

# VIGILANTE NONPROFITS: THE *BOB JONES* RULE AS APPLIED TO THE INTERNATIONAL PROMOTION OF THE RULE OF LAW

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## I. INTRODUCTION

Imagine a small European nation in which physician-assisted suicide for the terminally ill has been legalized. Perhaps organizations aiding in the provision of such services have even been held to be tax-exempt charities in this country. Now imagine that these organizations, flooded with donations from local contributors, decide to extend their operations overseas in order to offer their services to individuals in other countries, including the United States, where domestic laws prevent the formation of similar organizations. Whether or not these groups would be criminally prosecuted in the United States, the fact that their home nation is in effect subsidizing their attempts to flout U.S. law via tax exemption would most likely complicate relations between the two nations. Whatever the merits of the organizations' missions, significant portions of the American population would be outraged — if not by the activities themselves, then by the organizations' disregard for U.S. law.

Yet many comparable organizations based in this country have motives and missions such as distributing Bibles or freeing slaves that Americans would consider laudable and charitable if carried out within the United States but that run afoul of the laws of the governments in whose territories they operate. What are the legal consequences when an American nonprofit operating abroad begins to act like a vigilante, promoting its own allegedly charitable agenda despite the prohibitions of foreign laws? The Supreme Court has held that an organization that violates a fundamental federal public policy is not charitable and is thus not eligible for tax exemption.<sup>1</sup> The fundamental policy addressed by the Court was a domestic one: the elimination of racial discrimination in education.<sup>2</sup> Should the loss of exemption rule also apply to a different fundamental policy — the goal of promoting the growth of the rule of law — that operates in the international sphere? An organization that violates another country's laws undermines the rule of law ideal that the law ought to bind everyone equally and effectively; should such an organization still be granted tax-exempt status?

This paper addresses these questions in five parts. Part II examines specific organizations whose actions raise these difficult legal and policy issues. Part III examines the current legal framework, focusing on the *Bob Jones* public policy test and other instances of its application. As the public policy test was derived from the law of trusts, Part IV discusses cases in which trusts have implicated similar issues. Part V examines the possibility that these vigilante nonprofits violate a public policy of promoting the rule of law internationally. Part VI explores the possible ways a court could address such a situation should it be confronted with the issue and concludes that the least objectionable solution to the dilemma is legislative action.

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<sup>1</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 592–99 (1982).

<sup>2</sup> *Id.* at 577.

## II. VIGILANTE NONPROFITS

### A. *Bible Distributions in China*

Although the current constitution of the People's Republic of China purports to protect religious liberties,<sup>3</sup> the same government organization (the State Administration for Religious Affairs, or SARA) that is charged with protecting these liberties is also charged with making sure that religion develops in accordance with the law and does not threaten social stability.<sup>4</sup> More than mere Marxist materialism explains the communist government's wariness towards religion. Ye Xiaowen, the director of the SARA, once stated:

The disintegration of the Soviet Union and the dramatic change in Eastern Europe resulted from their domestic political and economic failures and the sharpening of *social* contradictions there, including the failure of their policy toward religion over the long term that resulted in the alienation of the religious believers. Religion became a weapon in the hands of the dissidents for inciting the masses and creating political disturbances, thus hastening the collapse of the Soviet and Eastern European communist parties.<sup>5</sup>

Unsurprisingly, religious activities in China are very heavily regulated by a government determined not to fall victim to the same forces that brought down other communist regimes.

The SARA has set up five "patriotic associations" to serve as liaisons between the state-recognized religions and the government: the Chinese Buddhist Association, the Chinese Catholic Patriotic Association, the Three-Self Patriotic Movement (covering the Protestant church), the Chinese Daoist Association, and the Chinese Islamic Association.<sup>6</sup> In order to "set up a place of religious activity, one must go through the process of registration" with the SARA.<sup>7</sup> Churches that refuse to go through the

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<sup>3</sup> Citizens of the People's Republic of China enjoy freedom of religious belief:

No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.

The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.

Religious bodies and religious affairs are not subject to any foreign domination.

P.R.C. CONST. art. 36 (Tao-Tai Hsia et al. trans.), in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 43–44 (Albert P. Blaustein & Gisbert H. Flanz eds., Oceana Publications, Inc. 1992).

<sup>4</sup> Anthony Lam, *The Ministry of the Public Security and the Religious Affairs Bureaus*, 104 *TRIPOD* 47, 50–51 (Mar.–Apr. 1998). The Religious Affairs Bureau has since been renamed the State Administration for Religious Affairs. David Aikman, *China's Approach to Religion During the Hu Jintao Era: Statement to the Congressional-Executive Commission on China* (July 24, 2003), available at <http://www.cecc.gov/pages/hearings/072403/aikman.php>.

<sup>5</sup> Ye Xiaowen, *China's Current Religious Question: Once Again an Inquiry into the Five Characteristics of Religion*, in *SELECTION OF REPORTS OF THE PARTY SCHOOL OF THE CENTRAL COMMITTEE OF THE CHINESE COMMUNIST PARTY*, 1996, No. 5, reprinted in *HUMAN RIGHTS WATCH/ASIA, CHINA: STATE CONTROL OF RELIGION* 116, 133 (1998).

<sup>6</sup> Darin W. Carlson, *Understanding Chinese-U.S. Conflict over Freedom of Religion: The Wolf-Specter Freedom from Religious Persecution Acts of 1997 and 1998*, 1998 *BYU L. REV.* 563, 567–68.

<sup>7</sup> DECREE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, NO. 145 (1994), reprinted and translated in 79 *TRIPOD* 48, 48 (Jan.–Feb. 1994).

registration and monitoring process are known as “underground” or “house” churches<sup>8</sup> and are often raided by the police.<sup>9</sup> Other religious groups, including any group that spreads “superstitious and heterodox beliefs,” are identified as cults and banned without even the option of registration.<sup>10</sup>

Foreigners are subject to even more extensive controls on their religious behavior. According to regulations, foreigners may preach at registered religious sites, but only upon invitation by a religious body at or above the provincial level; aliens not entering China officially as “religious personnel” must receive additional permission from government authorities at or above the provincial level before being allowed to preach.<sup>11</sup> Aliens must receive permission to bring religious printed materials or audio-visual products into China (other than in amounts for personal use); these items are banned altogether if their contents are “detrimental to Chinese national security and public interests of Chinese society.”<sup>12</sup> Foreigners may not intervene in the selection of religious personnel or sites, nor “intervene in or manipulate other internal affairs of Chinese religious bodies”; they also may not establish new religious organizations or hold religious classes.<sup>13</sup> Many missionary activities are specifically banned, including appointing religious personnel or developing religious followers among Chinese citizens, preaching without permission or at unregistered sites, distributing religious propaganda materials, or “other missionary activities.”<sup>14</sup> If any aliens violate these regulations, government authorities “at or above the county level shall stop them in accordance with law.”<sup>15</sup>

However, many American groups disregard the regulations and risk punishment rather than conform to the Chinese government’s restrictions on their ability to proselytize.

On our second day in Hong Kong, our group gathered together with a local missions outreach to China. Our plan was to smuggle Bibles into China. We divided into five groups and moved into China at the rate of one group an hour. We carried Bibles and teaching books in camera bags, purses, carry-on bags and suit cases. The trick was to get past customs without being caught! As a back up, we all carried extra Bibles and teaching books strapped to our bodies. The men had them strapped to their bellies or back and the women carried them in a special pouched skirt. Some of us carried dummy bags to put through the X-ray scanners so as to distract the soldiers. We were instructed to walk swiftly through the customs gate with the Bible bag over our left shoulder while looking as inconspicuous as possible. Unfortunately, there were a few of us who were apprehended by the soldiers. But not all was lost! Even though they had their Bible bags confiscated, they made it through with the Bibles that were strapped to their bodies!

Once inside China, each group went to a different restaurant and sat down as if to order food. One at a time, we each went to the restroom and unloaded our Bibles into a single suitcase.

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<sup>8</sup> HUMAN RIGHTS WATCH/ASIA, CHINA: STATE CONTROL OF RELIGION 14 n.25 (1998).

<sup>9</sup> Hannah Beech, *When the Smugglers Are Working for Jesus*, TIME (Asia), Sept. 18, 2000, available at <http://www.time.com/time/asia/magazine/2000/0918/china.bibles.html>.

<sup>10</sup> *Identifying and Banning of Cultic Organizations – A Document from Public Security Ministry*, reprinted in 128 TRIPOD 47, 47–49 (Spring 2003).

<sup>11</sup> *Government Sets New Rules for Religious Activities*, 120 TRIPOD 45, 46 (Nov.–Dec. 2000).

<sup>12</sup> *Id.* at 47.

<sup>13</sup> *Id.* at 48–49.

<sup>14</sup> *Id.* at 49.

<sup>15</sup> *Id.*

From there, each group leader brought the Bibles to a hotel room full of Bible-packed suitcases that were waiting to be distributed to the underground churches throughout China. All together, our group brought 640 Bibles and 1,160 teaching books into communist controlled China!<sup>16</sup>

Overseas evangelists make trips to China weekly, smuggling in up to several thousand Bibles at a time.<sup>17</sup> Groups such as Open Doors recruit “couriers” on the Internet, and claim to have trained thousands of individuals to make Bible smuggling trips (and to have provided those individuals with Bibles and other outreach materials).<sup>18</sup> Individual churches, such as the Berrien Center Bible Church in southwestern Michigan, also sponsor smuggling trips; on one such trip, 4775 Bibles were brought into China after the couriers were caught and fined three times.<sup>19</sup>

### B. *Slave Redemption in Sudan*

Civil war has plagued Sudan intermittently since the country’s independence from Great Britain in 1956.<sup>20</sup> Though the British had largely eliminated slavery during their control of Sudan, it soon reappeared in the context of civil war.<sup>21</sup> Aided by the government in Khartoum, Muslim raiders from the northern parts of the country regularly take prisoners during their forays into the southern areas, which are predominately Christian and animist; these captives are brought back to the northern areas and kept as slaves.<sup>22</sup>

Officially, slavery is illegal in Sudan.<sup>23</sup> Kidnapping and abduction are punishable by up to five years imprisonment.<sup>24</sup> Wrongfully concealing or keeping in confinement a kidnapped or abducted person carries the same penalty.<sup>25</sup> Trafficking in minors carries an even longer sentence — up to seven years’ imprisonment.<sup>26</sup> Unlawfully compelling labor is subject to a sentence of up to one year in prison.<sup>27</sup> In addition to violating Sudanese criminal law, slavery also violates multiple treaties to which Sudan has acceded over the years, as well as customary international law prohibitions.<sup>28</sup> Sudan agreed to abolish the slave trade as early as 1926, by acceding to the Slavery Convention of that year.<sup>29</sup> Therefore, despite governmental support of the armed groups who capture and abduct slaves,<sup>30</sup> it would

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<sup>16</sup> ANTIOCH CHURCHES, *South East Asia Impacted with the Gospel!*, at <http://www.antiochchurches.org/asia.htm>. (last visited Feb. 13, 2005).

<sup>17</sup> Beech, *supra* note 9.

<sup>18</sup> OPEN DOORS, *Take Living Water to Thirsty Nations*, at <http://www.odusa.org/Display.asp?Page=Courier> (last visited Feb. 13, 2005).

<sup>19</sup> Associated Press, *Michigan Couple Help Smuggle Bibles into China*, Jan. 1, 2002, at <http://www.detnews.com/2002/religion/0201/31/a08-379619.htm>.

<sup>20</sup> Richard Minitier, *The False Promise of Slave Redemption*, ATLANTIC MONTHLY MAG., July 1999.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> PENAL CODE, ch. 22 (1994) (Sudan).

<sup>24</sup> *Id.* § 200.

<sup>25</sup> *Id.* § 204.

<sup>26</sup> *Id.* § 205.

<sup>27</sup> *Id.* § 206.

<sup>28</sup> HUMAN RIGHTS WATCH/AFRICA, *CHILDREN OF SUDAN: SLAVES, STREET CHILDREN AND CHILD SOLDIERS* 32–34 (1995).

<sup>29</sup> *Id.*

<sup>30</sup> Minitier, *supra* note 20.

seem that encouraging the slave trade would run afoul of what is at least officially Sudanese law and public policy, in addition to international law.

Despite these prohibitions, it has been estimated that there are twenty thousand slaves in Sudan.<sup>31</sup> It is not only the slave raiders who are undeterred by the laws, however; other groups with more admirable intentions also seem to run afoul of the penal code, or at least the policy behind it. Those who redeem slaves from the raiders to return to their families could be deemed to be abetting the raiders' actions,<sup>32</sup> as they provide a market for such slaves, giving an incentive for further raids and pushing prices for slaves upward — from only \$15 per slave up to \$50 to \$100 each.<sup>33</sup> Tragically, nonprofit groups intending only to give individuals their freedom are thus incentivizing the slave trade by redeeming individuals from slave traders.

The largest of these groups, Christian Solidarity International (CSI), claimed in 1999 to have freed almost eight thousand slaves since 1995.<sup>34</sup> CSI states that its slave redemption program “is done in cooperation with local black African and Arab leaders. CSI’s policy is to assist families who do not have the means to buy back their loved ones.”<sup>35</sup> A set price is paid to slave retrievers, who either buy the slaves back from their masters or abduct them; the slaves are then returned to their home areas.<sup>36</sup> CSI admits that there is no guarantee that the redeemed slaves will not simply be recaptured, but claims that there is no evidence that this has actually happened.<sup>37</sup> CSI also claims that the number of slave raids has decreased since its program began,<sup>38</sup> but there is evidence that the size of the average raiding party has increased dramatically over that same period.<sup>39</sup>

Other types of organizations also run into conflicts with foreign or international laws and policies. Religious groups that send missionaries to countries such as Saudi Arabia could run afoul of laws criminalizing the conversion of Muslims to other religions.<sup>40</sup> By providing sources of funding for brothel owners, groups or individuals that pay girls’ debts to buy the girls’ freedom from brothels in countries such as India<sup>41</sup> or Cambodia<sup>42</sup> may be frustrating local policies aimed at discouraging the growth of the brothels. Groups or individuals such as these raise an important legal question: should

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<sup>31</sup> *Id.*

<sup>32</sup> This would also be a criminal offense. PENAL CODE ch. 7 (1994) (Sudan).

<sup>33</sup> Minitier, *supra* note 20.

<sup>34</sup> *Id.*

<sup>35</sup> CHRISTIAN SOLIDARITY INTERNATIONAL, SLAVE LIBERATION PROGRAM, at [http://www.csi-int.org/csi/csi-redemp\\_prog.htm](http://www.csi-int.org/csi/csi-redemp_prog.htm) (last visited Feb. 13, 2005). The government of Sudan filed a complaint against CSI at the United Nations, resulting in CSI’s losing its consultative NGO status. See U.N. ESCOR, *NGO Loses Consultative Status with Economic and Social Council*, ECOSOC/5876 (Oct. 26, 1999), at <http://www.un.org/News/Press/docs/1999/19991026.ecosoc5876.doc.html> (stating that complaint was based on CSI’s ties to a rebel Sudanese leader). Nevertheless, CSI is listed as a section 501(c)(3) public charity at Guidestar.org (<http://www.guidestar.org>).

<sup>36</sup> CHRISTIAN SOLIDARITY INTERNATIONAL, SLAVE LIBERATION PROGRAM, at [http://www.csi-int.org/csi/csi-redemp\\_prog.htm](http://www.csi-int.org/csi/csi-redemp_prog.htm) (last visited Feb. 13, 2005).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Minitier, *supra* note 20.

<sup>40</sup> For a description of the lack of religious freedom in Saudi Arabia, see U.S. DEP’T. OF STATE, SAUDI ARABIA: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003, available at <http://www.state.gov/g/drl/rls/irf/2003/24461.htm> (last visited Feb. 13, 2005).

<sup>41</sup> See SHARED HOPE, A NEW LIFE FOR SUNITA, at <http://www.sharedhope.org/sunita.htm> (last visited Feb. 13, 2005) (describing Shared Hope’s story of rescuing a girl from a brothel).

<sup>42</sup> See Nicholas D. Kristof, *Back from the Brothel, and Full of Hope*, INT’L HERALD TRIB., Jan. 26, 2004, available at <http://www.iht.com/articles/126496.html>.

organizations with good intentions but purposes that conflict with foreign laws be given favorable tax treatment by the United States government?

## II. THE NONPROFIT TAX FRAMEWORK

### A. *The Internal Revenue Code and Bob Jones University v. United States*

Section 501 of the Internal Revenue Code (Code) grants certain organizations exemption from paying the federal income tax.<sup>43</sup> To qualify for an exemption under section 501(c)(3), an organization must meet several tests.<sup>44</sup> It must have an exempt purpose; namely, it must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals. . . .”<sup>45</sup> Secondly, no part of its net earnings may inure “to the benefit of any private shareholder or individual.”<sup>46</sup> Finally, the organization must not engage in substantial lobbying nor participate in any political campaigns.<sup>47</sup> These requirements are echoed in section 170 of the Code, which allows taxpayers to take limited deductions based upon contributions to organizations with these characteristics.<sup>48</sup>

Although no other criteria are mentioned in either of these sections, the Supreme Court has read an additional requirement for exemption as being implicit within them. In *Bob Jones University v. United States*,<sup>49</sup> the Court addressed the decision of the Internal Revenue Service (Service) to revoke the exempt status of a university that had a policy of forbidding interracial dating within its student body.<sup>50</sup> Although Bob Jones University seemed to be an educational institution under section 501(c)(3), the Court agreed with the Service that, “underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”<sup>51</sup>

To justify this approach, the Court examined the legislative history of the Code provisions and their predecessors, and stated that “Congress’ intention was to provide tax benefits to organizations serving charitable purposes,” with the definition of “charitable” being derived from common law rules governing trusts.<sup>52</sup> In general, a charitable trust may be formed for purposes such as “the relief of poverty,” the advancement of education or religion, “the promotion of health,” governmental purposes,

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<sup>43</sup> I.R.C. § 501(a).

<sup>44</sup> I.R.C. § 501(c)(3).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* However, organizations can perform more extensive lobbying by choosing to subject themselves to the guidelines of I.R.C. § 501(h).

<sup>48</sup> I.R.C. § 170(a), (c).

<sup>49</sup> 461 U.S. 574 (1983).

<sup>50</sup> *Id.* at 580–81. The Service’s position on this issue had been consistent for over a decade. See *Green v. Connally*, 330 F. Supp. 1150, 1179–80 (D.D.C. 1971) (enjoining the Service from granting exempt status to racially discriminatory private schools in Mississippi, as the schools’ violation of the public policy against discrimination prevented them from being “charitable”); Rev. Rul. 71-447, 1971-2 C.B. 230 (stating that “a school . . . must be a common law charity in order to be exempt” under § 501(c)(3)).

<sup>51</sup> *Bob Jones Univ.*, 461 U.S. at 586.

<sup>52</sup> *Id.* at 587–88 (citations omitted).

or “other purposes the accomplishment of which is beneficial to the community.”<sup>53</sup> The benefit accruing to the community from a trust dedicated to such purposes is supposed to justify its exemption from the application of the rule against perpetuities.<sup>54</sup> Similarly, the *Bob Jones* Court stated that both Congress and the Court itself had in the past described the “public benefit” that exempt organizations provided as the justification for their tax exemption; this language was similar to that used at common law in describing the requirement that charities provide a “public benefit.”<sup>55</sup> However, common law also contains a logical “corollary to the public benefit principle”: charitable trusts cannot be created for illegal purposes, or for purposes that, though not strictly illegal, still violate public policy.<sup>56</sup> The Court argued that failing to apply this corollary to the determination of tax-exempt status would lead to unacceptable results, such as schools for training terrorists being eligible for exemption.<sup>57</sup>

In applying this common law rule to the question of tax exemption, the Court warned that “a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”<sup>58</sup> In *Bob Jones*, the public policy in question was the eradication of racial discrimination in education; the Court found evidence of support for this policy from all three branches of the federal government — prior decisions of the Court itself, Congress’s enactment of the Civil Rights Act of 1964, and “numerous Executive Orders.”<sup>59</sup> The task of determining whether an organization’s activities violate such a public policy falls to the Service, as part of its responsibility for making the initial determination of whether the organization is charitable.<sup>60</sup> The Court upheld the Service’s determination that Bob Jones University violated the federal policy against racial discrimination in education and thus did not provide a public benefit justifying its tax exemption as a charity.<sup>61</sup>

### B. Other Applications of the Bob Jones Logic

Over the years, the Service has examined, and sometimes litigated, the question of whether violations of other public policies could be the grounds for denial or revocation of an organization’s exempt status. In 1975, the Service ruled that an organization advocating world peace and disarmament did not qualify for exemption.<sup>62</sup> This organization was nonviolent, but its main form of activism was sponsoring protest demonstrations “in which demonstrators are urged to commit violations of local ordinances and breaches of public order.”<sup>63</sup> In addition to citing the requirement of trust law that no charity can be formed for an illegal purpose, the Service explored policy justifications for rejecting charitable status for this organization: “the generation of criminal acts increases the burdens of

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<sup>53</sup> RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

<sup>54</sup> *Id.* cmt. b.

<sup>55</sup> *Bob Jones Univ.*, 461 U.S. at 589–91.

<sup>56</sup> *Id.* at 591; *see also* RESTATEMENT (SECOND) OF TRUSTS § 377 (1959) (“A charitable trust cannot be created for a purpose which is illegal.”).

<sup>57</sup> *Bob Jones Univ.*, 461 U.S. at 591 n.18.

<sup>58</sup> *Id.* at 592.

<sup>59</sup> *Id.* at 592–96.

<sup>60</sup> *Id.* at 597–98.

<sup>61</sup> *Id.* at 605. The Court came to the same conclusion in the companion case to *Bob Jones*. *See* *Goldsboro Christian Sch., Inc. v. United States*, 461 U.S. 574 (1983) (denying a tax exemption to a school that maintained racially discriminatory admissions policies for its kindergarten through high school program).

<sup>62</sup> Rev. Rul. 75-384, 1975-2 C.B. 204.

<sup>63</sup> *Id.*

government, thus frustrating a well recognized charitable goal, *i.e.*, relief of the burdens of government.”<sup>64</sup>

In 1977, the Service clarified its stance on the public policy against racial discrimination. Advice was requested from the Service as to whether exempt status could be granted to an organization formed by a labor union to operate a trade school exclusively for American Indians.<sup>65</sup> The Service ruled that the school would be eligible for exemption; its admissions policy was not the “type of racial restriction that is contrary to Federal public policy,” as it was “designed to implement certain statutorily defined Federal policy goals that are not in conflict with Federal public policy against racial discrimination in education.”<sup>66</sup>

In 1983, the D.C. Circuit addressed the eligibility for exemption of an organization, claiming to be educational, whose literature’s general theme was the inferiority of minorities to white Americans of European ancestry.<sup>67</sup> The court denied the exemption on the grounds that its materials did not fall under any conceivable definition of “educational” intended by Congress.<sup>68</sup> However, in a footnote, the court mentioned that the Service had previously contended that the organization was not charitable due to its condoning of violence and other illegal activities; the district court had dismissed this argument, and the Service had not argued it on appeal.<sup>69</sup> Still, the court implied that *Bob Jones* (decided one month before this decision was issued) could have applied, had that argument been pursued.<sup>70</sup>

A year later, the Tax Court upheld the revocation of the Church of Scientology’s exempt status.<sup>71</sup> The court held that the loss of exemption was justified for multiple reasons, including violations of public policy, namely conspiring to “impede the IRS in performing its duty to determine and collect taxes from petitioner and other Scientology churches.”<sup>72</sup> This conspiracy included actions that were facially illegal as well as some that violated more general public policies: “petitioner filed false tax returns, burglarized IRS offices, stole IRS documents, and harassed, delayed, and obstructed IRS agents who tried to audit the Church’s records.”<sup>73</sup> The Ninth Circuit upheld the Tax Court’s decision, though only discussing the revocation on grounds other than public policy and illegality.<sup>74</sup>

In 1989, the Service concluded that the *Bob Jones* rule applied to all organizations described in section 501(c)(3), not just educational institutions.<sup>75</sup> The situation in question involved a trust for the benefit of “worthy and deserving white persons over the age of sixty years, who are the residents of the city of *S* and who have not sufficient income from other sources for their comfort and support.”<sup>76</sup> Discrimination on the basis of race was stated to be a violation of a “public policy so fundamental as to

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<sup>64</sup> *Id.*

<sup>65</sup> Rev. Rul. 77-272, 1977-2 C.B. 191.

<sup>66</sup> *Id.* Those other federal policy goals were set out in the Adult Indian Vocational Training Act of 1956, Pub. L. No. 84-959, § 1, 70 Stat. 986, 986 (1956) (codified as amended at 25 U.S.C. § 309 (2004)), which called for federal funds to be used to finance job training programs for adult American Indians.

<sup>67</sup> *Nat’l Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983).

<sup>68</sup> *Id.* at 873.

<sup>69</sup> *Id.* at 870 n.4.

<sup>70</sup> *Id.*

<sup>71</sup> *Church of Scientology of Cal. v. Commissioner*, 83 T.C. 381 (1984), *aff’d*, 823 F.2d 1310 (9th Cir. 1987).

<sup>72</sup> *Church of Scientology of Cal.*, 83 T.C. at 503.

<sup>73</sup> *Id.* at 505.

<sup>74</sup> *Church of Scientology of Cal. v. Commissioner*, 823 F.2d 1310, 1322 (9th Cir. 1987).

<sup>75</sup> Tech. Adv. Mem. 89-10-001 (Mar. 20, 1989).

<sup>76</sup> *Id.*

justify denial of charitable status to any organization otherwise described in section 501(c)(3).”<sup>77</sup>

That same year, the question arose as to whether exempt status could be granted to an organization which paid the salary for a teacher who would provide courses on the Bible as history and literature at a public school.<sup>78</sup> The Service had to determine whether teaching such classes in a public school violated the First Amendment by creating an establishment of religion; in light of relevant rulings from the Supreme Court and lower federal courts, the specific program in question was held not to violate the constitution.<sup>79</sup> In reaching this conclusion, the Service recognized that only rarely had it asserted that violations of public policies other than that against racial discrimination would be the grounds for a denial of exempt status; it cautioned that the Supreme Court’s rule from *Bob Jones* was that “the public policy involved must be fundamental and there must be no doubt that the activity involved is contrary to that fundamental public policy.”<sup>80</sup> However, it also stated that it could “think of no more fundamental federal public policy than the Bill of Rights.”<sup>81</sup>

Finally, in 1997, the Service addressed the case of a health care services organization that was accumulating large amounts of income instead of expending it.<sup>82</sup> The Service decided that there was not a public policy against an unreasonable accumulation of income.<sup>83</sup> It based this decision on the statement that “[c]urrently the sole basis for revocation of exemption on public policy grounds is engaging in racial discrimination.”<sup>84</sup> In light of the previous cases discussing other public policy grounds for revocation, such as advocacy of illegal behavior or violence, or interference with the Service, this language may be too conclusory; a more accurate statement of the precedent might be that racial discrimination is the only well-established public policy ground for revocation of exemption, though there is evidence of some support for other grounds as well.<sup>85</sup>

#### IV. LOOKING INTERNATIONALLY: LESSONS FROM TRUST LAW

The implications of the *Bob Jones* public policy requirement for nonprofits whose operations extend outside the United States are not clear. Section 501(c)(3) contains no restrictions on the location of either an organization’s formation or its operations; a foreign organization could qualify for exemption under the section.<sup>86</sup> There is a requirement in section 170(c) that an organization be formed domestically in order for contributions to the organization to qualify as deductible,<sup>87</sup> but there is generally no requirement that the organization restrict its operations to the domestic arena.<sup>88</sup> Thus, an

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<sup>77</sup> *Id.*

<sup>78</sup> Gen. Couns. Mem. 39,800 (Oct. 25, 1989).

<sup>79</sup> *Id.* Key to the Service’s decision was the determination that the classes generally did not teach religious doctrine as “truth,” but focused mainly on objective questions of history. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 1997 FSA LEXIS 478 (Apr. 23, 1997).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Actions which frustrate other public policies can also have tax consequences outside the realm of nonprofit organizations. *See, e.g.,* Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958) (holding that fines imposed on a trucking company for violating state vehicle weight limits could not be deducted as ordinary and necessary business expenses).

<sup>86</sup> I.R.C. § 501(c)(3).

<sup>87</sup> I.R.C. § 170(c).

<sup>88</sup> There is, however, such a restriction on corporate donations — a corporation’s contributions to trusts, chests, funds, or foundations (but not to corporations, for some reason) must be expended within the United States in order to be deductible.

exempt nonprofit organized within the United States is largely free to carry on activities in foreign countries, potentially setting up a conflict with those countries' laws.

In such a situation, what would be the relevance of the *Bob Jones* requirement that an exempt organization's activities not be illegal or violative of public policy? Milton Cerny, in a brief discussion of U.S. nonprofit involvement in Burma, maintains that "[w]hile not stated explicitly, it appears to be most logical to read these standards from the viewpoint of the United States and not from the viewpoint of Burma."<sup>89</sup> Thus, according to his example, a nonprofit's activities in Burma would only have to conform to U.S. law and policy, not Burmese law or public policy, in order to retain exempt status. To some degree, Cerny's view makes intuitive sense; this would avoid subordinating determinations of exempt status under U.S. law to determinations of compliance with the uncertainties and vicissitudes of foreign laws, and would therefore avoid assigning a most difficult task to the Service and the courts.

However logical this view may at first appear to be, does the law actually follow this approach? The effect on tax-exempt status of actions violating another country's laws or public policies has seemingly never yet been addressed. As the *Bob Jones* requirements for establishing "charitable" status were imported into tax law from the law of charitable trusts, the first step in answering the question ought therefore to be to examine how such a situation would be addressed by the common law of trusts. Cases dealing with trusts which created similar problems through their international operations have arisen on several occasions during the last few centuries, both in the United States and in other common law countries.<sup>90</sup> The general rule according to Scott is that a "trust is illegal where the performance of the trust involves a violation of the law of another country."<sup>91</sup>

*Attorney-General v. Guise*<sup>92</sup> is an English case which dealt with a testamentary trust intended to provide for the university education of Scotsmen who would enter into holy orders and "propagate the doctrine and discipline of the *Church of England*" in Scotland.<sup>93</sup> However, though the trust would have been legal at the time of the testator's death, Scotland had by the time of this case been reestablished as officially Presbyterian.<sup>94</sup> Thus, it was said that "the charity cannot now take place according to the letter and express direction of the will."<sup>95</sup> Still, the court did not invalidate the trust, but applied the doctrine of *cy pres* to reform the gift and prevent the money from falling back into the estate.<sup>96</sup>

Much more recently, an English court in *McGovern v. Attorney General* invalidated a trust which

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I.R.C. § 170(c). For further discussion, see Nina J. Crimm, *Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors*, 23 VA. TAX REV. 1 (2003).

<sup>89</sup> Milton Cerny, *International Philanthropy*, ALI-ABA Continuing Legal Education (Nov. 20, 1997) at 43, available at WL SC34 ALI-ABA 13.

<sup>90</sup> As the majority of these cases do come from countries other than the United States, it is fortunate that common law countries share the background body of English trust law, thus making their approaches in this type of case quite instructive. See, e.g., Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247, 256 (1996) (stating that "English common law continues to be important to American state courts today," particularly in areas such as trust law); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 434-35 (1998) (claiming that the trust is "one of the major features distinguishing the English-inspired common law legal systems from the civil law systems of continental Europe") (citation omitted).

<sup>91</sup> AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, 4A SCOTT ON TRUSTS § 377, at 309 (4th ed. 1989).

<sup>92</sup> 2 Vern. 266, 23 Eng. Rep. 772 (Ch. 1692).

<sup>93</sup> *Id.* at 266, 23 Eng. Rep. at 772.

<sup>94</sup> See *Jackson v. Phillips*, 96 Mass. 539, 581-83 (1867) (discussing the long judicial history of this bequest).

<sup>95</sup> *Guise*, 2 Vern. at 266, 23 Eng. Rep. at 772.

<sup>96</sup> *Id.*

was set up for Amnesty International in an attempt to have some of the organization's activities officially designated as charitable.<sup>97</sup> The trust assets were to be used for the benefit of prisoners of conscience (attempting to secure their release and giving aid to them and their families) as well as for "[p]rocur[ing] the abolition of torture or inhuman or degrading treatment or punishment" and other human rights work.<sup>98</sup> The court declared that the trust was noncharitable as a trust for political purposes, as its purposes included attempting to persuade governments to take actions such as changing their laws and releasing prisoners of conscience.<sup>99</sup>

The most relevant part of the court's discussion is its decision to treat foreign lobbying the same as it would domestic lobbying. The court had "no doubt whatever that a trust of which a principal object is to alter the law of this country cannot be regarded as charitable."<sup>100</sup> There are several policies behind this English rule, including that "[e]ach court in deciding on the validity of a gift must decide on the principle that the law is right as it stands" — so that the court cannot decide whether the specific change in the law being advocated would benefit the public.<sup>101</sup> When advocacy of a change to foreign law is at issue, the court "is not obliged for all purposes to blind itself to what it may regard as the injustice of a particular foreign law,"<sup>102</sup> but despite not being required to assume that the foreign law is correct, the court will still "have no adequate means of judging whether a proposed change in the law of a foreign country will or will not be for the public benefit."<sup>103</sup> The court would simply lack the institutional competence to make that judgment.<sup>104</sup>

The court had one additional concern on this issue: it stated that in making a judgment about the public benefit of such a trust, it would

be bound to consider the consequences for this country as a matter of public policy. In a number of such cases there would arise a substantial prima facie risk that such a trust, if enforced, could prejudice the relations of this country with the foreign country concerned. . . . The court would have no satisfactory means of assessing the extent of such risk, which would not be capable of being readily dealt with by evidence and would be a matter more for political than for legal judgment.<sup>105</sup>

Thus, such trusts would be for political purposes, and therefore invalid under English law.

One of the very few times an American court has even touched on the public policy aspects of this type of trust took place in New York eighty years ago. A testatrix set aside one thousand dollars for her executor to expend "in the manner which in his judgment will best further the development of the Irish Republic."<sup>106</sup> Employing logic similar to that used later in *McGovern*, the Westchester County Surrogate's Court held that the gift was invalid as a trust for the attainment of political purposes.<sup>107</sup>

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<sup>97</sup> *McGovern v. Attorney General*, 1982 Ch. 321.

<sup>98</sup> *Id.* at 329–30.

<sup>99</sup> *Id.* at 347–52.

<sup>100</sup> *Id.* at 335.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 338.

<sup>103</sup> *Id.* at 338–39.

<sup>104</sup> However, American courts generally do not follow this rule of invalidating trusts for political purposes. See RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. j (1959).

<sup>105</sup> *McGovern*, 1982 Ch. at 338–39.

<sup>106</sup> *In re Killen's Will*, 209 N.Y.S. 206, 208 (Sur. Ct. 1925).

<sup>107</sup> *Id.*

Whereas trusts for promoting changes in domestic law are not charitable due to the court's inability to determine whether they provide public benefit, "a bequest tending to encourage a change in the fundamental law of any nation of the world might very well and probably would be said to be against public policy."<sup>108</sup> The court did not give any further explanation of its reasoning, but held that the bequest was void as being neither for charitable purposes nor for a personal bequest.<sup>109</sup>

By far the largest body of cases dealing with this type of trust arises from the repetition of a single pattern of facts — a trust set up for the purpose of aiding the resettlement of Jews in the Holy Land. The first opinion addressing such a situation was from an English court in *Habershon v. Vardon*.<sup>110</sup> The testator wished for one thousand pounds from his estate to be applied "towards the political restoration of the Jews to Jerusalem and to their own land."<sup>111</sup> This bequest was held to be noncharitable and therefore void.<sup>112</sup> The only possible meaning the court could ascribe to the bequest was to encourage a revolution in a friendly country,<sup>113</sup> as Jerusalem was then under Turkish rule.<sup>114</sup> The court stated that "Jews might at present reside in Jerusalem; and, if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte."<sup>115</sup> Thus, it was apparently not merely the political nature of the trust which the court found problematic, but the fact that its effects would, in the court's view, most likely be problematic for British foreign policy — a far cry from the self-declared agnosticism of the *McGovern* court, which declared itself not competent to address such issues.

A similar case arose in 1924, at which point, Scott notes, Palestine was no longer under Turkish rule.<sup>116</sup> The testator in that case left legacies for purposes such as a future Jewish University of Jerusalem, as well as leaving his residuary estate to the Jewish National Fund.<sup>117</sup> The court determined that "the testator intended to benefit other persons of the same persuasion who were willing to go and colonize Palestine and so exhaust the fund."<sup>118</sup> No considerations of public policy were mentioned in this later case, possibly because the risk of political complications that worried the *Habershon* court was no longer present.

Canadian courts have twice dealt with trusts of this nature. In 1963, the Supreme Court of British Columbia held that a trust set up for the benefit of the Jewish National Fund was charitable.<sup>119</sup> The court distinguished *Habershon*:

In the matter the learned vice-chancellor obviously thought the gift in the words quoted was for a political purpose and that it was against the public policy of Britain to allow a revolution to be encouraged in a friendly state.

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<sup>108</sup> *Id.* (citation omitted).

<sup>109</sup> *Id.*

<sup>110</sup> 4 De G. & Sm. 467, 64 Eng. Rep. 916 (1851).

<sup>111</sup> *Id.* at 467, 64 Eng. Rep. at 916. The testator believed that the Church of England would soon start sanctioning the raising of funds for such a purpose, and he wanted his gift to be made toward that fund. *Id.* He also wished to leave an additional five hundred pounds to be paid to the future Anglican bishopric of Jerusalem. *Id.*

<sup>112</sup> *Id.* at 468, 64 Eng. Rep. at 916.

<sup>113</sup> *Id.*

<sup>114</sup> SCOTT & FRATCHER, *supra* note 91, § 377, at 309 & n.6.

<sup>115</sup> *Habershon*, 4 De G. & Sm. at 468, 64 Eng. Rep. at 916.

<sup>116</sup> SCOTT & FRATCHER, *supra* note 91, § 377, at 309 & n.7.

<sup>117</sup> *Rosenblum v. Rosenblum*, 1924 Sol. J. 320 (Ch.).

<sup>118</sup> *Id.* at 320.

<sup>119</sup> *Re Schechter Estate*, 41 W.W.R. 392 (1963).

Here, on the contrary, public policy of Britain and the policy of the free nations generally has been for a number of years to encourage the establishment of the Jews in a Jewish homeland and this worthy object the testator has clearly indicated as his aim by the residuary clause of his will. There is no intention to be drawn from this will to establish a revolution by the creation of a Jewish colony within Palestine or within the United States or any British dominion, the only intention being the establishment of a Jewish community where the rehabilitated Jews may farm land for their living.<sup>120</sup>

This language indicates a willingness to make at least some judgments as to whether a trust's purposes would be consistent with foreign policy objectives. Though this court reached the opposite conclusion from the *Habershon* court, the two courts' reasoning has in common a sharp contrast with the protestations of a lack of institutional competence that came from the court in *McGovern*. However, this Canadian decision did not stand; the British Columbia Court of Appeals overturned the ruling the next year, holding that the bequest was not charitable, as it was not for religious purposes nor exclusively for poor Jews.<sup>121</sup>

However, a residuary devise "unto the state of Israel for charitable purposes only, said charities to be decided upon by my Trustees herein" was held by a Canadian court in 1989 to be a valid charitable bequest.<sup>122</sup> Two limitations were placed on the trustee. First, he was limited to selecting objects in Israel that would be recognized as charitable by the laws of Ontario.<sup>123</sup> Secondly, "war-like activities in a foreign country" could not be supported, regardless of language from the preamble to the Statute of Elizabeth (originally listing charitable purposes) which stated that "the setting out of soldiers" would be charitable.<sup>124</sup> The court reasoned that such activities, "as well as any other which are inimical to Canada or its good relations with other states," would be forbidden by the rules invalidating trusts for purposes that are political or contrary to public policy.<sup>125</sup> No explanation was given as to how it would be determined whether any particular activity would be inimical to Canada.

Finally, this issue was briefly addressed by an American court in 1936. The Supreme Court of California held that the American Jewish Congress, whose purposes included "further[ing] the development of the Jewish National Home in Palestine," was a charitable organization.<sup>126</sup> The court based its holding on an earlier case which stated that political purposes were indeed charitable.<sup>127</sup> It noted that, "as we understand it, 'the development of the Jewish National Home in Palestine' contemplates the resettlement of Palestine under British mandate by the Jewish people and is already the cause of friction with the Arabs."<sup>128</sup> However, it would not conclude from the possibility of such foreign relations complications that public benefit, and therefore charitable status, had not been established. Instead, the court held that the judicial lack of institutional competence to decide which political trusts would provide public benefit meant that all trusts for political purposes would be considered charitable, unless the changes sought in the law would be immoral or would be intended to

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<sup>120</sup> *Id.* at 397.

<sup>121</sup> *Royal Trust Co. v. Jewish Nat'l Fund*, 46 W.W.R. 577 ¶ 15 (1964), *aff'd*, [1965] S.C.R. 784.

<sup>122</sup> *Re Levy Estate*, 68 O.R.2d 385, 387, 394 (1989).

<sup>123</sup> *Id.* at 393.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *In re Murphey's Estate*, 62 P.2d 374, 375 (Cal. 1936).

<sup>127</sup> *Id.* at 375 (citing *Collier v. Lindley*, 266 P. 526 (Cal. 1928)).

<sup>128</sup> *Id.*

be brought about by other than peaceful methods.<sup>129</sup>

It thus appears that Scott's conclusion that "[a] trust is illegal where the performance of the trust involves a violation of the law of another country"<sup>130</sup> does not tell the whole story. One basic purpose behind such a rule — namely, avoiding granting charitable status to trusts which create international relations problems for the nation (and thereby increase the burdens on government rather than providing a public benefit) — has sometimes been ignored even where applicable.

The cases display a wide spectrum of approaches to trusts that run afoul of another government's policies. Most frequently, courts apply a rule of automatic invalidation, either with little explanation or relying on the reasoning that they do not have the institutional competence to decide which trusts' purposes would run counter to the interests of the nation being asked to grant charitable status. At other times, though, nearly the opposite rule is applied, and trusts are upheld regardless of whether they would make relations between the two nations in question more difficult, based upon the same logic of the courts' lack of competence in sorting out the beneficial trusts from the harmful ones. Finally, some courts disregard the problem of institutional competence and tackle the problem headfirst, judging for themselves whether or not validating the trust would be consistent with the nation's foreign policy interests.

## V. THE RULE OF LAW

### A. *A Fundamental Policy of Promoting the Rule of Law*

Resorting to the common law of trusts therefore does not satisfactorily answer the question of how the *Bob Jones* rule for tax exemption should be applied to nonprofit organizations whose overseas activities violate the laws or public policies of another country. A more fruitful approach may be to reconceptualize the question in terms that more closely fit the *Bob Jones* framework. If these problematic nonprofits were violating a fundamental American public policy, it would seem to be irrelevant where this behavior occurred — their tax exemptions would be in jeopardy. Thus, the key question may be whether promoting law-abiding behavior within other countries is a fundamental policy of the U.S. government. Support for this proposition may be found in evidence that encouraging the development in foreign nations of "the rule of law" — a concept which will be shown to include the efficacy of domestic laws — is fundamental to American foreign policy.

The clearest statement of the existence of this policy is located in a congressional statement of purpose:

An ultimate goal of the United States is a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to *the rule of law*; and in which international adjustments to a changing world are achieved peacefully.<sup>131</sup>

Though facially only stating a preference for the resolution of international conflicts through the operations of the "rule of law" rather than by armed conflict, this congressional statement can be viewed in conjunction with myriad other sources which together reveal that general promotion of the rule of law

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<sup>129</sup> *Id.*

<sup>130</sup> SCOTT & FRATCHER, *supra* note 91, § 377, at 309.

<sup>131</sup> 22 U.S.C. § 2551 (2005) (emphasis added).

is indeed a broad policy goal of the United States.<sup>132</sup>

For example, Congress has instructed the president to take steps to restrict the transfers of arms to certain countries that do not promote democracy, do not respect human rights, engage in armed aggression, promote terrorism, contribute to the proliferation of weapons of mass destruction, or present regional risks (such as arms races).<sup>133</sup> Among the criteria to be used in determining whether the country promotes democracy is whether its government “promotes the rule of law and provides its nationals the same rights that they would be afforded under the United States Constitution if they were United States citizens.”<sup>134</sup> Similarly, in 1994 Congress expressed its sense that certain Eastern European countries should be invited to join the North Atlantic Treaty Organization (NATO) under certain conditions, including “maintain[ing] their progress toward establishing democratic institutions, free market economies, civilian control of their armed forces, and the rule of law.”<sup>135</sup>

Congress has also often attempted to support the growth of the rule of law in particular countries and regions. Most common have been authorizations for the expenditures of funds towards that end. For instance, in 2002, Congress instructed that “not less than \$10,000,000 shall be made available for assistance for activities to support democracy, human rights, and the rule of law in the People’s Republic of China,” as well as appropriating an equal amount for “programs and activities to foster democracy, human rights, press freedoms, women’s development, and the rule of law in countries with a significant Muslim population” and where terrorism is a concern.<sup>136</sup> In that same act, Congress also conditioned the availability of funds appropriated for programs in Serbia on the president’s determination that the Government of the Federal Republic of Yugoslavia was, among other things, “taking steps to implement policies which reflect a respect for minority rights and the rule of law”;<sup>137</sup> Congress also appropriated funds for, inter alia, training Jamaican police in “internationally recognized human rights, the rule of law, [and] strategic planning.”<sup>138</sup>

Congress has also authorized the president to provide assistance to the former states of the Soviet Union for activities including “[e]stablishing a democratic and free society by fostering . . . respect for internationally recognized human rights and the rule of law; . . . [and] development and support of grass-roots and nongovernmental organizations promoting democracy, the rule of law, transparency, and accountability in the political process.”<sup>139</sup> The Russian Federation has received other “rule of law” aid as well, such as funds for the establishment of “civic education programs relating to democracy, public policy, the rule of law, and the importance of independent media.”<sup>140</sup> Congress has also instructed Radio Free Europe/Radio Liberty and the Voice of America “to disseminate throughout the Russian

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<sup>132</sup> This policy, though fundamental, may at times be in conflict with other fundamental policies. For example, in countries such as China, where religious exercise is subject to extensive restrictions, promoting the rule of law can conflict with the equally important policy of promoting religious freedom: encouraging obedience to the legal restrictions would undermine the goal of promoting individuals’ religious liberties. The implications of this potential conflict will be returned to in Part VI, *infra*.

<sup>133</sup> International Arms Sales Code of Conduct Act of 1999, Pub. L. No. 106-113, § 1262, 113 Stat. 1501, 1501A508 (1999).

<sup>134</sup> *Id.* § 1262(b)(1)(C), 113 Stat. at 1501A508.

<sup>135</sup> NATO Participation Act of 1994, Pub. L. No. 103-447, § 202(2)(A), 108 Stat. 4691, 4695 (1994) (as amended).

<sup>136</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, Pub. L. No. 107-115, § 526, 115 Stat. 2118, 2147 (2002).

<sup>137</sup> *Id.* § 584(c)(3), 115 Stat. at 2172.

<sup>138</sup> *Id.* § 587(a), 115 Stat. at 2173.

<sup>139</sup> 22 U.S.C.A. § 2295(2)(B), (E) (West. Supp. 2004).

<sup>140</sup> Russian Democracy Act of 2002, Pub. L. No. 107-246, § 5(a)(2), 116 Stat. 1511, 1515 (2002).

Federation information relating to democracy, free-market economics, the rule of law, and human rights.”<sup>141</sup>

Congress has authorized the Secretaries of Commerce, State, and Labor to set up programs to conduct rule of law training for commercial and labor law in China.<sup>142</sup> The Congressional-Executive Commission on the People’s Republic of China is responsible for monitoring the development of the rule of law in China, as well as for encouraging bilateral cooperation towards the development of the rule of law.<sup>143</sup> Similarly, the Pacific Charter Commission was established for purposes including the support of “democratization, the rule of law, and human rights in the Asia-Pacific region.”<sup>144</sup>

Other areas where Congress has encouraged the development of the rule of law, either through funding or through admonitions, include East Timor<sup>145</sup> and Africa.<sup>146</sup> However, it is not only Congress which emphasizes the centrality of the rule of law to American foreign policy; this concept is also frequently mentioned in presidential proclamations. In declaring a week in July 2001 to be Captive Nations Week, the president stated that “the United States will continue to stand for greater consolidation of pluralism and religious freedom, wider access to information, and respect for human rights and for the rule of law.”<sup>147</sup> The president’s 2003 Thanksgiving Day proclamation cautioned that “[w]e must never take for granted the things that make our country great: a firm foundation of freedom, justice, and equality; a belief in democracy and the rule of law; and our fundamental rights to gather, speak, and worship freely.”<sup>148</sup> While proclaiming Pan American Day and Pan American Week, 2004, the president stated that “[t]he nations of the Western Hemisphere will continue to draw upon the [Inter-American Democratic] Charter to strengthen the rule of law, protect human rights and freedoms, encourage economic growth, and promote good governance.”<sup>149</sup> The president has also included in reports to Congress statements that U.S. policy goals overseas include the promotion of the rule of law.<sup>150</sup>

These are but a sampling of the Congressional and Executive efforts to support and encourage the rule of law, through both financial and hortatory means.<sup>151</sup> The repetition of the concept, and the contexts in which it is continually brought up, makes clear that the rule of law is indeed a key

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<sup>141</sup> *Id.* § 5(b), 116 Stat. at 1515.

<sup>142</sup> 22 U.S.C. § 6981(a), (b) (2004).

<sup>143</sup> 22 U.S.C. § 6912(c), (d) (2004).

<sup>144</sup> Pacific Charter Commission Act of 2000, Pub. L. No. 106-570, § 402, 114 Stat. 3038, 3047 (2000).

<sup>145</sup> East Timor Transition to Independence Act of 2002, Pub. L. No. 107-228, §§ 631–32, 116 Stat. 1350, 1399–1402 (2002).

<sup>146</sup> African Conflict Resolution Act, Pub. L. No. 103-381, § 2(7), 108 Stat. 3513, 3514 (1994) (“Demobilization and other measures to reduce the size of African armies, and civilian control of the military under the rule of law are in the interest of international security and economic development.”). On another occasion, Zimbabwe was singled out as needing the restoration of the rule of law. *See* Zimbabwe Democracy and Economic Recovery Act of 2001, Pub. L. No. 107-99, 115 Stat. 962 (2001) (including a denial of certain forms of aid pending presidential certification of the restoration of the rule of law in Zimbabwe).

<sup>147</sup> Proclamation No. 7455, 66 Fed. Reg. 37,103 (July 17, 2001).

<sup>148</sup> Proclamation No. 7738, 68 Fed. Reg. 66,315 (Nov. 25, 2003).

<sup>149</sup> Proclamation No. 7771, 69 Fed. Reg. 20,537 (Apr. 16, 2004).

<sup>150</sup> *See, e.g.*, Report to the Congress Regarding Conditions in Burma and U.S. Policy Toward Burma, 68 Fed. Reg. 17,529 (Apr. 10, 2003).

<sup>151</sup> The judiciary has also frequently lent its voice to support the importance of the rule of law, though generally in the domestic context. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 708 (1974) (referencing “our historic commitment to the rule of law”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (observing that the rule of law “is the great mucilage that holds society together”).

component of American foreign policy. However, merely pointing out how often the concept is emphasized begs the question of what the rule of law actually means. Although it seems that the phrase is often invoked as a rhetorical device, this is also true for terms such as “democracy,” “human rights,” and “free-market capitalism” — so the fact of frequent rhetorical usage should not prevent an attempt to define this term any more than it does in the cases of other similar terms. Indeed, the fact that “the rule of law” is so often mentioned in conjunction with terms such as “democracy” and “human rights” provides a good first step towards fashioning a workable definition: “the rule of law,” though related to those concepts, must encompass within it different concepts than those terms do, or else its frequent invocations would merely be redundant in the presence of the other terms.

### *B. Defining the Rule of Law*

The closest that Congress has come to defining the term was in its establishment of the Congressional-Executive Commission on the People’s Republic of China.<sup>152</sup> The commission was given the duty to monitor the development of the rule of law in China, including, but not limited to:

- (1) progress toward the development of institutions of democratic governance;
- (2) processes by which statutes, regulations, rules and other legal acts . . . are developed and become binding . . . ;
- (3) the extent to which statutes, regulations, rules, administrative and judicial decisions, and other legal acts . . . are published and are made accessible to the public;
- (4) the extent to which administrative and judicial decisions are supported by statements of reasons that are based upon written statutes, regulations, rules, and other legal acts . . . ;
- (5) the extent to which individuals are treated equally under the laws . . . without regard to citizenship;
- (6) the extent to which administrative and judicial decisions are independent of political pressure or governmental interference and are reviewed by entities of appellate jurisdiction; and
- (7) the extent to which laws . . . are written and administered in ways that are consistent with international human rights standards, including the requirements of the International Covenant on Civil and Political Rights.<sup>153</sup>

Although the first and seventh criteria use language that could be open to rather broad interpretations, it is probably best to read them fairly narrowly, as being primarily concerned with procedural aspects of governance — as are the middle five factors. A more expansive reading, encompassing substantive concerns such as particular political and personal liberties, would not only be a jarring contrast to the more formalistic issues raised in the other factors, but would also import into “the rule of law” concepts more appropriately addressed elsewhere. Indeed, another part of the same code section also gives the commission a separate responsibility to monitor specific human rights issues, further supporting the implication that reading those concerns into the factors on “the rule of law” would be redundant.<sup>154</sup>

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<sup>152</sup> 22 U.S.C. § 6911 (2004).

<sup>153</sup> 22 U.S.C. § 6912(c) (2004).

<sup>154</sup> 22 U.S.C. § 6912(a) (2004).

The academic literature attempting to provide the best definition of “the rule of law” is as varied as it is vast. The theories can be divided into two general types: “thin” theories and “thick” theories.<sup>155</sup> While “thin” theories are concerned with “formal or instrumental aspects of rule of law — those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic,”<sup>156</sup> a “thick” theory, on the other hand, incorporates within itself “elements of political morality such as particular economic arrangements . . . , forms of government . . . or conceptions of human rights . . . .”<sup>157</sup> For present purposes, only “thin” conceptions of the rule of law will be addressed. In addition to the previously mentioned concerns that including other substantive issues in the definition of the term would be redundant, it would simply be impossible to settle upon a single, uncontroversial “thick” definition for application to nonprofit tax law.

David Kairys offers the following as a minimalist definition of the rule of law: “certain relationships, events and transactions should be subject to rules; the rules laid down should be followed and should apply to everyone, including limits on the government and on the powerful; and the rules should be enforced with some mechanism for seeking redress.”<sup>158</sup> John Orth’s definition has a few more requirements:

- (1) regular availability of tribunals for resolving disputes; (2) impartial decision-makers; and (3) prompt and effective implementation of decisions. Around these core concepts cluster others of almost equal importance, such as adequate record-keeping, fair trial practices, the publicity of proceedings, reasoned explanations of results, and the right of appeal.

No particular substantive law is generally required, but it is essential that disputes be decided by reference to known pre-existing rules (no retrospective laws).<sup>159</sup>

William Whitford states that the “core idea of the Rule of Law” is “the accountability of transparent government decisions (including judicial responses to private lawsuits) to predetermined standards applied by an independent body, probably a court, through a procedure that can be practically utilized by the aggrieved.”<sup>160</sup> Finally, Richard Fallon lists five elements emphasized in modern accounts of the rule of law:

- (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
- (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz’s phrase, “people should be ruled by the law and obey it.”
- (3) The third element is stability. The law should be reasonably stable, in order to facilitate

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<sup>155</sup> Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471, 472 (2002).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 318 (2003) (citations omitted).

<sup>159</sup> John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 79 (1998) (citations omitted).

<sup>160</sup> William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 726.

planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.<sup>161</sup>

Taking into account the various academic and Congressional descriptions of the rule of law, it should be possible to arrive at a satisfactory working definition, imprecise though it may still be, of what the United States has a policy of promoting around the world. It will suffice to say that “the rule of law” requires public tribunals (and the right to appeal) to be available to individuals for the impartial resolution of disputes in accordance with predetermined, publicly-known laws, applied equally and consistently. It is the latter part of this definition with which the actions of nonprofits like Open Doors and CSI conflict; their decisions to flout the laws and policies of other countries undermine the message that the law ought to bind everyone consistently and effectively.

## VI. OPTIONS FOR JUDICIAL ACTIONS

It is an open question how a court ought to respond to an accusation that a nonprofit violated this “promotion of the rule of law” public policy by acting in a matter contrary to another country’s law or public policy, thereby undermining the efficacy of that law. A wide spectrum of possible responses exists, but it appears that all of the options on this spectrum are unsatisfactory to varying degrees. The first possible judicial response would be to limit the import of *Bob Jones* to nonprofits which act contrary to domestic policies; this could be done by declaring that elements of U.S. foreign policy do not count as fundamental public policies for the purposes of the *Bob Jones* determination of charitable status. The rationale for the decision to so hold would be that foreign policy is too ephemeral and contingent upon current geopolitical conditions to be considered fundamental. Although this is a valid concern, it seems that this argument would be overinclusive, in the sense that some foreign policy objectives, such as the drive for democratization and human rights, as well as promotion of the rule of law, are at least as firmly established as the domestic policy against racial discrimination. All of these policies are imperfectly and inconsistently implemented, but all are nevertheless fundamental to our national identity.

Alternatively, the court could hold that, while foreign policy goals should not be excluded per se from attaining the status of fundamental public policies under *Bob Jones*, the promotion of the rule of law is not a sufficiently fundamental goal of American foreign policy to merit that status. This argument would be less convincing than the first option, for if policies such as democratization and the promotion of human rights — two of the other most prominent foreign policy goals — would be recognized as being arguably fundamental policies, it would be difficult to distinguish the promotion of the rule of law. As the numerous congressional and presidential references to the policy show, all of these policies are often invoked simultaneously, and on a seemingly equal footing with each other. If promotion of the rule of law is not fundamental to American foreign policy, it would be difficult to name a policy that would be.

Next, the court could decide that the global promotion of the rule of law is indeed a fundamental

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<sup>161</sup> Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8–9 (1997) (citations omitted).

public policy, but that actions contrary to another country's laws or public policies do not violate this fundamental policy. For example, the court could maintain that only organizations that directly strive to weaken the rule of law, or to hinder efforts to strengthen it, would be denied classification as charitable organizations. This solution would also be unsatisfactory, though, as it would be a distortion of the *Bob Jones* standard. Bob Jones University did not attempt to prevent the elimination of racial discrimination in educational institutions elsewhere; it was the university's actions taken in the pursuit of its religious and educational goals that the Supreme Court found to be contrary to public policy.<sup>162</sup> Similarly, if a nonprofit's activities were not directly aimed at thwarting the federal government's attempts to promote the rule of law, but were still contrary to that policy, that should be sufficient to trigger the *Bob Jones* rule. Unless the organization would confess to the foreign government after each violation of that country's laws and willingly allow itself to be punished, a nonprofit of the type which disregarded foreign laws and policies in the pursuit of its specific goals would not be acting consistently with the rule of law ideal that law should bind all parties equally, with no one's defiance of it being sanctioned. Thus, its actions would be contrary to federal policy just as much as the actions of Bob Jones University were.

The next two possible responses by the court would appear to be fairly similar, facially. First, the court could declare that violations of another country's laws or policies are always contrary to the policy of promoting the rule of law, and that this public policy is fundamental, but that the Service has the ability to choose when to bring a case to revoke or deny an organization's exemption based upon such violations. For example, for strategic reasons, the Service could allow an exemption to a group like Open Doors despite determining that the group technically ran afoul of the *Bob Jones* rule; this could occur if the Service was afraid that litigating the case might result in the *Bob Jones* precedent being overruled by a differently-constituted Supreme Court. Second, the court could declare that such violations are only sometimes contrary to a fundamental federal policy in favor of promoting the rule of law, and that the executive has the responsibility to determine when this conflict exists and when, on the other hand, any violation of the policy would be outweighed by other foreign policy goals (thus rendering the policy not "fundamental"). The executive could employ a balancing test to determine whether an organization's activities aided other policy goals more than they proved detrimental to the promotion of the rule of law. Thus, the executive could decide that Open Doors' Bible distribution program did not, on the whole, run counter to fundamental foreign policy goals if its promotion of freedom of religion outweighed its tendency to undermine the promotion of the rule of law.

These two scenarios would generate the same results, as both rely on the executive's judgment, but the two are based on differing justifications. The first of the two would be tantamount to saying that the Service has prosecutorial discretion in this area — certainly not an implausible decision, as it would parallel the Service's role in domestic *Bob Jones* situations: certain actions always violate a federal policy, but action will not always be taken. The second of the two scenarios also has a logical basis, namely, deference to the executive branch on questions of foreign policy. There is significant precedential support for such deference. The Supreme Court has noted that in the "vast external realm, with its important, complicated, delicate and manifold problems, the president alone has the power to speak or listen as a representative of the nation."<sup>163</sup> The Court has also recognized that the president has more information than the judiciary does about the international realm, and that

the very nature of executive decisions as to foreign policy is political, not judicial. Such

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<sup>162</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1982).

<sup>163</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.<sup>164</sup>

The Court that used such strong language was addressing a situation similar to the one discussed here, in that a private organization was seeking a benefit from the government — namely, a certificate for operating an international air route, rather than a tax exemption.<sup>165</sup> The executive's denial of the application for such a certificate was held to be not subject to judicial review, as it was based on foreign policy considerations which were solely the province of the executive branch.<sup>166</sup>

Similarly, a decision by the Service regarding whether or not to bring a case to revoke or deny an organization's exempt status, or a decision that an organization's violation of another country's laws did or did not violate the rule of law policy, could be seen to be based on the dictates of foreign policy. For example, the state of U.S. relations with China, and the diplomatic strategies the president plans to pursue, could determine the stance that the executive would choose to take towards Open Doors. Even if promoting the rule of law would be less important than the promotion of religious freedom at a particular time, maintaining good relations with China could be made more difficult if the U.S. government were seen to be supporting (through tax exemption) lawless organizations. Conversely, it may be that at a particular time U.S. strategic interests could be served by aiding the development of internal religious dissident groups that could cause problems for the Chinese communist government. The point is that these are delicate geopolitical questions with which the judiciary is not equipped to grapple; thus, deference to executive decision-making could be seen to be appropriate.

However, though the foreign policy elements of these decisions are important, these are still domestic organizations whose fates are being decided. As much deference as may be due the executive on matters of international relations, it would not be fair to subject these domestic nonprofits to unchecked executive discretion when their exempt status (or lack thereof) may determine the fate of all their other, uncontroversial missions as well. Despite the Supreme Court decision exempting presidential decisions on international air routes from examination by the judiciary, lack of some sort of judicial review does not seem to be consonant with traditional notions of due process of law.

The final path that a court could choose would avoid this problem of insufficient checks on the executive. The court could examine whether the rule of law is a fundamental element of U.S. policy with respect to whichever foreign nation is in question by looking for evidence of relevant executive and legislative actions. The provision of funding for rule of law programs and repeated rhetorical invocations of the need for the rule of law in a particular country could indicate that promoting the rule of law is a particularly fundamental element of the U.S. stance toward that country. The lack of such evidence could imply that other values, such as religious freedom or democratization, are of more pressing concern in that country, and thus that damage to the rule of law may be outweighed if the illegal activities help to promote the other values. This method would get the judiciary involved in the problem and thus avoid unchecked executive discretion. However, in so doing, the problem of the lack of judicial competence is reintroduced; as in *Habershon*, the court would be employing its own perceptions about what would be detrimental to current foreign policy. Relying on formal executive and legislative actions as the evidence for determining what U.S. policy is towards a particular country may

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<sup>164</sup> *Chicago & S. Air Lines, Inc., v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

<sup>165</sup> *Id.* at 105.

<sup>166</sup> *Id.* at 111.

provide accurate results in some cases, but in others, the partial picture that it provides may not be an accurate one. Behind-the-scenes diplomatic negotiations, long-term strategic considerations, and nonpublic information, among other things, may be key in forming an accurate description of the relationship between America and another nation. No court, however well-intentioned, can attempt to evaluate foreign policy without a significant risk of misperception and ill-informed judgment.

## VII. CONCLUSION

It thus appears that under current law, a court confronted with a Service decision to deny or revoke the exempt status of a nonprofit whose activities violated another country's law would not have any fully satisfactory course of action. A *per se* rule that those activities did or did not create *Bob Jones* violations of a public policy of promoting the rule of law would be overbroad, either giving exemptions to organizations who are violating a fundamental policy or denying an exemption to organizations operating in areas where the rule of law may not be as fundamental of a concern. Leaving the determination of when violations of a fundamental policy occur up to the Service would result in unchecked executive discretion. Yet, relying on the judgment of the judiciary would be asking it to address matters that are beyond its institutional competence. Legislative action is most likely required to clarify this conflicted area of law.

It may be that the only way for Congress to solve this apparently intractable question is to preempt it from ever being asked in the first place. Rather than trying to set up a framework for a court to determine when a nonprofit's actions violate a fundamental rule of law policy and when they do not, and therefore when an organization would lose its exempt status due to its overseas activities, Congress could make the illegality of overseas actions irrelevant to a nonprofit's exempt status. Moreover, it could do so merely as a concession to the difficulties inherent in bringing such questions before a court, without implying that promotion of the rule of law overseas is not a fundamental policy of the United States. Congress ought to provide that overseas activities violating another country's laws do not imperil an organization's exempt status but are not themselves exempt from taxation.<sup>167</sup> Donations to an organization which are earmarked for such activities would not be eligible for the charitable contribution deduction, while the organization would have to pay some level of tax on those contributions as well as on non-earmarked funds which are expended for such purposes. This could provide a compromise position, reserving judgment on whether the particular activities would run afoul of an international *Bob Jones* rule or not; the activities themselves would not be declared to be charitable, but the organization would also not be in danger of losing its exempt status on those grounds alone.

Thus, organizations such as those discussed in Part II could still qualify for tax-exempt status while continuing to carry on their activities that violate foreign laws, though the U.S. government would cease its effective subsidization of those activities. Donations specifically given for purposes of smuggling Bibles into China illegally or for combating slavery in ways which violate Sudanese laws would not be deductible by the donors. Additionally, these organizations would have to pay a non-exempt activities tax on any funds which they use to support such activities. For organizations such as Open Doors or CSI, the financial consequences may be quite large, if the questionable overseas activities constitute a large part of their total budgets. However, for organizations such as the Berrien Center Bible Church, whose remaining exempt activities would most likely dwarf those programs that would not be exempt,

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<sup>167</sup> This solution would be modeled on the tax on unrelated business income for otherwise tax-exempt organizations. I.R.C. § 511.

the impact of this proposal should be minimal.

Thus, legislation that officially establishes agnosticism as to the compatibility of these organizations' actions with American public policy might be the only satisfactory way to solve the difficult question of the groups' tax status. Though far from a perfect solution, this method of sidestepping the difficult issues may be preferable to judicial decisions that could risk either sanctioning unchecked executive discretion or forcing judgments on issues outside a court's competence. Preventing this issue from coming before the courts may be the least of all the possible evils.