfur, the next logical question is what is the next step for the U.S. in regards to the ISIS genocide? At the time Secretary Kerry made his official statement concerning the genocide, he

124 Genocide Convention, supra note 2.
125 Jafari, supra note 123.
126 Id.
127 Id.
128 Mayroz, supra note 47, at 79.
129 Enos & Phillips, supra note 5.
said the U.S. would strongly support efforts to “collect, document, preserve, and analyze the evidence of atrocities” and see that the perpetrators were held to account. But is this all the U.S. can do, and must it do more?

Concerning holding the perpetrators to account for the crimes they committed and abiding by the obligation to punish, there are a few methods by which the perpetrators can be prosecuted. The methods include bringing ISIS before the International Criminal Court (“ICC”), a state invoking universal jurisdiction, or use of the legal tools available to individual states. As mentioned above, prosecution by the domestic courts in the place where the crimes are occurring has already been ruled out as a viable option.

ISIS could be tried before the ICC. There are three ways that the situation in Syria and Iraq could come before the ICC: by state referral, by UN Security Council resolution, or by the use of the prosecutor’s Proprio Motu powers. There is one hurdle the ICC must get over in order for the court to be able to have jurisdiction over the crimes being committed in Iraq and Syria and that is the fact neither state is a party to the Rome Statute. The ICC does not have jurisdiction over crimes committed on non-state territories. However, if the acts occur on a territory of a member state, the ICC would have jurisdiction. An example of this type of occurrence is the ISIS massacre at the Bataclan in France.

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130 Holpuch et al., supra note 3.
131 Enos & Phillips, supra note 5 (discussing what the next steps for the U.S. should be in combatting genocidal acts).
133 Steven, supra note 82, at 428. Prosecuting the perpetrators of the ISIS genocide in the domestic courts of Iraq and Syria is not possible because of the turmoil the states are currently in.
134 Van Schaack & Slye, supra note 132, at 141-143 (discussing the trigger mechanisms for situations to come before the ICC).
135 Id. at 145.
136 Holpuch et al., supra note 3.
137 Id.
138 Id.
139 Van Schaack & Slye, supra note 132, at 145 (applying the territoriality principle to the ISIS genocide). See also, Holpuch et al., supra note 3 (discussing the hurdles facing an ICC prosecution of perpetrators of the genocide taking place in Iraq and Syria).
dreadful night in France were part of the genocide and acts fit the definition of genocide within the Genocide Convention, since the massacre occurred in France, a party to the Rome Statute, the situation could be referred to the ICC, even though it involved nationals of other states that are not members to the Rome Statute.  

Another method by which ISIS could be punished and the perpetrators of the atrocity held to account for their crimes is by setting up an ad hoc tribunal. One of the three methods that can be used to set up an ad hoc tribunal is by Security Council Resolutions, Treaty provisions, or conditions of victory. Examples of ad hoc tribunals include International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Nuremburg Tribunal, and the International Military Tribunal of the Far East.

The U.S. could invoke universal jurisdiction in order to prosecute the perpetrators of genocide. Although the Genocide Convention does not have a specific clause granting universal jurisdiction over crimes constituting genocide, as mentioned earlier there are strong arguments for genocide being a jus cogens that gives rise to obligations under customary international law, the designation of something as genocide by the U.S. alerts the international community that there should be a more aggressive response to the problem. As of right now the U.S. also lacks national legislation enabling the U.S. to take universal jurisdiction over crimes constituting genocide and prosecute the perpetrator once they are in the custody of the U.S. The lack of

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140 Id.
141 Genocide Convention, supra note 2.
142 Van Schaack & Slye, supra note 132, at 99-137 (detailing how international jurisdiction through ad hoc tribunals is established, focusing mainly upon UN Security Council resolutions).
143 Id.
144 Holpuch et al., supra note 3.
145 Carter & Weiner, supra note 94.
146 Holpuch et al., supra note 3.
147 Van Schaack & Slye, supra note 132, at 91-92 (discussing universal jurisdiction in the United States).
national legislation allowing for universal jurisdiction is commonly blamed for why there has been a lack of action to past episodes of genocide on the part of the U.S. 148

An individual state can also use the tools available to them to aid in the prevention and the prosecution of the crime of genocide.149 The tools in the U.S. arsenal, not including military tools, are both financial and legal.150 As mentioned previously, the vagueness of the Genocide Convention on how to move forward means the State Department’s determination did not give rise to legal obligations on the part of the U.S. 151 “The convention is purposefully vague on next steps because different countries have varying capacities to carry out the spirit of its intentions.”152 The U.S. has already used its financial tools in the fight against ISIS’s genocidal actions by putting in place anti-money laundering and counter-terrorism financing tools to aid in cutting back the ability of ISIS to carry out illicit activities.153 However, there are additional financial tools that could be used to stop the financing of ISIS’ activities.154 Another weapon in the U.S. arsenal is the presidential executive order.155 As President George W. Bush did with Darfur, under the International Emergency Economic Powers Act President Obama has the authority to issue an executive order to sanction ISIS for its human rights abuses.156

The breadth of this article would not be able to begin to cover the possibilities of military intervention into Syria and Iraq to prevent further genocidal acts from occurring. This is also the place to note again that the Genocide Convention does not compel mandatory intervention by a

149 Enos & Phillips, supra note 5.
150 Id.
151 Id.
152 Id. Every country will approach the prevention and punishment of genocide differently based upon that countries capacities.
153 Id.
154 Id. If individuals who carried out genocide were identified, they could be placed on the Treasury Specially Designated Nationals List, and traffickers known to enslave Yazidi, Christian, or Shiite women and girls could be designated as primary money laundering concerns under the USA Patriot Act §311.
155 Id.
156 Id. Some of these sanctions include: blocking assets and property of the group located in the U.S. from being transferred out of the U.S. and prohibiting donations being made to the group.
contracting party into the region where the genocide is occurring.^{157} Notwithstanding the possibility of military intervention into the region by the U.S., the U.S. could also use diplomatic means to fulfill its obligations under the Genocide Convention.^{158}  

Turning toward the need to prioritize the safety and protection of the victims, providing refugee assistance should be one of the next steps the U.S. takes in fighting ISIS.^{159} Between “April 2013 and April 2016 the U.S. resettled 529 Yazidis from Iraq, 8,470 Christians from Iraq and Syria and 15,338 Shiite Muslims from Iraq and Syria.”^{160} The U.S. has also gone above and beyond protecting the victims of the genocide by resettling 22,324 Sunni Muslims from those countries even though they are not directly threatened by acts of genocide being inflicted upon them as a group.^{161} This particular group poses a greater security threat to the U.S. because of the relatively higher risk that the Sunni Muslims may support ISIS.^{162} As of 2015, one of the largest resettlements of Yazidis in the U.S. was in Lincoln, NE where more than 1,000 have found refuge.^{163} Representative Jeff Fortenberry, the congressman from the district in Nebraska which encompasses Lincoln, was a co-sponsor for the genocide resolution which was unanimously passed by the House and designated the acts of ISIS against the Christian and Yazidi community as genocide.^{164} “Any U.S. refugee resettlement program should ensure proper security screening for Syrian and Iraqi refugees coming to the U.S.”^{165} There is already a method put in place that subjects Syrian refugees to further screening, but the U.S. has a duty to ensure a proper vetting system is in place and current refugee law is adhered to.^{166}

^{157} Id.  
^{158} Jafari, supra note 123.  
^{159} Id.  
^{160} Enos & Phillips, supra note 5.  
^{161} Id.  
^{162} Id.  
^{165} Enos & Phillips, supra note 5.  
^{166} Id.
Overall, authors Enos and Phillips suggest the U.S. should sanction ISIS for its acts of genocide and “consider whether victims of Iraqi and Syrian genocide qualify for Priority 2 status under the United States Refugee Admission Programs.”\textsuperscript{167} Aside from sanctions and providing assistance to genocide victims, it is unclear whether the U.S. has a mandatory obligation to intervene within the region.\textsuperscript{168} Moving forward, there are also options for prosecuting perpetrators of the crime, one of the strongest options being bringing the situation before the ICC when the crimes occur on the territory of member states.\textsuperscript{169} It is abundantly clear however, that for the U.S. to do nothing would further invalidate the Genocide Convention and further delegitimize it.\textsuperscript{170} As one author stated, because the U.S. has deemed the acts being committed by ISIS as genocide, it should elicit a stronger response from the international community.\textsuperscript{171} The U.S. with the support of other member countries must act to prevent and to punish the ISIS genocide in order to keep the Genocide Convention alive.\textsuperscript{172}

**IV. CONCLUSION**

The call for the absolute prohibition of genocide within the Genocide Convention has no meaning unless all states have an absolute obligation to bring offenders to justice.\textsuperscript{173} “The concept of international criminal law is no longer confined to enforcing and developing mutual cooperation between the criminal justice systems of different states, but also reaches out to define and prohibit activities understood to be a threat to the interests of the international community.”\textsuperscript{174} This being the current state of things, the international community must work as a whole, and each state must do its part to apprehend, arrest, prosecute, and convict perpetrators of international crimes in order to maintain the new cohesive international community.\textsuperscript{175}

\textsuperscript{167} Id.

\textsuperscript{168} Id.

\textsuperscript{169} Van Schaack & Slye, supra note 132, at 145 (applying the territoriality principle to the ISIS genocide); See also, Holpuch et al., supra note 2 (discussing the hurdles facing an ICC prosecution of perpetrators of the genocide taking place in Iraq and Syria).

\textsuperscript{170} Enos & Phillips, supra note 5.

\textsuperscript{171} Holpuch et al., supra note 3.

\textsuperscript{172} See generally Enos & Phillips, supra note 5.

\textsuperscript{173} Steven, supra note 82, at 446.

\textsuperscript{174} Id.

\textsuperscript{175} Id.
The U.S. as a signatory of the Genocide Convention has an obligation to prevent and punish the genocide going on in Iraq and Syria at the hands of ISIS.\textsuperscript{176} However, there is no mandatory mechanism by which the U.S. is to meet its obligations.\textsuperscript{177} In order for the convention to have any meaning and serve its intended purpose, countries such as the U.S. who deem acts committed by a group as genocide are going to have to take action to prevent the further slaughter of targeted groups and punish the perpetrators of these heinous crimes.\textsuperscript{178} Without this follow-through, the Genocide Convention will be meaningless and genocides like the one occurring at the hands of ISIS will continue.\textsuperscript{179} This article concludes as the authors Enos and Phillips concluded with a call for action by the U.S.:

The world can no longer deny that genocide is being carried out by ISIS. Now the U.S. should use its global leadership to combat this atrocity. Next steps should go beyond what Secretary Kerry has suggested and evaluate and employ the many tools available to punish ISIS for its violence and ensure justice for victims of genocide in Iraq and Syria.\textsuperscript{180}

\textsuperscript{176} Genocide Convention, \textit{supra} note 2.
\textsuperscript{177} Mayroz, \textit{supra} note 47, at 81.
\textsuperscript{178} See generally Enos & Phillips, \textit{supra} note 5.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.}
21st Century Terrorism Business Model: ISIS v. Al-Qaeda

By: Alexandra L. Boll

There are two things a brother must always have for jihad, the self and money. - An Al-Qaeda operative.

I. INTRODUCTION

In the last two years, the Islamic State in Iraq and Syria (“ISIS”) has accomplished more than Al-Qaeda has been able to in three decades. Unlike Al-Qaeda who fell short in these areas, ISIS has been very successful in the different strategic aspects of funding, recruiting, survival, and capturing the word’s undivided attention. Proclaiming itself a caliphate in 2014, known as the Islamic State, ISIS has attempted to legitimize their organization and be the forefront leader of the

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1 Juris Doctor Candidate, 2017, Creighton University School of Law.
Muslim movement. ISIS differs from other terrorist organizations by recognizing the importance of internal funding, as it reveals a new structure for operations that has proven very successful. ISIS has proven this to be successful by establishing and operating a business model unlike anything seen before; within a year of departing from Al-Qaeda, ISIS was labeled the, “World’s Richest Terrorist Group,” by Business Insider, while Forbes ranked ISIS the, “richest terrorist organization the world has known.” They have accomplished this by structuring a well-built business model utilized to establish dangerous strongholds.

This business model is defined as, “a design for the successful operation of a business, identifying revenue sources, customer base, products, and details of financing.” ISIS has created a business foundation that has allowed them to maintain operations and grow at alarming rates. The ideological and theological implications surrounding their caliphate present a significant challenge to other terrorist organizations, particularly Al-Qaeda. ISIS has suffered financial strain in 2016, and as a result has faced significant territory loss. While ISIS’s business foundation has proven overwhelmingly successful, recently, the sustainability of said model has


8 Jason Dozier, Who is funding ISIS?, GLOBAL RISK INSIGHTS (Feb. 18, 2016), http://globalriskinsights.com/2016/02/who-is-funding-isis/.


come into question. Despite ISIS’s fragile state, their swift surges and atrocities will continue to
draw enemies, elicit recruits, and further permeate their existence.¹³

This article focuses on the importance of understanding modern day terrorist organization
business models.¹⁴ Terrorism is currently at the forefront of global issues and the means by which
these organizations operate and commit atrocities are of the utmost importance.¹⁵ A comparative
analysis of organization foundations and operations will iterate the evolution of financing and
highlight the need of subsequent remedial measures to minimize operations and halt further
expansion.¹⁶

This article will begin by discussing terrorist organization’s business models, the
importance of their individual structures, and the requisite means to operate an organization.¹⁷ The
remaining portion of the background section will discuss the Al-Qaeda organization and the
framework on which they have historically and currently operate.¹⁸ This article will argue ISIS’s
business model is more effective than Al-Qaeda’s due to its heavy reliance on internal funding,
adaptability, advanced technology and territory control.¹⁹ Finally, the conclusion will re-iterate
the importance of terrorist organization’s business foundations by discussing current operations,
organization evolution, and the desperate need of modern counter-terrorist financing measures.²⁰

II. BACKGROUND

Thoroughly investigating the infrastructure of terrorist groups is critical to understanding
an organization’s current capabilities and future objectives as “[s]uccessful groups are often

¹³ See generally Christine Williams, Islamic State reportedly preparing for loss of caliphate,
group focusing on jihad abroad, JIHAD WATCH (Jul. 13, 2016),
https://www.jihadwatch.org/2016/07/islamic-state-reportedly-preparing-for-loss-of-caliphate-
group-focusing-on-jihad-abroad.
¹⁴ Infra section I Introduction.
¹⁵ Infra section III Argument.
¹⁶ Infra section III Argument.
¹⁷ Infra section II Background.
¹⁸ Infra section II Background.
¹⁹ Infra section III Argument.
²⁰ Infra section IV Conclusion.
defined as much by their skills as financial managers as they are by their military expertise and ability to recruit fighters.”

Terrorist organizations require significant funds for operations, propaganda, recruitment, training, salaries, and social services.

Historically, terrorism financing took a hand to mouth existence approach and was funded by state sponsors or large donors. In order to establish any level of financial independence in the 21st century, terrorist groups are required to move from primarily external funding to internal, self-generated funding. This self-generated funding is more difficult for the international community to track and disrupt. If terrorist groups are to grow and be sustainable, they need to develop reliable sources of financing based on the territory, population, and resources where they are located. The on-going conflict in Syria and Iraq is morphing the nature of the terrorist threat and this self-sufficiency is what differentiates ISIS from Al-Qaeda. It is important to recognize these differences as terrorist organizations operate with different fundraising and expenditure priorities. During their existence, these priorities and methods of operation will evolve as they establish their infrastructure, influence, and operational capabilities.

In August of 1988, Soviet troops began to withdraw from Afghanistan following an eight-

24 Id.
25 Id.
26 Id.
30 Id.
year intervention against the rebels, promoting a communist and pro-Soviet government. Amongst the turmoil, Osama Bin Laden and other top officials met in Pakistan where they determined it was time to initiate a global jihad movement. Bin Laden envisioned a group of elite fighters who would lead the global jihad initiative by bringing together hundreds of struggling and unorganized small jihadist groups. This group became known as Al-Qaeda. By the mid-1990's Osama Bin Laden re-directed the movement to focus on what he believed was corrupting all local regimes, American influence. Seeking to re-shape the Muslim world, Al-Qaeda sought to avenge the wrongdoings of Jews and Christians against Muslims around the world. As years went on, Al-Qaeda continued to grow and facilitate terrorist attacks around the world claiming the lives of many women, men, and children. Despite the 2011 death of their leader, Bin Laden, the


34 Al-Qaeda in Arabic translates to “the base.” Laura Hayes et al., Al-Qaeda Osama bin Laden’s Network of Terror, INFOPLEASE (Sept. 12, 2001), http://www.infoplease.com/spot/al-Qaeda-terrorism.html.


group continued to grow and commit atrocities. Al-Qaeda capitalized on their anger and spread their ideology to Iraq by waging an insurgency against the United States troops in Iraq. Following the gassing and genocide of his own people, an uprising against Syrian dictator Bashar al-Assad became evident. Al-Qaeda in Iraq saw this uprising as a key opportunity to spread its presence into Syria and renamed themselves ISIS. Al-Qaeda did not approve of this new organization due to an existing counterpart. As distaste with their organization and their atrocities grew, Al-Qaeda disavowed and distanced them from ISIS.

A sound and well thought out business plan is what can lead to the immense success or utter failure of an organization. “A business model is the plan implemented by a company to generate revenue and makes a profit from operations. The model includes the components and functions of the business, as well as the revenues it generates and the expenses it incurs.”

Understanding how terrorist organizations have generated revenues, organization operations, and

40 Id.
41 Id.
42 Id.
maintains expenses is of crucial importance. Absent this understanding, counter terrorism financing measures will be ineffective.

With a global overhaul to eliminate funding sources, organizations are constantly required to think ahead of their combatants and do so in secrecy. The means necessary to carry out a terrorist attack are relatively small compared to the damage they can inflict and the cost of an organization’s daily operations. The costs of a plane ticket, homemade explosives, detonators or guns are a very small portion of organization costs.

Substantial structural costs of growing, maintaining, and operating extreme ideologies are what drive a strategic and efficient business model. In order to maintain a stable infrastructure and continue to promote objectives, terrorist groups require a steady flow of income. A large portion of organization funds includes living costs for members and their families; secure methods of communication, member training, and extensive propaganda. As technology continues to evolve, organization ideologies are easier to spread yet costs remain significant. Organizations

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47 Id.
48 Id.
50 Id.
53 Gómez, supra note 51.
such as ISIS incur the most expenses and require the most operational costs.\textsuperscript{55} In declaring a caliphate, ISIS assumes responsibility for the land, people, and resources within that territory.\textsuperscript{56} As organizations mirror the operations of ISIS, they too will be required to rely on significant financing to survive and thrive.\textsuperscript{57}

A. AL-QAEDA’S BUSINESS MODEL

Since their inception, Al-Qaeda has relied on foundations, mosques, banks, and fundraisers as its financial backbone.\textsuperscript{58} Responsible for the deadliest terrorist attack in US history, Al-Qaeda quickly became the main target of terrorism suppression.\textsuperscript{59} Prior to September 11, 2001 “9/11” their financial requirements for operation were estimated to be 30 million annually.\textsuperscript{60} This income was used for carrying out attacks, supporting and maintaining the military, training, indoctrination, and support to other terrorist groups.\textsuperscript{61} Ultimately bombed into submission, the post 9/11 years were the central focus for lawmakers in counter-terrorism.\textsuperscript{62} Following 9/11, President George W. Bush declared the global war on terror maintaining two objectives; to freeze terrorist assets and to disrupt their financial infrastructures.\textsuperscript{63}

Al-Qaeda’s business foundation of relying on external funding has significantly hindered their ability to maintain effectiveness on a global scale.\textsuperscript{64} Al-Qaeda operates a lean business model

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{60} Gómez, \textit{supra} note 51.
\textsuperscript{61} Id.
\textsuperscript{62} Center for the Analysis of Terrorism \textit{supra} note 55
\textsuperscript{64} Denise N Baken & Ioannis Mantzikos, \textit{Al Qaeda: The Transformation of Terrorism in the Middle East and North Africa}, 59-60 (2015).
with a hierarchical leadership structure. A lean business model is a strategy that strives to eliminate wasteful spending and increase quality and productivity. Unlike ISIS, Al-Qaeda is not concerned with extravagant spending and luxury commodities. Holding the most important role in Al-Qaeda’s financing, Saeed al-Masri is the former accountant for Osama Bin Laden. Killed in a US airstrike in 2010, Saeed’s reputation for being notoriously reserved and frugal has lived on.

Orchestrated by Al-Qaeda, September 11, 2001 marks the largest terrorist attack in the history of the United States. The entire operation responsible for the deaths of thousands of Americans cost a mere $500,000. In the months and years following the attack, the 9/11 commissions determined a majority of their income was through cash donations siphoned from legitimate charities, wealthy donors, and mosques. The cash donations were funneled by numerous amounts of radical clerics and corrupt administrators. Nonetheless, donations are not a reliable and consistent means to an income responsible for operating an entire organization.

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69 Id.
72 Roth, supra note 58, at 19.
74 See generally Michael Freeman, *The Sources of Terrorist Financing: Theory and Typology*, *Studies in Conflict and Terrorism*, (Volume 34, Number 6, June 2011),
When the means of Al-Qaeda’s financing were discovered, the world leaders quickly assembled a handful of counter-terrorism financing measures and initiatives. These measures acted as a financial chokehold and significantly minimized the group’s ability to function effectively. Al-Qaeda quickly learned the nature of relying heavily on external funding was easily interrupted. Post 9/11, Al-Qaeda was required to adapt and protect reliable financial sources to ensure their existence.

Al-Qaeda’s organization is run by a financial committee consisting of many leaders and headed by a finance minister. Al-Qaeda’s financial committee is no longer as effective as it once was because many committee members have been killed throughout the global war on terror. Many of the remaining leaders continue to rely on external sources for organization funding.


75 See generally Roth, supra at 58.
76 See generally The Global Regime for Terrorism, COUNCIL ON FOREIGN RELATIONS (June 19, 2013), http://www.cfr.org/terrorism/global-regime-terrorism/p25729 (The United Nations rallied international efforts for counterterrorism. Many conventions, committees, and countries have placed counter-terrorism efforts at the top of their agenda.).


77 See generally Center for the Analysis of Terrorism, supra note 55.

79 Center for the Analysis of Terrorism, supra note 55 at 7.
81 See generally Victor Comras, AL Qaeda Finances and Funding to Affiliated Groups, Strategic Insights, (Vol IV, Issue 1, Jan. 2005), http://calhoun.nps.edu/bitstream/handle/10945/11147/comrasJan05.pdf.
Although the organization is loosely run and decentralized, groups are still linked.\(^{82}\) Al-Qaeda’s priorities include terrorist attacks, destabilization, and the decimation of the western world.\(^{83}\) Presently, Al-Qaeda acts through a large number of cells and satellite terror groups.\(^{84}\) A global enterprise, its decentralized nature permitted its existence when anti-terrorism campaigns were at their biggest height.\(^{85}\) Morphing into their own distinct cells, Al-Qaeda is a large network with three interlinked entities under their umbrella.\(^{86}\) These networks include Al-Qaeda in Iraq, the Islamic Meghreb, and Al-Qaeda in the Arabian Peninsula.\(^{87}\) Although Al-Qaeda still relies on traditional funding methods, the cells within them are largely responsible for their own income.\(^{88}\) These groups have turned to criminal activities, such as drug trafficking and kidnapping in order to obtain a consistent and reliable stream of revenue.\(^{89}\) The individual income and decentralized command under Al-Qaeda leaders has minimized the control they have over their affiliates.\(^{90}\) Although this specific structure has minimized the control over their affiliates, it has allowed them to adapt individually to counter-terror measures and broaden its fundraising strategies.\(^{91}\) Directed by the organization’s leaders, businesses and shell organizations have been created to generate


\(^{84}\) Baken & Mantzikos, *supra* note 67.


\(^{86}\) Gómez, *supra* note 51.


\(^{88}\) Comras, *supra* note 81, at 464.

\(^{89}\) Id. at 466.


\(^{91}\) See generally Humud, *supra* note 87
self-funds through various scams.\(^{92}\)

Affiliate cells and satellite terror groups established in an estimated 16 countries\(^{93}\) have provided support for one another and subsidized other affiliates in financially difficult times.\(^{94}\) According to the New York Times, it is believed that a significant portion of Al-Qaeda’s activities are financed through ransoms paid to free Europeans.\(^{95}\) While affiliates are still reliant on donors and charities, some of the more successful affiliates act as franchises of Al-Qaeda and subsidize one another.\(^{96}\)

**III. ARGUMENT**

Claim: ISIS’s business model is more effective than Al-Qaeda’s due to their adaptable nature, advanced technology, extensive propaganda, exploitation of the weak, reliance on internal funding, and vast territory control.

ISIS follows a similar business model to that of a large corporation.\(^{97}\) ISIS has structured themselves in a manner that cannot easily be eliminated with existing counter-terrorism measures by relying on nothing but their own independence.\(^{98}\) By financing themselves, ISIS has been able to maintain political, economic and religious autonomy.\(^{99}\) ISIS operates as a bureaucratic and

\(^{92}\) Powell, *supra* note 78.


\(^{95}\) Id.

\(^{96}\) Comras, *supra* note 81.


\(^{99}\) Center for the Analysis of Terrorism, *supra* note 55 at 6.
administrative organization ensuring its own success and stability with its predefined financial strategy.\(^{100}\)

An internal document drafted by ISIS describes its strategy as follows: “The wealth of the State is the principal component and source of financing for all internal and external operations, and the existence of secure financial resources whose value does not change in every time and place is a must.\(^{101}\)” ISIS relies on multiple revenue streams for organization operations, which maintains the rules of conventional economics.\(^{102}\) ISIS’s economic system progressively escalated their goals, organizational structure, and revenue sources.\(^{103}\) The progressive escalation has risen to the level of self-sufficiency seen in ISIS today.\(^{104}\) Once the organization reached this level of self-sufficiency, they were able to utilize the funding against its targets, payment for its members, and public services for those within its territory.\(^{105}\) Once self-sufficient and fully operational, ISIS was able to provide public services to the people that included street cleaning, power, and telephones.\(^{106}\)

“The administration of wealth within the territory under ISIS control is based on several principles illustrating an economic and political strategy based upon the maintenance of technical and executive staff within all productive and administrative sectors, alongside a hierarchy affiliated with the group.”\(^{107}\)

\(^{100}\) Id. at 25.

\(^{101}\) Id. at 6 (quoting Abu Abdullah al-Masri “Islamic State Caliphate on the prophetic methodology” IS internal document, 2013-2014).


\(^{103}\) See generally Center for the Analysis of Terrorism, supra note 55.

\(^{104}\) Id. at 5.

\(^{105}\) See generally Center for the Analysis of Terrorism, supra note 55.

\(^{106}\) Id. Recently the group has been under financial strain and cut back on some of the public services provided.

\(^{107}\) Id. at 8.
ISIS’s operations and their internal sources present a new intelligence and policy challenge on a global level.108 “This non-state actor’s ability to survive and grow independent of external funding and exploitation of ungoverned spaces make it difficult for the U.S.-led coalition to target the group’s funding using traditional measures.”

A. EXPLOITATION, TERRITORY CONTROL, RESOURCES

ISIS has gained significant traction in areas of instability by exploiting war-torn and weak governments.110 Taking advantage of those that are economically marginalized was something Al-Qaeda never pursued.111 By seizing and controlling large portions of territory in both Syria and Iraq, the proclaimed caliphate has quickly surpassed Al-Qaeda as the dominant and preeminent force in the international jihadist movement.112 The vast territory controlled by ISIS provides the caliphate with a location for training, governing, and housing.113 The organization extracts all the resources within the territory by taking administrative and civil control over the conquered territories.114 Despite a lack of reliance on donations for financing operations, ISIS’s estimated donations in 2015 were around $50,000,000.115 The independence of this organization has enabled them to avoid measures implemented to combat the financing of terrorism and to maintain power.116 Absent ties to major donors or state sponsors, they are not restricted from any


111 Id.


113 See generally Center for the Analysis of Terrorism, *supra* note 55.

114 Swanson, *supra* note 7.

115 Center for the Analysis of Terrorism, *supra* note 55, at 20.

116 Id.
demands. Donations can give an organization a source of initial "seed-funding", but they are vulnerable to disruption and ultimately unreliable.

1. Oil

ISIS exploits oil for two reasons: economic value, and political pressure. Mocking oil-trading operations of a state oil company, they possess the biggest advantage over other groups because they have taken control of existing fields in Syria and Iraq and exploit oil via Turkey.

As one of their most lucrative streams of revenue, ISIS expends vast resources on the extraction, refining, and selling of oil. According to the U.S. Treasury department, oil provides ISIS annual revenue of $500 million per year. Analysts have discovered that a combination of revenues from extortion, bank robbery, and taxation together account for a little more revenue than from oil. Through mocking oil-trading operations of a state oil company, ISIS has been able to derive significant funds from oil. Recent coalition air strikes have hindered extraction and production of oils fields within their territory.

The complex nature of oil does not permit ISIS to possess the individual expertise or machinery to effectively run oil fields. When ISIS first seized territory containing oil fields there

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117 See generally Center for the Analysis of Terrorism, supra note 55.
118 Keatinge, supra note 21.
119 See generally Center for the Analysis of Terrorism, supra note 55.
124 See generally Center for the Analysis of Terrorism, supra note 55, at 9-11.
125 Swanson, supra note 7.
was still a significant amount of industry specialists remaining in the area.\textsuperscript{127} As the population dwindled, ISIS brokered agreements with the Syrian regime and public companies in the oil sector.\textsuperscript{128}

Managing complex entities in tandem has proven very successful as they exchange some of its gas production for expertise.\textsuperscript{129} This relationship has provided ISIS with the qualified staffing and elaborate equipment required to operate their refineries.\textsuperscript{130} Selling barrels at almost half of the current industry norm, the line for purchasing said resource is never short.\textsuperscript{131} ISIS follows the practice of local black market vendors, by selling oil to the highest bidder.\textsuperscript{132} ISIS is able to minimize transportation and storage costs by selling through the shortest distribution circuits and local markets.\textsuperscript{133} When controlling both the oilfields and distribution circuits, ISIS is able to heavily regulate the process and ultimately its profit margin.\textsuperscript{134}

As of September 2016, ISIS is no longer in possession of oil fields in Iraq.\textsuperscript{135} The recapture by Iraqi soldiers of oil rich cities Shargat and Qayyarah has left the organization unable to produce, smuggle and sell oil out of Iraq.\textsuperscript{136} In losing these oilfields ISIS’s revenue have been reduced to that of what they incurred during the time of rapid expansion.\textsuperscript{137} ISIS possesses six key oilfields in Syria and is heavily dependent on this for income, as it now constitutes 70\% of its overall income.\textsuperscript{138}

2. \textit{Banks & Finances}

\textsuperscript{127}Erika Solomon, \textit{The ISIS economy: Meet the new boss}, \textsc{Financial Times} (Jan. 5, 2015), http://www.ft.com/cms/s/0/b2c6b5ca-9427-11e4-82c7-00144feabdc0.html#axzz4Hz8UzvIT.

\textsuperscript{128}Center for the Analysis of Terrorism, \textit{supra} note 55, at 12.

\textsuperscript{129}Id.

\textsuperscript{130}Id.

\textsuperscript{131}See generally Center for the Analysis of Terrorism, \textit{supra} note 55, at 9-11.

\textsuperscript{132}Center for the Analysis of Terrorism, \textit{supra} note 55, at 10.

\textsuperscript{133}Id.

\textsuperscript{134}Id.

\textsuperscript{135}\textit{ISIS no longer controls any Iraqi oil}, \textsc{Rudaw} (Sept. 27, 2016), http://rudaw.net/english/kurdistan/270920164.

\textsuperscript{136}Id.

\textsuperscript{137}Id.

\textsuperscript{138}Id.
ISIS Stole $425 million in cash in mid-June of 2014 from the Mosul branch of the Central Bank of Iraq, which was previously unheard of from a Terrorist Organization.\textsuperscript{139} By 2015, ISIS had a total of 115 bank branches under its control.\textsuperscript{140} Although ISIS controls a large number of bank branches, they are limited to acting solely as deposit banks.\textsuperscript{141} Regulators and large banks preclude ISIS from accessing the global financial system through the banks within their control.\textsuperscript{142} No longer tied to the global financial system, ISIS has been hindered in their efforts to buy critical military and communications.\textsuperscript{143}

ISIS has manipulated the Iraqi banking system and utilized an external trade system called Hawala.\textsuperscript{144} Through network currency exchange offices, the Hawaladars throughout the region can instantaneously send or receive money.\textsuperscript{145} ISIS is able to trade with agents in Jordan and Turkey by using the Hawala system.\textsuperscript{146} Also utilized by Al-Qaeda, bypassing regulations and neutralizing the Hawala system is difficult to do.\textsuperscript{147} The agents shuffle funds across borders benefiting from the exchange rate fluctuations.\textsuperscript{148} This has made funding sources of ISIS difficult to trace.\textsuperscript{149}

3. Taxes, Fees, Fines, and Confiscations


\textsuperscript{140} Center for the Analysis of Terrorism, \textit{supra} note 55, at 23.

\textsuperscript{141} \textit{Id.}


\textsuperscript{144} Center for the Analysis of Terrorism, \textit{supra} note 55, at 23.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} Center for the Analysis of Terrorism, \textit{supra} note 55, at 24.

\textsuperscript{147} \textit{Id.}


\textsuperscript{149} al-Masri, \textit{supra} note 101.
Although commonly used as a revenue source by criminal organizations and enterprises, ISIS’s widespread extortion from their population possesses ingenuity. The greater the population within their control, the more revenue they obtain. With an administrative structure, ISIS’s department of the Diwan al-Khadamat (Services Department) is dedicated solely to extortion. The department also consists of a large militant team that actively engages in tax collection. Taxes implemented under ISIS include; truck driving tolls, satellite installation or repair, exit fees for leaving the city, tax on cash withdrawals from bank accounts, a road tax, customs tax, tax on archeological sites, telecommunication company taxes, looting taxes, protection taxes for non-Muslim communities, and taxes for being Christian. All establishments within ISIS territory are under sanctions and international monitoring.

ISIS offers services to their residents such as water and electricity but requires them to pay a steep fee on a monthly basis to maintain these.

Imposing strict rules based off Sharia Law, ISIS gathers financial penalties on all transgressions. Fines on transgressions range from $100 US dollars to $500 US dollars. The types of transgressions warranting these fines include smoking, wearing of non-regulatory clothing, and much more. Residents within ISIS control are often quizzed on the contents of the

150 Center for the Analysis of Terrorism, supra note 55, at 4.
151 Id. at 18.
152 Id.
153 Id.
154 Id. at 15-18.
155 See generally id.
156 Id. at 16.
159 Id.
Qur’an.\textsuperscript{160} If answered incorrectly, ISIS will publicly discipline that individual.\textsuperscript{161} In an attempt to collect more revenue, ISIS has held back public discipline and replaced these repercussions with fines.\textsuperscript{162}

When seizing territory, ISIS often carries out confiscations and requisitions of all individuals within their control.\textsuperscript{163} Upon conquering different communities, ISIS systematically loots any goods possessed by citizens.\textsuperscript{164} ISIS sells confiscated goods on the local markets and gives preferential purchases and steeper discounts to members within their caliphate buying goods.\textsuperscript{165}

Although taxes and fees provide ISIS with a significant amount of funding, their attempt to regulate all goods and services has yielded a frustrating level of red tape.\textsuperscript{166} The growing pain incurred in ISIS’ attempt to expand is similar to that of a newly established and growing business.\textsuperscript{167}

4. Kidnap & Ransom

Targeting businessman, politicians, international travelers, and religious dignitaries, ISIS has always resorted to kidnapping for ransom.\textsuperscript{168} It is estimated that in 2013, ISIS raised up to $45 million in kidnapping ransoms.\textsuperscript{169} Exploiting its caliphate’s population in more ways than one,


\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} See generally Center for the Analysis of Terrorism, \textit{supra} note 55.

\textsuperscript{164} Center for the Analysis of Terrorism, \textit{supra} note 55, at 16.

\textsuperscript{165} Id.

\textsuperscript{166} Weiss, \textit{supra} note 12.


\textsuperscript{168} Weiss, \textit{supra} note 12.

\textsuperscript{169} Keatinge, \textit{supra} note 21.
ISIS is known for supplementing a portion of their revenue through the sale of women and children.\textsuperscript{170}

5. *Antiquities Trafficking*

Although contradictory in nature, ISIS continues to call for the destruction of antiquity sites, yet receives significant revenue by exploiting these sites and looting the antiquities within.\textsuperscript{171} Whether it is sold for profit or destroyed, it is important to acknowledge the decimation of cultural heritage and history amongst these territories that can be dated back to 9000 B.C.\textsuperscript{172} Under ISIS’s current business model, they have established a bureau called the Diwan of Natural Resources.\textsuperscript{173} Divided into two regions, this department is purely dedicated to the excavation, exploration, and surveying of archaeological sites containing artifacts.\textsuperscript{174} This department is run in similar fashion to a corporation with their own marketing team, research and development, exploration and identification, and administration.\textsuperscript{175} ISIS has legitimized the systematic looting by issuance of licenses permitting authorized traffickers to search, excavate and sell any objects discovered at a 20-50\% tax rate.\textsuperscript{176} In order to get the highest profit margin, ISIS often performs the explorations, excavation, and sale through the Diwan of Natural Resources.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{170} See generally Center for the Analysis of Terrorism, *supra* note 55.
\item \textsuperscript{173} Jones, *supra* note 171.
\item \textsuperscript{174} *Id.*
\item \textsuperscript{175} *Id.*
\item \textsuperscript{176} Center for the Analysis of Terrorism, *supra* note 55, at 19.
\item \textsuperscript{177} *Id.*
\end{itemize}
In early 2015, ISIS was estimated to control 2,500 archeological sites in Iraq\(^\text{178}\) and 4,500 sites in Syria\(^\text{179}\). With the antiquities industry poorly regulated, ISIS is easily able to smuggle artifacts through neighboring countries, Turkey and Jordan\(^\text{180}\). The estimated revenue derived from the sale of artifacts in 2015 was around $30 million\(^\text{181}\). The revenue generated from antiquities only represented 1% of their total revenue\(^\text{182}\). The estimated revenue for the 2016 fiscal year is predicted to be significantly less than $30 million as they have already ravaged many sites and lost control of the ancient city of Palmyra\(^\text{183}\). Although not confirmed, it is believed that ISIS still has a large amount of valuable items hidden in storage that will be sold in the future when the attraction of stolen antiquities subsides\(^\text{184}\).

6. **Agriculture**

A common theme throughout ISIS’s business model is the utilization of resources within the territory they have seized as a revenue source\(^\text{185}\). The agriculture resource is exploited for income through taxes at varying levels of the production process in addition to taking a certain percentage of the income made from farmers\(^\text{186}\). Taxes on the agricultural industry are applied at all different levels of production and transportation\(^\text{187}\). ISIS commonly invests in cultivating the lands for farming wheat and other public lands\(^\text{188}\). In December of 2015, ISIS was estimated to control one-third of Iraq’s wheat and barley land\(^\text{189}\).

\(^{178}\) *Id.*


\(^{180}\) *Id.*

\(^{181}\) *Id.*

\(^{182}\) Powell, *supra* note 78.

\(^{183}\) *Id.* at 6.

\(^{184}\) *Id.* at 20.

\(^{185}\) *See generally id.*

\(^{186}\) *Id.* at 16 (farmers are forced to pay a tax of 5-10\% for their harvests).

\(^{187}\) *See generally id.*

\(^{188}\) *Id.*

\(^{189}\) Pagliery, *supra* note 122.
It is not uncommon for ISIS to seize agricultural machines and rent them out back to the farmers. Although not common, ISIS has been known to smuggle livestock to Turkish lands. ISIS’s agriculture involvement accurately portrays their business model of utilizing resources in as many ways as possible within the territories they seize. Expanding revenue past a farmer’s tax allows them to collect revenue at different levels of production and in different manners. This versatility is what has made ISIS so successful.

7. Phosphate Mines

The phosphate mines within ISIS control represent their thoughtful business foundation and fiscal strategy. With a miniscule profit margin, low international prices, and difficulties associated with the transportation of phosphates, ISIS has limited their action within that industry. Although the resource phosphate is abundant and has been utilized for financial gain in the past, ISIS’s business model does not give heavy consideration to revenue sources with miniscule profit margins.

B. VIOLENCE & BRUTALITY

Worldwide, ISIS exploits fear and instability by branding and advertising indiscriminate killings. Despite the indiscriminate tactics utilized by Al-Qaeda on September 11, they publicly renounce the violent nature surrounding ISIS. A significant disagreement from their predecessors, Al-Qaeda was not accepting of the violence and brutality ISIS sought. ISIS has

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190 Id.
191 Al Mashhour et al., supra note 102.
192 See generally Center for the Analysis of Terrorism, supra note 55.
193 Id.
194 See generally, Swanson, supra note 7.
195 See generally Center for the Analysis of Terrorism, supra note 55, at 12.
196 Id.
197 Id.
200 Id.
started to spread their ideology of indiscriminate violence urging lone-wolf militants with elementary improvised explosives and weapons to commit atrocities.201

C. TECHNOLOGY, RECRUITMENT, & PROPAGANDA

Closely linked with violence and brutality, ISIS pushes its violent ideologies and actions through propaganda and technology.202 Utilizing the production of gruesome acts on footage, ISIS strives to outbid Al-Qaeda in the realm of cruelty.203 With an online presence more prominent and sophisticated than Al-Qaeda, ISIS reaches many prospective fighters.204 Given the organization’s recent birth, they have been afforded technology that was not available to Al-Qaeda during their prime years.205 Al-Qaeda’s propaganda videos typically consisted of the group’s former president, Osama Bin Laden, sitting in a cave.206 “Hiding in an Afghan cave or in a modest Pakistani compound without access to internet is just so last decade.”207 These videos revealed a rugged lifestyle plagued with location secrecy and continuing evasion.208 “The Al-Qaeda people were Afghan warriors. Great warriors – horrible people but great warriors. They didn’t have the ability


203 Malsin and Cairo, *supra* note 112.

204 Id.


208 Id.
to use the Internet, they didn’t have the ability to infiltrate.”\(^\text{209}\) Al-Qaeda’s propaganda was limited to its words by promising eternity to its followers.\(^\text{210}\) ISIS takes a different approach by glorifying all communication and social media.\(^\text{211}\) Promising virgins, luxurious accommodations, and a steady income; ISIS conveys this lifestyle to prospective recruits through advanced technology.\(^\text{212}\) ISIS has created a mobile application called “The Dawn of Glad Tidings.”\(^\text{213}\) This application has allowed the organization to post content to supporters and gain income from those purchasing the application.\(^\text{214}\)

Due to its global expansion, ISIS devotes significant resources and educators to teaching its followers and members the proper use of different encrypted communications.\(^\text{215}\) These encrypted communications are difficult to track as technology and media platforms continually evolve and develop.\(^\text{216}\) This sophisticated technology is used for recruiting, member communication, and fundraising.\(^\text{217}\)

D. ADAPTABILITY

Adaptability is key to the success and operations of terrorist organizations.\(^\text{218}\) ISIS represents an unprecedented level of risk.\(^\text{219}\) With a global initiative targeting the caliphate and

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\(^\text{211}\) See generally Malsin and Cairo, *supra* note 112.


\(^\text{214}\) Id.

\(^\text{215}\) See generally Center for the Analysis of Terrorism, *supra* note 55.

\(^\text{216}\) Paganini, *supra* note 54.
their revenue sources, ISIS has been forced to compensate for a loss of revenue utilizing its population as an adjustment variable.\textsuperscript{220} Through extortion and population variables, ISIS is able to compensate for its loss of production of oil due to coalition airstrikes.\textsuperscript{221}

As of October 1, 2016 the swaths of territory controlled by the ISIS organization has significantly dwindled.\textsuperscript{222} Once deemed unstoppable, the U.S. led air coalition has driven ISIS out of Tikrit, Ramadi, Fallujah, Sargat, and Qayyara.\textsuperscript{223} The airstrikes carried out thus far have resulted in a significant loss of leadership.\textsuperscript{224} This continuing loss of leadership has weakened the organization, but a pre-planned succession of replacements has long been part of ISIS’s strategic operations.\textsuperscript{225}

Since the airstrikes and bombings by the coalition have intensified in the year 2016, ISIS sells the oil it produces to independent traffickers at the oilfields in order to avoid the risks associated with transportation.\textsuperscript{226} In the wake of intense airstrikes, ISIS has developed teapot refineries to boost its decreasing oil revenue.\textsuperscript{227}

Other adaptable variables of ISIS include: decreased salaries for organization fighters, a tax increase, search for new resources, and the expansion and infiltration of surrounding populations.\textsuperscript{228} “While we see our core structure in Iraq and Syria under attack, we have been able

\begin{footnotesize}
\begin{enumerate}
\item See generally Center for the Analysis of Terrorism, supra note 55.
\item Al Mashhour et al., supra note 102.
\item Pamela Engel, ISIS official’s death could have major implications for the future of the group, BUSINESS INSIDER (Aug. 30, 2016), http://www.businessinsider.com/adnani-isis-killed-implications-2016-8.
\item Id.
\item See generally Center for the Analysis of Terrorism, supra note 55.
\item Nicolas Torres, ISIS turns to “teapot” refineries as airstrikes cripple oil revenue, PETRO GLOBAL NEWS (Jul. 11, 2016), http://petroglobalnews.com/2016/07/isis-turns-teapot-refineries-airstrikes-cripple-oil-revenue/.
\item Al Mashhour et al., supra note 102.
\end{enumerate}
\end{footnotesize}
to expand and have shifted some of our command, media and wealth structure to different countries,” said a longtime Islamic State Operative.229

E. SUSTAINABILITY

Hand-in-hand with their adaptability is the success of long-term sustainability.230 Relying on a loose network of foreign fighters and small militant cells, ISIS sends fighters back to their home state after visiting Syria and Iraq.231 These fighters are allowed to plan and execute attacks in their home states with the approval of ISIS leaders.232 With little direction from the central command the attacks have been less detrimental.233 Attackers are poorly trained and the death tolls from these attacks reflect that.234 Although not as effective, these attacks are minimal investments that do not cause harm to the organization in the event a plan is foiled.235 This new and loose approach of self-initiating violence is more expansive than what Al-Qaeda exhibited a decade prior.236 Lone wolf and low profile attacks make it difficult for counter-terrorism forces to detect them and uncover plans prior to attacks.237 A collapse of the caliphate would place heavier reliance


230 See generally Center for the Analysis of Terrorism, supra note 55.


232 Malsin and Cairo, supra note 112.


235 Id.

236 Malsin and Cairo, supra note 112.

237 McDowall, supra note 234.
on foreign fighters.\textsuperscript{238} If the caliphate were to collapse, ISIS would surely continue to spread their ideologies on a global level through propaganda, social media, and messages.\textsuperscript{239}

\textbf{IV. CONCLUSION}

ISIS has proven to be a very successful and dangerous organization that will continue to spread their extreme ideologies and dangerous activities. They have done so by operating an efficient and well planned business model encompassing adaptability, advanced technology, extensive propaganda, exploitation, internal funding and territory control.

“What most criminal enterprises want and cherish above all is money. Though it may not have been the motivating force at the beginning, it slowly corrupts the organization from within so that radical terrorists become nothing more than corrupt conflict entrepreneurs. Just check out the $7,000 Rolex Oyster on the wrist of the caliphate leader, Abu Bakr Al Baghdadi.\textsuperscript{240}” Without money, an organization like ISIS cannot sustain operations or spread ideologies.\textsuperscript{241} The Rolex on the wrist of the caliphate leader not only symbolizes the success of ISIS operations but also acts as a lucrative draw for potential members.\textsuperscript{242}

Disregarding Al-Qaeda’s classic business model of reliance on rich donors and state sponsorship, the Islamic State is a self-funded power house operating as a non-state actor.\textsuperscript{243} ISIS has found success in surpassing the one-time exploitation standard of most terrorist organizations

\begin{thebibliography}{9}
\bibitem{239} See generally Williams, \textit{supra} note 13.
\bibitem{241} \textit{Id.}
\bibitem{242} See generally The ISIS Leader Abu Bakr al-Baghdadi Wears The Same Watch As James Bond (It Seems) \textit{supra} note 207.
\bibitem{243} Council on Foreign Relations, \textit{supra} note 76.
\end{thebibliography}
as they continue to benefit from resources on a long-term scale. With leadership similar to that of a strong corporate board, ISIS places thoughtful consideration in their structure and operations.\textsuperscript{244} Due to this new funding approach, current counter-terrorism financing measures originally targeted at Al-Qaeda do not carry a similar effectiveness against ISIS. “Fighting a sophisticated 21st century enemy is going to take more than mid-20th century tactics.\textsuperscript{245}” New tactics will need to be created and implemented to hamper financial efforts and thwart further organization expansion.

Given ISIS immense success, Al-Qaeda and its affiliates are starting to mirror a business foundation similar to the caliphate. Despite near extinction in the past, special attention should be given to Al-Qaeda. In copying ISIS’s business model, Al-Qaeda has taken a slightly different approach to the people and social services within their control avoiding gruesome and brutality. Absent resistance from local groups, Al-Qaeda’s approach could eventually be more dangerous than that of ISIS. Porous borders and interconnected international systems will continue to permit finance, transit and communications to all areas of the globe.\textsuperscript{246}

Business model expert Alexander Osterwalder once said “In today’s climate, it’s best to assume that most business models, even successful ones, will have a short lifespan.\textsuperscript{247}” As ISIS continues to be at the forefront of international terrorism, they will be required to pivot the goal of their model from seizing territory to launching attacks in-order to ensure success.\textsuperscript{248} Although the long-term fate of these groups is unknown, it has become evident their influence and operations has guaranteed their existence for the near future. Their guaranteed existence in the future will be heavily dependent on the business model in which they operate.


\textsuperscript{245} Kleponis & Creal, supra note 240.

\textsuperscript{246} Council on Foreign Relations note 76.

\textsuperscript{247} Scerri, supra note 44.

\textsuperscript{248} Engel, supra note 224.