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ARTICLES:

WHAT DO WE OWE EACH OTHER IN THE GLOBAL ECONOMIC ORDER?: CONSTRUCTIVIST AND CONTRACTUALIST ACCOUNTS

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I. INTRODUCTION

Longstanding discontent persists about the role of international economic institutions in the global economy. Some perceive globalization as producing substantial injustice.[1] Those

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1. For example, the French sociologist Pierre Bourdieu says that globalization:

> is a myth in the strong sense of the word, a powerful discourse, an *idée force*, an idea which has social force, which obtains belief . . . It ratifies and glorifies the reign of what are called the financial markets, in other words, the return to a kind of radical capitalism, with no other law than that of maximum profit, an unfettered capitalism without any disguise, but rationalized, pushed to the limit of its economic efficacy by the introduction of modern forms of domination, such as 'business administration,' and techniques of manipulation, such as market research and advertising . . . .
>
> In short, globalization is not homogenization; on the contrary, it is the extension of the hold of a small number of dominant nations over the whole set of national financial markets.

PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET 34–35, 38 (Richard Nice trans., New Press 1999).

who favor globalization blithely dismiss the objections of globalization critics. Writing on the protests that occurred at the World Trade Organization (WTO) Seattle Ministerial Conference, Thomas Friedman wrote in the *New York Times*, "Is there anything more ridiculous in the news today than the protests against the World Trade Organization in Seattle?"[2] Friedman called the protestors "a Noah's ark of flat-earth advocates, protectionist trade unions and yuppies looking for their 1960's [sic] fix."[3] It seems like a cognitive or linguistic inability to understand each other exists. Neither side knows what the other is talking about.

Much of the criticism of the WTO and the other multinational economic institutions focuses on the power of multinational enterprises. What power do multinationals actually exert on the policies and operations of these institutions? The influence of the multinational enterprises has been difficult to articulate and explain in terms familiar to lawyers and policy makers. We have trouble breaking out of the barriers we are educated to respect. Public choice theory informs us that we should be concerned about the influence of powerful lobbying groups who work within the political processes of the governments of WTO members. These interest groups, the story goes, capture the negotiating positions of powerful WTO members and influence the agenda, as it is set in the WTO negotiating rounds and in the work done between the rounds. They exercise a similar sway over the policies and operations of other international economic institutions such as the International Monetary Fund and the development banks.

For example, if we want to understand the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), we might want to inquire about the role of the pharmaceutical, film, and recording industries, in assisting the United States Government in formulating negotiating positions for TRIPS. Some would argue that these interest groups persuade the governments of high-income countries that TRIPS should contain a strong set of intellectual property protections that go far beyond the traditional remit of what the GATT/WTO framework ever aspired to previously.[4]

Because of such influence, the argument goes, the mult-

2. Thomas L. Friedman, Editorial, *Foreign Affairs; Senseless in Seattle*, N.Y. TIMES, Dec. 1, 1999, at A23.

3. *Id.*

4. *See, e.g.*, Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised,* 14 BERKELEY TECH. L.J. 519, 521–24 (1999) (arguing that Hollywood persuaded Congress to adopt legislation that exceeded treaty requirements under the World Intellectual Property Organization Copyright Treaty).

inationals are able to get what they want, resulting in unfair agreements. The WTO agreements, the argument continues, comply with few or no standards of fairness, or if they do, it is accidental. They may lower tariffs and barriers to trade in services so that companies can effectively operate across borders, but they may also maintain barriers to trade to protect powerful interests who benefit from protectionism. These are the arguments. I summarize them; I do not necessarily accept them, at least in their simple form.

Does the divisiveness derive from lack of consensus on a theory of justice with which we can deliberate about the merits of international economic agreements? No legal system deserving of continued support can exist without an adequate theory of justice. This article is about the elaboration of a theory of justice to underpin international economic law and international economic institutions. A world trade constitution cannot credibly exist without a clear notion of justice upon which to base a consensus. Despite attempts to describe a world trade "legal system" or constitution, no such system or constitution yet exists in a way credible to many people. There is yet no consensus on the public reason underpinning the rules and the institutions. Much of the anti-globalization dissent, though sometimes unfocused and confused, seems bottomed on the basic notion that a legal system requires a theory of justice. Governments will never get their populaces to embrace international economic law and institutions without a consensus on what is just in the international economic sphere. Scholars and practitioners have expended great effort in improving our understanding of world trade rules and policies, but the normative dimensions of such inquiry seems incomplete without an underlying consensus of sufficiently wide scope on the reasons for the rules and policies. That the rules and policies now encroach upon areas of domestic regulation in sensitive policy areas serves to highlight the problem.

Economic efficiency has been the benchmark often used to evaluate the merits of international economic agreements. Economic efficiency is a commonly understood aspiration embedded in the idea of progressive liberalization: the progressiveness of liberalization is determined based on efficiency gains. I have no qualms about economic efficiency. I think it is a valuable tool, and I think economists bring a very useful toolkit to the table. I am not going to expend any effort in bashing economics because such bashing is wrongheaded. I refocus away from economics, however, away from the efficiency-versus-distribution dimensions of conceptualizing the effects of

international economic institutions. I devote this article to examining approaches to understanding the allocation of resources that most economists are unwilling to devote much energy analyzing. I have nothing against economics, but I do not see how we can base a constitutional system solely on efficiency. In fact, no existing constitutional system is. Why should efficiency be the default principle?

One of the questions I explore is Kantian in influence: is there a universal and cosmopolitan constructivist procedure we can apply to better understand international economic agreements, to improve our deliberation about the WTO and to develop a consensus on what is and is not acceptable? This article is located firmly in moral philosophy and hangs closely to deontological approaches to moral philosophy. No critical or postmodern approaches are undertaken.

This article examines alternatives to the question of what should be a proper distributional framework for the design of international economic treaties and institutions. In this article, I discuss two approaches, those of John Rawls and T.M. Scanlon, focusing primarily on Scanlon's work. The natural starting point for any discussion of moral theory in the context of social institutions is Rawls's *A Theory of Justice*.[5] I will not expend as much effort on Rawls as I should, though he offers the most influential account.[6] I cannot avoid Rawls. Rawls wrote the most influential piece of moral philosophy in the twentieth century. His *A Theory of Justice* must form a base to discuss a cousin theory that has gained a good deal of recent popularity, the contractualist account of T.M. Scanlon, the most recent elaboration of which is in Scanlon's *What We Owe to Each Other*.[7] Both accounts protect *each person*; this feature is what distinguishes them from utilitarianism.

We could focus on other theories. I would have to write a book rather than an article if I were to survey exhaustively theories in competition with Rawls's theory of justice, but it is worth at least brief mention of a few. Amartya Sen and Martha Nussbaum propose what is known as a capabilities approach.[8] To Sen and

5. JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

6. Frank Garcia has done a series of important articles on Rawls and world trade. *See, e.g.*, Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMP. L. REV. 291 (2004); Frank J. Garcia, *Building a Just Trade Order for A New Millennium*, 33 GEO. WASH. INT'L L. REV. 1015 (2001); Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975 (2000).

7. T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998).

8. Martha Nussbaum, *Capabilities and Human Rights*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS 117, 122, 132 (Pablo De Greiff & Ciaran Cronin, eds. 2002); Amartya Sen, *Equality of What?*, *in* THE TANNER LECTURES ON HUMAN VALUES 197, 217

Nussbaum, some goods are inputs needed to function in society. They propose that governments equalize the ability to function in a society. The capabilities approach has had some influence on the United Nations Development Programme (UNDP), which in 1993 began to assess quality of life using the concept of people's capabilities.[9] Ronald Dworkin argues that there should be equality of basic resources available to persons, with a mechanism for valuing nontransferable resources (such as native talent) in terms of transferable resources.[10] Gerard Cohen argues for equalizing access to advantage.[11] I could go on with this list, but I will mention just one more because her theory will get lots of play in the coming years. Susan Hurley articulates a cognitivist theory of distributive justice, which aims to neutralize bias in order to develop greater public agreement on what is good.[12] Hurley's idea of cognitive theory focuses on the meta-ethics of justice concepts. She wants to solve the problem of the divide between private and public reason that Rawls deals with in *Political Liberalism*.[13]

I do not discuss rules in a comprehensive way, though I do apply the tools set forth in this article to one persistent problem — the regulation of intellectual property rights at the WTO level and access to pharmaceuticals in low-income countries. Rules are very important. Nevertheless, I do not think this project is at the stage yet where I can offer systematic applications of the decision procedures set forth in this article. At most, one could say that this article is about what lawyers call policies about rules. Its focus is how to evaluate whether a rule is desirable or not based on an underlying value. This article is representative of a project, one to articulate philosophical thought about justice for application in the future, perhaps to compare with efficiency results. Looking at theories of justice seems required if governments are to come up with meaningful cross-cultural comparisons of quality of life. What are the norms for evaluating the so-called constitutional order? We cannot claim to have a constitutional order without understanding what that order is based upon. It is difficult to have a conversation about global injustice without common standards.

So many ways of approaching this project exist that un-

(Sterling M. McMurrin ed. 1980); AMARTYA SEN, INEQUALITY REEXAMINED, 39–55 (1992); AMARTYA SEN, ON ECONOMIC INEQUALITY 199–218 (1973).

9. Nussbaum, *supra* note 8, at 119.

10. *See* Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

11. G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 916 (1989).

12. S. L. HURLEY, JUSTICE, LUCK AND KNOWLEDGE 246–253 (2003).

13. JOHN RAWLS, POLITICAL LIBERALISM 213–22 (1993).

doubtedly I am open to criticism for failing to address something. I have been very selective in this article. Some may see as a glaring omission that I am not expending much effort discussing human rights. Others have said much more about human rights that I can say. For discussions from the perspective of philosophy see works by Thomas Pogge[14] and Jürgen Habermas,[15] and for discussions from the perspective of a philosophically informed legal scholar see works by Ernst-Ulrich Petersmann.[16] If this is a weakness in my approach, it is one shared with others. For example, Onora O'Neill, a prominent Kantian, explains that "[t]he most significant *structures* of ethical concern can be expressed in linked webs of *requirements*, which are better articulated by beginning from the perspective of agents and their obligations rather than that of claimants and their rights."[17] The idea here is that "there can be requirements *on* us that no one has any standing *to require of* us."[18] Whether we want to "legalize" these requirements to produce legally binding obligations, so that someone has such standing in the courts, is a question for policy makers informed by the standards found in this and other works.

II. RULE ORIENTATION AND IMPLICATIONS FOR FAIRNESS

One of the most significant achievements of the Uruguay Round was the negotiation of the Dispute Settlement Understanding (DSU).[19] The DSU creates the rules and the institutions for binding settlement of disputes relating to WTO agreements between or among WTO members.[20] The DSU, by its own terms, explains that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability

14. *See, e.g.*, Thomas Pogge, *Human Rights and Human Responsibilities*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS, *supra* note 8, at 151.

15. *See, e.g.*, Jürgen Habermas, *On Legitimation Through Human Rights*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS, *supra* note 8, at 197.

16. *See, e.g.*, Ernst-Ulrich Petersmann, *From 'Negative' to 'Positive' Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law?*, 37 COMMON MKT. L. REV. 1363 (2000); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Relationships*, 4 J. INT'L ECON. L. 3 (2001); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000).

17. ONORA O'NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 4 (1996).

18. Stephen Darwall, *Respect and the Second-Person Standpoint*, 78 PROC. & ADDRESSES AM. PHIL. ASS'N 43, 44 (2004).

19. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

20. *Id.*

to the multilateral trading system."[21] The DSU is an important stage in the evolution of the world trading system towards legalism, in which "legalist" approaches to dispute settlement in the world trading system evolve from "pragmatist" approaches, based primarily in diplomacy.[22] Some contend that there is a move towards legalization in the international sphere generally and that the WTO is one good example of this trend.[23]

John Jackson's rule-versus-power orientation is one of the most important and well-known insights in the literature on world trade law.[24] In making this distinction Jackson, a careful scholar, made few claims about the justice of the rules. He did not say that the WTO agreements and institutions constitute a legal system. But he opened the way for thinking about whether the WTO is actually a legal system. Some scholars claim that the WTO system is constitutional, that a "world trade constitution" exists.[25] Others, relying on positivist notions of the law found in Hart and even in Austin, make claims about the existence of a world trade legal system.[26]

Two kinds of theories about the international legal order are influential in the present day: positivist and instrumental.[27] Both these theories maintain longstanding relationships going back to Bentham, who was both a positivist and a utilitarian. Both approaches fail to provide adequate accounts of justice. Positivism is obsessed with the pedigree of rules. In its exclusive form, it requires the separation of law and morality. In its inclusive form, it denies any necessary connection between law and morality but admits that a connection between law and morality is possible.

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21. *Id*. Art. 3(2).

22. *See* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 833–34 (1995).

23. *See, e.g.*, *id*.; LEGALIZATION AND WORLD POLITICS 1–2 (Judith Goldstein et al. eds., 2001).

24. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 109–11 (2d ed. 1998).

25. *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514–15, 542–43, 604 (2000).

26. David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 478–80 (2000). *Contra* Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, 37 INT'L LAWYER 651, 676 (2003) (arguing that "[t]he fundamental requisites for 'law' and 'legal' system in Austin's paradigm are not all satisfied by the WTO and its DSU").

27. I do not claim that positivists hold the view that international law is law. *See* H.L.A. HART, THE CONCEPT OF LAW 213–37 (2d ed. 1994), in which Hart offers his famous argument that international law is an important set of social, as opposed to legal, rules. In Hartian positivism, the basic problem with international law is the lack of secondary rules of recognition. Many have taken on these arguments and have tried to show that international law, at least in its contemporary level of development, is law. *See, e.g.*, ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 46–53 (2004). No need exists to go into this topic here, since the point of the above analysis is simply that lawyers conceptualize WTO law in positivistic terms.

Clearly, positivism does not require any moral criteria to assess the pedigree of legal rules. Instrumentalists, most notably law and economics scholars, argue that concepts of justice are rhetorical. Eric Posner and Jack Goldsmith, for example, argue that states use "moralistic and legalistic rhetoric" to advance their own interests.[28] Why this rhetoric (if it is rhetoric) is less helpful in furthering our understanding than the metaphors of game theory, such as "cheap talk" and "signaling,"[29] is for another article, but what the law and economics approach fails to identify is their longstanding connection to a discredited Benthamism. Law and economics scholars make the same arguments about justice that Bentham did in the eighteenth century. In *The Principles of Morals and Legislation*, Bentham explains in a footnote that:

> justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases. Justice, then, is nothing more than an imaginary instrument, employed to forward on certain occasions, and by certain means, the purposes of benevolence.[30]

In *The Theory of Legislation*, Bentham uses the words "just" and "unjust" along with other words "simply as collective terms including the ideas of certain pains or pleasures."[31]

One of the major defects that positivism and instrumentalism share is that if we assume that they provide adequate accounts for legal principles, either in pedigree or in rational choice, then they produce bad counterexamples. It is easy to come up with a system of positivistic and efficient rules that are unjust. Justice simply is not a criterion in these accounts, unless it arises as a matter of practice within the activity of law itself, an accidental circumstance and not a necessary condition of the account.

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28. Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115, 133 (2002) [hereinafter Goldsmith & Posner, *Moral and Legal Rhetoric*]. *See also* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) [hereinafter GOLDSMITH & POSNER, LIMITS OF INTERNATIONAL LAW].

29. Goldsmith & Posner, *Moral and Legal Rhetoric*, *supra* note 28 at 115.

30. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 120 n.b2 (J.H. Burns & H.L.A. Hart eds. 1970).

31. JEREMY BENTHAM, THE THEORY OF LEGISLATION 2 (Oceana Publications 1975). These references are discussed in John Rawls, *Justice as Fairness*, a 1958 article appearing in the PHILOSOPHICAL REVIEW, and now reprinted in JOHN RAWLS, COLLECTED PAPERS 48–49 (Samuel Freeman ed. 1999).

These two prevailing accounts of international economic law, positivism and instrumentalism, when combined with concepts from both the normative welfare economics of international trade and also the political economy of international trade, produce a quasi-utilitarian framework for the assessment of international economic law and institutions.[32] Quasi-utilitarianism is, it seems, the default principle. I use the term quasi-utilitarianism because economics is distinct from utilitarianism, particularly from the Millian version of utilitarianism, and because I do not think there is an explicit recognition of utilitarianism as the actual reasons for action in the making of international economic law and policy.

Quasi-utilitarianism has so many problems that I do not know where to begin. Distinguishing other ethical theories from utilitarianism and the broader notion of consequentialism has been one of the major debating tournaments of modern moral philosophy, and others far more capable than I have dealt with the issues in depth. I mention just a few weaknesses of utilitarianism here because of their relevance to international economic law and policy. How does quasi-utilitarianism work? The main problems are in average utility, the greatest good for the greatest number, and in concepts like Pareto efficiency. These measures fail to account for effects on the worst off. They focus wholly on states of affairs and not on principles.[33] Quasi-utilitarianism tends to engage in an improper aggregation of the effects of a policy into a single judgment, giving inadequate attention to the distributive effects of the policy. Aggregation tends to disguise the adverse effects of a policy on groups who suffer substantial burdens or who may be worse off in the society in question. Joseph Raz has provided the example of how a utilitarian must commit to the claim that an extra lick of ice cream for a sufficiently large number of people can justify the killing of another person, if the trivial satisfactions of the many who get the extra lick outweigh the loss suffered by the person killed.[34] Utilitarian and quasi-utilitarian concepts do not link to concepts humans seem to possess of right and wrong. It is telling that we do not teach our children to be

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32. I borrow the "quasi-utilitarianism" phrase from Carl Cranor, Presentation: The Genomic Revolution and Intra-National and Inter-National Equity (on file with the author).

33. The distinction between a focus on states of affairs or principles is this: In the dominant quasi-utilitarian ways of thinking, people's preferences, desires and satisfactions are not analyzable and given, and from these one determines how to increase or maximize these preferences, desires and satisfactions. In a principles-based account, we evaluate the content of these preferences, desires and satisfactions to decide if they are right or wrong, or good or bad. In an approach based on principles, we might decide that an action is impermissible even though it may increase the satisfaction of the agent or agents in question.

34. JOSEPH RAZ, THE MORALITY OF FREEDOM 276 (1986).

utilitarian, but rather, we try to instill in them the reason-giving force of right and wrong.

III. FAIRNESS THEORIES

My project is to set forth some alternatives to the current default rule of quasi-utilitarianism, so that we may better understand the fairness of international economic law and institutions. As explained above, the natural starting point for any such discussion is Rawls's *A Theory of Justice*. Before I take on the substantive accounts, some groundwork is necessary.

At the outset, we must be cautious in extending Scanlon's version of contractualism to provide an account of public morality. Scanlon explains that his contractualism applies only to individual conduct.[35] It is intended for application to the basic question that moral philosophers try to answer, and that is "how should one live." The focus of inquiry in contractualism is thus plainly distinguishable from that of Rawls' *A Theory of Justice*, which has as its explicit target an account of a public morality. Rawls elaborates in *Justice as Fairness: A Restatement* that his principles concern "the basic structure of society, that is, its main political and social institutions and how they fit together into one unified system of cooperation."[36] Considerable problems may appear in trying to extend Scanlonionian contractualism from the private to the public sphere, but considerable promise exists in such an extension nonetheless. We will have to work out these problems, or contractualism ultimately will not make the move into the political and legal realms.

The theories that I discuss all deal in concepts about principles.[37] They do not focus solely on states of affairs, as economics, utilitarianism and other forms of consequentialism do. Both Rawls and Scanlon blend the two values. They permit a focus on states of affairs, but states of affairs cannot trump principles of fairness. Neither theorist is neutral about principles. Scanlon starts his influential work on contractualism with an account that places his theory within descriptivism, but with little in the way of the metaphysical baggage often associated with such

35. Scanlon expresses this idea implicitly and explicitly throughout *What We Owe to Each Other*. For an example of Scanlon contrasting his contractualism with Rawls, *see* SCANLON, *supra* note 7, at 228 (pointing out the application of contractualism to individual conduct).

36. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 39–40 (Erin Kelly ed. 2001).

37. *See supra* note 33 for a discussion of the distinction between ethical approaches that focus on states of affairs versus principles.

discussion.[38]

Rawls's work is constructivist, although Rawls did not use that term in *A Theory of Justice*. In *A Theory of Justice*, he does discuss the idea of construction, that his principles of justice provide "constructive criteria" for guiding action.[39] Rawls distinguishes constructivist from intuitionist approaches. He argues that intuitionism produces a set of impractical and unranked moral principles and thus does not help to guide action.[40] Thus, his major distinction is between constructivism and realism.[41] In a constructivist moral theory, moral principles are not the "fabric of the world."[42] They are not facts independent of and prior to moral reasoning. However, they have validity and are correct when they are the product of a procedure in which a human agent engages in practical reason to articulate and live by a moral principle. In his *Lectures on the History of Modern Moral Philosophy*, Rawls explains that Kant is a constructivist. "An essential feature of Kant's moral constructivism is that the particular categorical imperatives that give the content of the duties of justice and of virtue are viewed as specified by a procedure of construction (the CI procedure)."[43] Constructivists do not have to be Kantian. Utilitarians are constructivists, as is the neo-Hobbsian David Gauthier.[44] Rawls is a Kantian constructivist. In his 1980 Dewey Lecture, entitled "Kantian Constuctivism in Moral Theory," Rawls "'set out more clearly the Kantian roots of *A Theory of Justice*,' and to elaborate [more clearly] the Kantian form of constructivism."[45]

Rawls is also a contractualist. In *A Theory of Justice*, Rawls places his work within the social contract tradition of Kant, Locke and Rousseau.[46] Scanlon places his work in the tradition of Rousseau.[47] O'Neill argues that we can read Scanlon to be a

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38. SCANLON, *supra* note 7, at 2.

39. RAWLS, A THEORY OF JUSTICE, *supra* note 5, at 30. *See also* Onora O'Neill, *Constructivism Versus Contractualism,* 16 RATIO 319, 320 (2003).

40. O'Neill, *supra* note 39. Rawls makes the same distinctions about Kant. *See* JOHN RAWLS, LECTURES ON THE HISTORY OF MODERN MORAL PHILOSOPHY 237–38 (Barbara Herman ed. 2000) [hereinafter LECTURES].

41. I use the word "realism" in its philosophical sense and not as used in legal thought to refer to legal realism. The two theories are radically different. *See, e.g.,* Michael S. Moore, *The Interpretive Turn in Legal Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 872 n.4, 880 (1989).

42. *See* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 15 (reprint ed. 1978).

43. RAWLS, LECTURES, *supra* note 40, at 237.

44. O'Neill, *supra* note 39, at 320; DAVID GAUTHIER, MORALS BY AGREEMENT (reprint ed. 1987).

45. RAWLS, LECTURES, *supra* note 40, at xiii, *quoting* John Rawls, *Kantian Constructivism in Moral Theory*: *The Dewey Lectures, 1980*, 77 J. PHIL 515, 515 (1980).

46. RAWLS, A THEORY OF JUSTICE, *supra* note 5, at xviii.

47. SCANLON, *supra* note 7, at 5.

constructivist.[48] To avoid confusion, I use the contractualist label to refer to Scanlon and the constructivist label to refer to Rawls.

A. Rawls: Kantian Constructivism

A threshold question is whether we can apply Rawlsian justice as fairness outside of the confines of domestic society. Rawls himself refused to extend his theory to international contexts, but many Rawlsians have argued that the conditions now hold for application of Rawlsian theory at the international level. I will not restate those arguments here.[49] The extension is justified because of the lack of economic self-sufficiency and distributional autonomy between states.[50] The WTO and other international economic institutions no doubt had a hand in bringing these two conditions into existence.

The Rawlsian theory of justice as fairness is about social justice or public morality. In *A Theory of Justice,* Rawls explains that the "primary subject" of his principles "is the basic structure of society, the arrangement of major social institutions into one scheme of cooperation."[51] Rawls elaborates in *Justice as Fairness: A Restatement,* that his principles concern "the basic structure of society, that is, its main political and social institutions and how they fit together into one unified system of social cooperation."[52] These principles, Rawls explains, "are to govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life."[53] They "must not be confused with the principles which apply to individuals and their actions in particular circumstances."[54]

The basic structure of the Rawlsian conception of justice is that if mutually self-interested and rational persons stand in relation to each other behind a veil of ignorance in the original position, and if they must choose a conception of the right to order their claims on society in the circumstances of justice, they will agree on two lexically ordered principles of justice. The first principle of justice is that society guarantees "each person . . . an

48. O'Neill, *supra* note 39.

49. *See, e.g.,* Garcia, *Beyond a Special and Differential Treatment*, *supra* note 6; Garcia, *Building a Just Trade Order*, *supra* note 6; Garcia, *Trade and Inequality*, *supra* note 6; BUCHANAN, *supra* note 27.

50. *See* Garcia, *Beyond a Special and Differential Treatment*, *supra* note 6; Garcia, *Building a Just Trade Order*, *supra* note 6; Garcia, *Trade and Inequality*, *supra* note 6; BUCHANAN, *supra* note 27, at 200–27.

51. RAWLS, A THEORY OF JUSTICE, *supra* note 5, at 47.

52. RAWLS, JUSTICE AS FAIRNESS, *supra* note 36, at 39–40.

53. RAWLS, A THEORY OF JUSTICE, *supra* note 5, at 47.

54. *Id.*

equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."[55] The second principle of justice is that society should arrange social and economic inequalities so that two criteria are met: (1) positions and offices should be open to everyone equally; and (2) social and economic inequalities should benefit everyone regardless of social group.[56]

The focus in discussions of global economic questions has mainly been on the second principle, which has clear implications for assessing the distributive justice of international economic law and institutions. I, like others, place less emphasis on the first principle, so we do not have to get into the question of public reason on mainly non-economic civil society issues to any great depth. The first principle, dealing with basic liberties and freedoms, goes to the heart of sovereignty. It is the subject of domestic constitutional orders, but also of international human rights and international criminal law regimes. As these international regimes proliferate, some of the responsibilities for securing the first principle move to the international level. That is not my concern here. That the first trumps the second is important for understanding why we should not lightly allow international legal orders to override fair domestic legal orders. The first principle retains its lexical priority institutionally to the extent that governments refuse to agree to treaties that derogate from basic rights and freedoms provided domestically. Difficulties may arise, however, if international tribunals, such as the WTO Dispute Settlement Body, issue decisions that trump basic rights granted domestically. This is an issue for another article.

Let us look a bit more closely at the second principle. Rawls contends that if we place persons behind a veil of ignorance in the original position, they would choose the difference and fair equality of opportunity principles as principles of equality.[57] At the risk of oversimplifying, the reason for the selection of these principles in the original position is because Rawls does not want to base the distribution of primary social goods (rights, liberties, opportunities, income and wealth) or primary natural goods (health, intelligence and imagination) on initial endowments obtained through luck. When they are behind the veil of ignorance in the original position, people do not know their endowments of these goods. The second principle permits inequality, and persons

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55. *Id.* at 53.

56. *Id. See also* Carl Cranor, *Rawlsian Choice of Distributive Principles* (unpublished, on file with the author).

57. RAWLS, A THEORY OF JUSTICE, *supra* note 5, at 130–32.

can use their unequal endowments to their own benefit, as long as institutions provide incentives to benefit everyone, particularly the worst off. Let us unpack this second principle. It itself contains two principles, the fair equality of opportunity principle and the difference principle.

The fair equality of opportunity principle holds that positions and offices that result in social and economic inequalities must be open to all. It does not assume or ensure that everyone is equal in talents, abilities and motivation. But, for individuals who are equal in talents, abilities and motivations, they should have an equal chance of attaining the same positions in a given society. Under the fair equality of opportunity principle, social and, in our context here, national starting points are irrelevant because they are arbitrary.

The difference principle essentially provides that inequality must benefit everyone. Inequality is fair only if it benefits the least advantaged. As long as the primary social goods of the worst-off group are increasing, inequality is fair and can continue to increase. As soon as the primary social goods of the worst-off group stop increasing, then the society in question has reached the maximum inequality permitted. We can add other groups into this picture. Suppose the benefits to the worst-off group plateau, but society could continue to make the best-off group (or any better-off group) better off with no detriment to the worst-off group. Is such a move fair? Inequality can continue, but we have to examine the effects on other groups. Consider the second-worst-off group. If, during increasing inequality, the lot of the second-worst-off group is increasing, so long as society does not make the worst-off group even worse off, inequality can continue to increase. The point at which increasing inequality must stop is at the point at which society could make no more moves without making the worst-off group or the second-worst-off group better off. We can generalize the account to any number of groups. The emerging concept is the difference principle: a scheme of cooperation is fair if, in the given historical and social circumstances, society can make no further move that would make all (every one) of the representative groups better off.[58] In other words, pick a regime of norms that makes *everyone* better off than they would be under any other regime of norms.

Rawls's theory of justice combines two prevailing approaches to moral theory. It is principled. It has a procedure of construction for determining the content of fairness. The veil of

58. *Id.* at 65–72.

ignorance and original position is a universalizing procedure, as is Kant's categorical imperative procedure. Rawls uses principles to evaluate states of affairs. In this way his theory is a hybrid. Rawls does not rely solely on the analysis of states of affairs, as utilitarianism does, but states of affairs are important in assessing the lot of groups in society, particularly those worst off. As we shall see in the following part, Scanlon's contractualism shares this hybrid feature.

The relevance of Rawls's theory of justice to the normativity of international economic law and institutions is remarkable. There is no wonder that so many have extended Rawls to the international realm.

B. Scanlon: Contractualism

In 1982, T. M. Scanlon published an influential article entitled "Contractualism and Utilitarianism," in which he first proposed his contractualist account of morality.[59] He since wrote a book on contractualism, *What We Owe to Each Other*, which revised some of his views, partly in response to critics.[60] Contractualism has gotten quite a bit of attention in moral philosophical circles, and it is worth investigating its application to institutions. I will not present anything like a complete account of contractualism here. I want to get to the structure of the contractualist argument, to understand its application. The meta-ethical, epistemological and metaphysical questions are for discussion in other venues. Despite the lack of an explicit link to the political realm, I think a good use of contractualism is as a heuristic for evaluating global economic treaties. Contractualism is an ethical framework that has the potential to produce increased attention to fairness in the global economic order.

Scanlon states the basic working principle of contractualism as follows: "an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that *no one could reasonably reject* as a basis for informed, unforced general agreement."[61] Scanlon prefers the negative formulation to the affirmative "that everyone could reasonably accept" because "[u]nanimous acceptance is a consequence of this condition's being fulfilled, but is not itself the

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59. T.M. Scanlon, *Contractualism and Utilitarianism, in* UTILITARIANISM AND BEYOND 103 (Amartya Sen & Bernard Williams, eds. 1982).

60. SCANLON, *supra* note 7.

61. *Id.* at 153 (emphasis added).

basic idea."[62] Scanlon did not intend to formulate anything like a Pareto-optimality requirement. Cohen has argued that an equivalent formulation for "*no* one *could* reasonably *reject*" would be "*every*one *must* reasonably *accept*."[63] Arguably, these phrases are equivalent, but it is best to use the phrase adopted by Scanlon, since it is his theory.

In contractualism, the basis for moral wrongness or rightness lies in mutual recognition, a kind of mutuality. Mutual recognition lies in the motivational basis for contractualism. Scanlon's contractualism is *not* Hobbesian. People do not enter into agreement out of any reasons of self-interest.[64] Scanlon explains:

> What distinguishes my view from other accounts involving ideas of agreement is its conception of the motivational basis of this agreement. The parties whose agreement is in question are assumed not merely to be seeking some kind of advantage but also to be moved by the aim of finding principles that others, similarly motivated, could not reasonably reject.[65]

Contractualism reflects "[t]he idea of a shared willingness to modify our private demands in order to find a basis of justification that others also have reason to accept."[66] The philosophical lineage of Scanlon's contractualism goes back to Rousseau, not Hobbes.[67]

A key aspect of Scanlon's contractualism is its justification requirement. Justification is necessary to his theory in two ways: first as a normative basis for determining the content of morality — for determining right and wrong — and, second, as a way of characterizing that content.[68] The focus of characterization is in something like a constructivist procedure in determining rightness or wrongness based on justification to others.[69] In this sense, Scanlonian contractualism does not need a veil of ignorance. The veil is unnecessary because contractualism internalizes the requirement of justifiability in the reasonable rejection standard.

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62. *Id.* at 390, n.8.
63. Brad W. Hooker, Scanlon's Contractualism, Address at University College London, Department of Political Science, School of Public Policy (Nov. 4, 2002), *at* http://www.ucl.ac.uk/spp/download/seminars/0203/Scanlons_Contractualism.rtf.
64. For a contemporary Hobbesian account *see* Gauthier, *supra* note 44.
65. SCANLON, *supra* note 7, at 5.
66. *Id.*
67. *Id.*
68. *Id.* at 189.
69. *Id.*

The concept of avoiding a bias of self-interest exists in the requirement of taking action that others could not reasonably reject. The motivational basis for the reasonable rejection requirement already requires that agents consider others. Scanlon does not need to impose a veil of ignorance requirement in order to get to the point where people will take others into account.[70] The lack of connection to Hobbes seems clear.

Contractualism accounts for morality in a narrow sense. It does not concern morality in a broader sense, where it has to do with a range of issues of individual moral conduct that do no harm or violate any duties to others.[71] For example, contractualism does no work towards helping us understand whether harming the environment in and of itself is morally wrong. Its scope is limited to a narrower range of morality, with duties we owe to others. Harm to the environment is a value to the extent it is, within a reasonable rejection framework, harm to others. Reasons for rejection are personal, but their force as reasons may depend on impersonal value, say, if people are of the view that protection of the environment is worthwhile.[72] Scanlon argues that contractualism nevertheless applies to a broader range of human action than justice does because justice has to do with social institutions.[73] His interpretation of justice as outside the realm of the practical reason of individual agents seems questionable, but I think he is simply trying to cabin contractualism as something that applies to individual or private circumstances.

Scanlon provides guidance as to the form of a contractualist argument. Consider the situation in which an agent must determine whether it is wrong to do X in circumstances C. First, "deciding whether an action is right or wrong requires a substantive judgment on our part about whether certain objections to possible moral principles would be reasonable."[74] From here, we must look at burdens and benefits. To determine what is reasonably rejectable by others, "we need . . . to form an idea of the burdens that would be imposed on some people in such a situation if others were permitted to do X."[75] Scanlon calls these "objections to permission."[76] We must compare objections to permission to "objections to prohibition," which focus on benefits to others.[77] We

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70. *Id.* at 207.
71. *Id.* at 6–7.
72. *Id.* at 220.
73. *Id.*
74. *Id.* at 194.
75. *Id.* at 195.
76. *Id.* at 195.
77. *Id.*

then can compare these two sorts of objections to derive a judgment about whether X is morally permissible. Scanlon explains:

> If the objections to permission are strong enough, *compared to the objections to prohibition,* to make it reasonable to reject any principle permitting doing X in C, then one would not expect the objections to prohibition to be strong enough, *compared to the objections to permission,* to make it reasonable to reject any principle that forbids doing X in C.[78]

In contractualism, objections derive from principles, not merely from effects or states of affairs.[79] This does not mean that principles cannot take states of affairs into account. The degree of harm a principle causes is directly relevant to its fairness. Individuals can reasonably object if they are overly burdened. Contractualism, however, does not focus *solely* on states of affairs; principles guide any consideration of states of affairs. The focus is on *why* an action is wrong. Reasons are thus paramount. This sort of thinking should not be exceptional to lawyers. For example, we would consider accidental harm different from intentional harm, even if the effects were the same. In determining whether to build a road or a school or an electrical transmitter, we accept the non-negligent injury or even death of a limited number of workers and possibly bystanders as socially acceptable risk. We can even determine with some degree of statistical confidence that such injuries or deaths will occur. On the other hand, the law does not accept intentional harm inflicted on a few people so that many will benefit. Scanlon offers the example of electrical equipment falling on the arm of a worker in a transmitter room of a television station broadcasting a World Cup match. We certainly would not sanction the failure to remove the worker from harm in order to continue the broadcast. We would want to rescue her before the match is over.[80]

We can understand the nature of objections to permission and prohibition is in what Derek Parfit's characterization of Scanlonian contractualism as a "Complaint Model" of ethical decision-making.[81] In the Complaint Model, only individuals can

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78. *Id.*

79. *See supra* note 33 (discussing the distinction between ethical approaches based on states of affairs versus principles).

80. SCANLON, *supra* note 7, at 235–36.

81. *Id.* at 229.

raise objections, which means that there can be no aggregation or summing of costs and benefits, because such aggregation or summing can result in the burdening of some groups to benefit others. Scanlon explains:

> A contractualist theory, in which all objections to a principle must be raised by individuals, blocks such justifications in an intuitively appealing way. It allows the intuitively compelling complaints of those who are severely burdened to be heard, while, on the other side, the sum of the smaller benefits to others has no justificatory weight, since there is no individual who enjoys these benefits and would have to forgo them if the policy were disallowed.[82]

Utilitarianism permits aggregation, but contractualism does not, except in a very narrow range of circumstances involving "ties." A tie is a situation in which the moral seriousness of, say, two states of affairs is equivalent, but one situation involves harm to more people than the other does. In such a situation, it is permissible to choose the alternative that causes harm to the fewer number of persons. In situations not involving ties, which Scanlon seems to think are the overwhelming majority of situations, we must look to principles to choose the appropriate course of action.[83]

Scanlon gives us some hint on how we could apply his contractualist principle to questions about global justice. In a section of his book on whether there should be a priority for the worst off, Scanlon elaborates two principles — the Rescue Principle and the Principle of Helpfulness.[84] Both have as their scope the question whether a duty to render aid exists. Aid-rendering duties have been the subject of longstanding questions of Kantians, consequentialists and virtue ethicists. The basic points of discussion are: (1) how other-regarding should I be?; (2) do I have to depart from my own life projects to aid others?; and (3) can I consider my own interests?

Scanlon contends that in some cases the question of a priority of the worst-off never arises.[85] His example is the obligation to keep a promise, a subject he devotes a good bit of discussion to in his book. Therefore, as a preliminary matter, it seems contractualism will excuse from the discussion of distributive

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82. *Id.* at 230.
83. *Id.*
84. *Id.*
85. *Id.* at 224.

justice any pre-existing obligations. Scanlon does not say much about this limitation. It has the potential to be a very significant limitation and is worthy of future exploration.

Scanlon says that a principle of priority for those worst off "has greater plausibility when we turn from principles whose aim is to create some specific form of protection or assurance to principles which tell us how we should distribute some transferable good, in cases in which the value of this good to potential beneficiaries is the dominant consideration."[86] The cases in which it is most clearly wrong not to give aid are cases in which others are in serious difficulties, where "their lives are immediately threatened, . . . they are starving, . . . in great pain, or living in conditions of bare subsistence."[87] He articulates his Rescue Principle for these cases: "if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so."[88] Thus, it would be unreasonable for me to reject a moral duty to give a charitable contribution to the victims of the recent tsunami. The Principle of Helpfulness, on the other hand, applies when someone else not in dire need would benefit from my help, and my help would mean a slight to moderate sacrifice on my part.[89]

Do these principles seem weak? They try to steer away from the problem faced by moral (but not legal) utilitarianism that it asks too much of agents. Scanlon allows us to consider our own life plans. Scanlon argues that it would be reasonable to reject a principle requiring us to give no more weight to our own interests than to the "similar interests" of others.[90] He explains, "[w]hat is appealed to is not the weight of my interests or yours but rather the generic reasons that everyone in the position of an agent has for not wanting to be bound, in general, by such a strict requirement."[91]

Of course, we must be fair to Scanlon here. His discussion is limited to the question of whether individuals — not governments — have a duty to render aid. The public international analogue is aid and development assistance, though we should not jump to the analogy without providing proper reasons for the extension of contractualism from the private to the public sphere. We cannot

86. *Id.* at 223–24.
87. *Id.* at 224.
88. *Id.*
89. *Id.*
90. *Id.* at 224.
91. *Id.* at 225.

suggest his principles as anything other than heuristics for evaluation of WTO (or other) policies and institutions without some account of how contractualism is a public form of morality, something of sufficiently broad scope that it is the subject for another article. The most glaring omission in contractualism as it stands now is a theory of justice about public institutions. The bottom line for contractualism is that, in contrast to Rawls's theory of justice, a "'priority for the worst off' . . . is a feature of certain particular moral contexts rather than a general structural feature of contractualist moral argument."[92] Scanlon admits that such a priority is a central feature of Rawls's difference principle, but he is careful to explain that Rawls "starts from the idea that…equal participants in a [fair] system of social cooperation . . . have a prima facie claim to an equal share in the benefits it creates."[93] In his constructivist account, Rawls tries to neutralize luck created in the natural lottery of birth, nationality and so on. Contractualism, lacking a political idea of equality, makes no claims about equality or initial endowments.

Do we want to extend contractualism into the public realm, to evaluate in our particular case the fairness of global economic treaties? Some scholars, such as Leif Wenar, contend that contractualism is adequate but that the main task of the contractualist is empirical and not philosophical. He argues that "[i]f the causal links are good — that is, if rich individuals can in fact improve the long-term well-being of the poor and their descendants through direct action with their time and money — then contractualism may place on rich individuals quite significant demands."[94] Wenar's argument is good as far as it goes for the construction of a moral principle in the realm of private morality, but I believe that we need to do more work to get an adequate account of contractualism to compare with Rawls's theory of justice. For now, we can use Scanlon's principles as heuristics.

IV. A SKETCH OF HOW TO APPLY FAIRNESS CRITERIA: TRIPS AND ACCESS TO MEDICINES

In his article, "Global Economics and International Economic Law," Jackson explains that "[d]istributive justice suggests a variety of policies within the scope of a domestic market: progressive taxation, welfare, safety nets, a social market

92. *Id.* at 228.
93. *Id.*
94. Leif Wenar, *Contractualism and Global Economic Justice*, *in* GLOBAL JUSTICE 78 (Thomas W. Pogge, ed. 2001).

economy, etc. However, internationally, of course, we have this problem also: the developing countries argue for certain preferences."[95] Frank Garcia has done important work on the application of Rawlsian principles of fairness to special and differential treatment.[96] The next steps are to evaluate the basic policies and normative structures in the WTO agreements and international economic institutions generally.

As for normative structures, a place to start is in understanding the fairness of the most basic of the traditional tools of the trade lawyer — national treatment and most favored nation (MFN) obligations. When is national treatment or MFN reasonably rejectable by a WTO member? Quotas are also an obvious target of analysis.

From these basic disciplines, we could move to examining non-tariff barriers to trade and areas of substantive regulation. TRIPS and the Sanitary and Phyto-Sanitary Agreement seem apt for some sort of contractualist analysis. Subsidies are another area in which a fairness analysis could tell us much. The recent *Upland Cotton* decision, in which the WTO Appellate Body upheld a ruling by a dispute settlement panel that U.S. subsidies to cotton farmers in part violated the Subsidies and Countervailing Measures Agreement and distorted trade, suggests a subject for further inquiry using Scanlonian or Rawlsian principles.[97] We could also assess the fairness of the WTO dispute settlement process itself using these principles. We could gain insights by using the tools of moral philosophy to understand, for example, the effects of dispute settlement policies on low-income countries or on inadequately represented groups. In addition to the need for a philosophical account to transition Scanlonian (and other) ethical theories to conceptions of political justice, the next steps are empirical: institutionally oriented studies of the details of the world trading system.

Here, I examine the effect of TRIPS on access to medicines in low-income countries. The subject of access to medicines has received a good deal of attention. The attention focuses on the devastation that disease has brought to low-income countries,

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95. JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 451 (2000).

96. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, *supra* note 6.

97. *See* Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R ¶ 763(Mar. 3, 2005) (upholding a dispute settlement panel ruling that U.S. subsidies to cotton farmers distorted trade and partly violated the subsidies and countervailing measures agreement).

particularly countries in sub-Saharan Africa.[98] Intellectual property rights are but one feature of the global health delivery system, one that is isolable and relates directly to the work of the WTO. In this analysis, I do not treat WTO members as "individuals" or "groups." Rather, the focus of inquiry is on representative groups in and across societies. This approach is Rawlsian in orientation, but extended beyond domestic political borders.

The link between poverty, poor health, and access to medicines is indisputable. According to a report written by the Commission on Macroeconomics and Health (CMH) for the World Health Organization, "[t]he linkages of health to poverty reduction and to long-term economic growth are powerful, much stronger than is generally understood. The burden of disease in some low-income regions, especially sub-Saharan Africa, stands as a stark barrier to economic growth . . . ."[99] The main causes of avoidable deaths in the least developed countries are the result of "HIV/AIDS, malaria, tuberculosis (TB), childhood infectious diseases, maternal and perinatal conditions," deficiencies in nutrition and illness related to tobacco use.[100] Many of these diseases are preventable or curable.[101] CMH estimates that if developed countries were to allocate only 0.1 percent of their GNP to assistance in health care, they could save 8 million lives per year in low-income countries.[102] The CMH report explains:

> This program would yield economic benefits vastly greater than its costs. Eight million lives saved from infectious diseases and nutritional deficiencies would translate into a far larger number of *years* of life saved for those affected, as well as higher quality of life. Economists talk of disability-adjusted life years (DALYs) saved, which add together the increased years of life and the reduced years of living with disabilities. We estimate that approximately 330 million DALYs would be saved for each 8 million deaths prevented. Assuming, conservatively, that each DALY saved gives an

98. *See, e.g.*, BERYL LEACH ET AL., PRESCRIPTION FOR HEALTHY DEVELOPMENT: INCREASING ACCESS TO MEDICINES: UN MILLENNIUM PROJECT TASK FORCE ON HIV/AIDS, MALARIA, TB & ACCESS TO ESSENTIAL MEDICINES 25 (2005).

99. WHO Comm'n on Macroeconomics and Health, *Macroeconomics and Health: Investing in Health for Economic Development* 1 (Dec. 20, 2001).

100. *Id.* at 2.

101. *See id.* at 3.

102. *Id.* at 11–12.

> economic benefit of 1 year's per capita income of a projected $563 in 2015, the direct economic benefit of saving 330 million DALYs would be $186 billion per year, and plausibly several times that. Economic growth would also accelerate, and thereby the saved DALYs would help to break the poverty trap that has blocked economic growth in high-mortality low-income countries. This would add tens or hundreds of billions of dollars more per year through increased per capita incomes.[103]

Malaria, a preventable disease, all but eradicated in the North, continues to plague the South and correlates strongly to poverty and poor economic growth.[104]

Some consider access to medicines a human right. The UN High Commissioner for Human Rights and the World Health Organization accept this approach.[105] Article 12 of the International Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[106]

Rights arguments are imprecise because they tell us nothing about *obligations* and *requirements*, and of course, intellectual property rights holders have rights that may conflict with the nebulous human right to health. Rights talk has gotten us little. The international human rights covenants require ratifying countries to conform their domestic laws to the covenants. However, countries do not have to ratify these covenants. Indeed, the United States has not ratified the International Covenant on Economic, Social and Cultural Rights.[107] There has been some argument in the human rights literature that some countries, such as the United States, will not ratify a human rights covenant unless its laws *already* conform to the covenant, though the findings are far from unequivocal[108] Even if a country ratified the

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103. *Id.* at 12–13 (endnotes omitted).

104. John Luke Gallup & Jeffrey D. Sachs, *The Economic Burden of Malaria*, 64 AM. J. TROPICAL MED. HYGIENE 85, 85–86 (2001).

105. WTO, Draft Cancún Ministerial Text of 12 September 2003, WT/MIN(03)/20 (2003).

106. International Covenant on Economic, Social and Cultural Rights, art. 12, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

107. U.N. Office of the High Comm'n for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004*, *available at* http://193.194.138.190/pdf/report.pdf.

108. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). *Cf.* Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000).

International Covenant on Economic, Social and Cultural Rights, and this ratification mandated improvements to health care in the country, it would impose no obligations on the country to seek to improve access to health care in other countries. These arguably weak human rights regimes contrast starkly to the strong intellectual property rights protection in TRIPS, which is mandatory if a country is a WTO member.[109] TRIPS is a multilateral agreement; all WTO members must comply, though low-income countries had more time to achieve compliance as a result of transition periods contained in TRIPS. TRIPS obligations, moreover, are enforced through the considerable bureaucratic and dispute settlement infrastructure of the WTO Secretariat. Below, I show how rights arguments are by themselves inadequate and how alternative formulations, based on requirements and obligations, might improve distributive justice across countries. Whether obligations on one person or set of persons gives rights to others I leave for future discussion.

A. TRIPS and the Doha Declaration

Property rights have been a prime area of controversy for several centuries. It would be difficult to challenge the argument that no other category of legal rules affects the distribution of wealth more than property rules. Hume postulated that the central reason people engage in society is for stability in the possession of property.[110] His reason looks very much like what rational choice theorists characterize as Nash equilibrium. The political economics of British agriculture in seventeenth and eighteenth centuries worked to produce the enclosure movement in Britain, the so-called first enclosure movement, in which the monarchy enclosed commons areas-such as copyholds of the yeomanry to expropriate the rights of small farmers in estates.[111]

While the battle in the first enclosure movement was over rights in agricultural land, the battle in the second enclosure movement is over rights in intangible products of the mind, which

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109. TRIPS is a multilateral agreement, which means that a WTO member must accept and comply with it. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, art. 4, (Apr. 15, 1994), *available at* http://www.wto.org/english/docs_e/legal_e/03-fa_e.htm, (last visited May 16, 2006). Marrakesh Agreement Establishing the World Trade Organization, arts. II(2), XVI, *available at* http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last visited May 16, 2006).

110. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 314 (David Fate Norton & Mary J. Norton eds., Oxford University Press 2000) (1739–40).

111. Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment,* 15 BERKELELY TECH. L. J. 777, 786–89 (2000).

includes pharmaceuticals and biotechnology.[112] The contested rights are in intellectual property.[113] Similes and metaphors abound in the literature. We are in the process of the second enclosure movement the "enclosure of the intangible commons of the mind"[114] and the "intellectual land-grab."[115] The battle for rights in intellectual property is "an information arms race . . . with multiple sides battling for larger shares of the global knowledge pool."[116] The enclosure of the intellectual commons is occurring in various disciplines of science and technology, including information technology, cyberspace, and biotechnology relating to pharmaceuticals, medicine, and human genetics.[117]

TRIPS is one of the most important international agreements relevant to the allocation of intellectual property rights in pharmaceuticals. Although an international trade agreement and not a domestic intellectual property law, TRIPS is relevant to ownership of rights in pharmaceuticals. It specifies standards for the intellectual property laws of the WTO members. It is unlike any other trade agreement preceding it, unlike anything produced in the WTO framework since the GATT's humble beginnings as an agreement to regulate tariffs. TRIPS harmonizes intellectual property protection at a high level of protection for rights holders, which is one of its controversial characteristics.

The WTO members negotiated TRIPS from 1986 to mid-1994 as part of the Uruguay Round.[118] It is one of the most important developments in the WTO regime. TRIPS has been described as "the most ambitious international intellectual property convention ever attempted"[119] and as "the most comprehensive multilateral agreement on intellectual property."[120] It would not be an exaggeration to say that in the Uruguay Round, multilateral co-operation in the WTO regime on intellectual property matters transformed from a casual indifference to an intense preference for

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112. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37 (2003).

113. *Id.*

114. *Id.*

115. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?,* 47 Duke L.J. 87, 95 (1997).

116. Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111, 111 (2003).

117. For a broad ranging discussion of the issues *see* Conference on the Public Domain, Duke Law School, Nov. 9-11, http://www.law.duke.edu/pd/ (last visited Apr. 21, 2006).

118. *See* JEFFERY J. SCHOTT & JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT (1994).

119. J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 366 (1996).

120. WTO, Overview: The TRIPS Agreement, *available at* http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited May 9, 2006).

rigorous standards. TRIPS does much more than impose the traditional WTO obligations of MFN and national treatment. It is the first international trade agreement to specify minimum standards of protection and universal coverage of intellectual property rights. It imposes positive obligations on WTO members to protect seven categories of intellectual property.[121] The standards in TRIPS reflect the high standards of intellectual property protection typically found in the intellectual property laws of high-income countries.[122] In effect, TRIPS harmonizes intellectual property protection. Low-income countries must meet the same standards as developed countries, although under the transition provisions of the Agreement they had more time in which to achieve compliance with the Agreement. Developed countries had until January 1, 1996 to achieve compliance, developing countries had until January 1, 2000, and the least-developed countries had until January 1, 2006.[123] In addition to high substantive standards that all WTO members must follow, TRIPS mandates untried procedural requirements for enforcing intellectual property rights. TRIPS directs WTO members on the details of how their enforcement system is supposed to enforce intellectual property rights within their borders.[124] Moreover, disputes between WTO members over compliance with TRIPS are decided in the WTO dispute settlement system.[125]

Two sets of TRIPS provisions are especially relevant to the affordable medicines debate: those dealing with patents and those dealing with compulsory licensing. First, TRIPS requires that WTO members make patents lasting for at least twenty years from the date of the filing of the patent application available for "any inventions, whether products or processes."[126] The pharmaceutical industry was particularly interested in having TRIPS require that all WTO members protect product patents. India, for example, has a long history of not recognizing product patents. India is a low-income country with many individuals paying health care

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121. Reichman, *supra* note 119, at 366 n.12.

122. *See* Monique L. Cordray, *GATT v. WIPO*, 76 J. PATENT AND TRADEMARK OFF. SOC'Y 121 (1994); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

123. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 arts. 65–66 (1994) [hereinafter TRIPS].

124. *Id.* arts. 41–62.

125. *Id.* arts. 63–64.

126. TRIPS, *supra* note 123, art. 27.

expenses out-of-pocket.[127] For many years India's substantial pharmaceuticals industry — in 2002 the largest producer of generic drugs in terms of volume — focused on reverse engineering pharmaceuticals and on producing inexpensive drugs for a low-income population.[128] Drug prices were in India thousands of percent lower than the patent protecting prices in higher income countries.[129] To comply with TRIPS, India had to amend its patent law to recognize product patents. In 2002, India amended its patent law to conform to TRIPS. The Patents (Amendment) Act of 2002, which went into effect in May 2003, recognizes twenty-year product patents on pharmaceuticals.[130]

Compulsory licensing is a concept known principally outside of the United States. It is a license to produce "a patented product . . . over the objection of the patent holder." [131] The license may run either to a government or to a user the government authorizes. TRIPS authorizes compulsory licensing but imposes a number of conditions. Before undertaking compulsory licensing, a government must try, "within a reasonable period of time," to negotiate "reasonable commercial terms" from the rights holder.[132] A WTO member may waive these requirements in the event of a "national emergency."[133] Any use of the compulsory license must be "predominantly for the supply of the domestic market" of the WTO member.[134] Finally, the right holder must be paid "adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization."[135]

The WTO members held the Doha Ministerial Conference in late 2001. In that ministerial conference, the WTO members agreed on November 14, 2001 to the "Declaration on the TRIPS Agreement and Public Health." [136] The so-called Doha Declaration states that the WTO members "recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis,

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127. *See* Shubham Chaudhuri, et al., *The Effects of Extending Intellectual Property Rights Protection to Developing Countries: A Case Study of the Indian Pharmaceutical Market* 5 (Nat'l Bureau of Econ. Research, Working Paper Series, Working Paper No. 10159, 2003), *available at* http://www.nber.org/papers/w10159.

128. *Id.*

129. *Id.*

130. *Id.* at 6.

131. Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution,"* 3 CHI. J. INT'L L. 47, 52 (2002).

132. TRIPS, *supra* note 123, art. 31(b).

133. *Id.*

134. *Id.* art. 31(f).

135. *Id.* art. 1(h).

136. WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

malaria and other epidemics"[137] and "stress the need" for TRIPS to be "part of the wider national and international action to address these problems."[138] On the other hand, the Declaration recognizes that "intellectual property protection is important for the development of new medicines," and "the concerns about its effects on prices."[139] The WTO members agreed that TRIPS "does not and should not prevent Members from taking measures to protect public health" and that TRIPS "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[140] The Declaration contains the following steps that are more concrete:

(1) "Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."[141] This section informs that compulsory licensing is a matter of national discretion.[142]

(2)"Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency."[143] This section provides that the current health crises in the low-income countries are "national emergencies" and that negotiations with rights holders before issuing compulsory licenses is unnecessary.

(3)"The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions . . . ."[144] This provision provides that WTO members may permit parallel imports so long as they are not discriminatory.[145]

(4)The last section of the Declaration, among other things, "reaffirm[s] the commitment of developed-country members to provide incentives to their enterprises and institutions to promote

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137. *Id.* art. 1.
138. *Id.* art. 2.
139. *Id.* art. 3.
140. *Id.* art. 4.
141. *Id.* art. 5(b).
142. Sykes, *supra* note 131, at 9.
143. Doha Declaration, *supra* note 136, art. 5(c).
144. *Id.* art. 5(d).
145. Sykes, *supra* note 131, at 9.

and encourage technology transfer to least-developed country members pursuant to Article 66.2."[146]

The Declaration left open for future work by the TRIPS Council the problem of lack of pharmaceutical manufacturing capability in some low income countries.[147] Compulsory licensing would not help alleviate public health crises in a country lacking the capability to produce drugs. The TRIPS Council was required to report to the General Council by the end of May 2002.[148] The outcome of this additional work was a Decision of the General Council on 30 August 2003, allowing least developed countries and countries that notify the WTO of their lack of capability to import pharmaceutical products from eligible countries.[149] The conditions for such exporting and importing are strict. I will not go into the details of the Decision here because they do not affect the analysis to follow.

B. Refocusing Towards Principles and Obligations

From an economic standpoint, it is widely held that strong global intellectual property rights have questionable welfare effects. From an economic standpoint, TRIPS might be welfare reducing and rent shifting, with the rents shifting from the poor to the rich. It is not at all clear that intellectual property rights are necessary for innovation.[150] I will not spend time explaining these economic points, as others have spent a good deal of effort on them. Add to these findings of normative welfare economists the findings of political economists, who argue that TRIPS is the product of industry capture,[151] and we certainly have a questionable state of affairs even from an efficiency point of view.

Part of the problem is a poverty of discourse, stemming from

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146. Doha Declaration, *supra* note 136, art. 7.

147. *Id.* art. 6

148. *Id.*

149. World Trade Organization General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (Sept. 1, 2003), http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited Apr. 21, 2006).

150. For examples of the burgeoning literature, *see* Chaudhuri et al., *supra* note 127; Michael Boldrin & David K. Levine, *The Case Against Intellectual Property*, 92 AM. ECON. REV. PAPERS & PROC. 209 (2002); Michael Boldrin & Daniel K. Levine, *The Economics of Ideas and Intellectual Property,* PROC. NAT'L ACAD. SCIENCES (forthcoming 2006).

151. The literature is substantial, but for a recent work on public choice and the proliferation of intellectual property rights generally, *see* William M. Landes & Richard A. Posner, *The Political Economics of Intellectual Property Law*, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES (2004), http://www.aei.org/docLib/20040608_Landes.pdf (last visited May 9, 2006).

the focus on property rights. The contentious compulsory licensing permissions coming from Doha are an example of how property rights arguments skew the debate. We have to talk about derogations from those rights and go through all sorts of efforts to get derogations. Furthermore, what if the pro-property rights lobby is right as to particular life-saving drugs? What if the derogations, or some of them, harm innovation in particular cases?

An intellectual property rights regime by itself is an incomplete solution. Focusing also on obligations or requirements could allow for institutional design that stimulates innovation while simultaneously providing for access to medicines in low-income countries.

1. The Rawlsian Approach

Though this article introduces a Scanlonian approach to examining the question of fairness of trade agreements, we should also examine how a Rawlsian approach might fare. Let us apply Rawls's second principle to the problems associated with intellectual property rights and affordable medicines. This second principle itself contains two principles, the fair equality of opportunity principle and the difference principle. We will not be able to come up with definitive answers because we need more empirical work, but we can put forth a framework for carrying on the analysis and reach tentative conclusions.

Here is how the analysis would proceed in determining whether TRIPS contravenes the fair equality of opportunity principle. In the context of the substantial need for affordable medicines in the low-income countries, the important question is whether TRIPS results in or contributes to over-protection of intellectual property rights. It results in over-protection to the extent that the rights that it creates and protects impair what Norman Daniels calls normal species functioning. According to Daniels, "impairments of normal species functioning reduce the range of opportunity we have within which to construct life-plans and conceptions of the good we have a reasonable expectation of finding satisfying or happiness-producing."[152] Daniels defines health care broadly. He divides heath care needs into five categories:

152. Norman Daniels, *Health Care Needs and Distributive Justice* 10 PHIL. & PUB. AFFAIRS 146, 154 (1981). *See also* NORMAN DANIELS, JUST HEALTH CARE (1985).

(1) adequate nutrition, shelter
(2) sanitary, safe, unpolluted living and working conditions
(3) exercise, rest, and other features of healthy life-styles
(4) preventive, curative, and rehabilitative personal medical services
(5) non-medical personal (and social) support services.[153]

He accepts that normal species functioning may vary across countries. For our purposes, however, the variance does not matter since the focus here is on basic health care. If over-protection of property rights in TRIPS impairs these goods or their functional equivalents, then TRIPS violates the fair equality of opportunity principle.

The focus on affordable medicines in low-income countries is on Daniels' fourth category, the availability of medical services, including access to medicines to combat HIV/AIDS, malaria, tuberculosis and other diseases common in low-income countries. To the extent that TRIPS impairs the ability of persons in low-income countries to obtain medicines of this sort, it violates the fair equality of opportunity principle. To meet the fair equality of opportunity principle, it is not required that these medicines be "free" or without cost to users. Rather, they should not be so costly as to unreasonably impair the life plans of individuals in the countries in question. In short, they should be affordable, with affordability determined based on some sort or means testing.

Though more research directly on these questions is necessary, the tentative evidence suggests that the fair equality of opportunity principle is not met in many situations in the low-income countries. Prices that are "patent protecting" make many drugs out of reach of persons in many representative groups in the low-income countries. Risking an oversimplified picture of an otherwise rich contracting and firm structure, consumers (which may be governments in countries where a public health system is the primary buyer of drugs) typically buy drugs from three kinds of sellers. First, they buy from the drug manufacturers themselves. This first avenue requires importing either from the firms who hold the patents for the drugs or from firms licensed by the patent holder to produce the drugs. Second, they import from a generic manufacturer located outside the country, who might make the drug without any license from the patent holder, a possible solution only prior to when TRIPS came into full force. Third, they could buy the drugs from producers inside their own borders, who

153. Daniels, *Health Care Needs and Distributive Justice, supra* note 152, at 158.

do not necessarily hold any license from the patent holder. India, for example, prior to bringing its patent system into compliance with TRIPS, could produce drugs cheaply and generically because it did not recognize product patents. TRIPS essentially collapses all these transaction forms into one: purchases from patent holders or their authorized producers. Doha provides some limited exceptions for compulsory licensing but it is too early to assess its effect.

The UN Millennium Project Task Force on HIV/AIDS, Malaria, TB, and Access to Essential Medicines has found TRIPS to be problematic. It describes as a barrier to the development of affordable new medicines the following:

> *(TRIPS) . . . may block access to affordable new medicines and vaccines.* After January 2005, generic production in India, the source of many vital existing medicines for developing countries without productive capabilities, will be fully subject to TRIPS provisions . . . . Concerns also exist that the August 30, 2003, decision reached by the WTO General Council concerning a waiver for TRIPS Article 31(f) (which would allow a compulsory license to be issued by the country in need and by the country that can produce the medicine for export) will be too cumbersome for developing countries to exploit . . . . Finally, the growing number of bilateral and regional trade agreements with major trading partners, such as the United States and the European Union, may often contain provisions that limit developing countries' use of existing flexibilities under TRIPS to protect public health (such as restrictive compulsory licensing conditions and parallel importation provisions, extended data protection, and requiring medicines regulatory agencies to take on national patent office oversight duties).[154]

This article provides only a sketch of how to apply the Rawlsian criteria and therefore it does not provide any sort of statistical correlation between normal species functioning and drug prices, though the connection seems clear enough for some tentative conclusions. The logic is as follows: illness is a major

154. LEACH ET AL., *supra* note 98, at 24.

reason why people in low-income countries are poor.[155] People in low-income countries are ill in large part because they cannot afford drugs to prevent or cure disease. Finally, they cannot afford drugs because of high patent protecting prices. The WHO has found:

> The consequences of this inadequacy include an enormous loss of life from preventable or treatable diseases (such as tuberculosis, pneumonia, acute respiratory infections, malaria, diabetes, and hypertension) and significant human suffering, particularly among the poor and marginalized populations of the world. The lack of access to life-saving and health-supporting medicines for more than 2 billion poor people stands as a direct contradiction to the fundamental principle of health as a human right. Illness is a major reason that the nearly poor slide into profound poverty. Illness decreases people's ability to work (be it remunerative or not). Illness orphans children and prevents them from getting the education they need. Women and children make up the majority of the poor, and their low status in many societies often means that they have even less access to medicines. Improving access to medicines must be a key component of strategies to strengthen healthcare.[156]

The WHO estimates that one-third of the world's population, about 1.7 billion people, lack access to the most basic essential medicines.[157] In the poorest countries this figure increases to one-half.[158] The WHO and the United Kingdom Department of Finance and International Development (DFID) have estimated that proper access to medicines would save about 4 million lives annually.[159] From the standpoint of burdens on worst-off groups, the poorest of the poor pay the highest out-of-pocket expenses for medicines.[160] Public sectors in developing countries cannot provide

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155. There may be a variety of other non-trade reasons contributing to poor health in low-income countries. The point here is that patent protecting prices are a major contributing reason. The literature seems clear on this point. *See supra* notes 97, 98, 126 and accompanying text.

156. LEACH ET AL., *supra* note 98, at 24.

157. *Id.* at 25.

158. *Id.*

159. *Id.*

160. *Id.* at 25.

affordable medicines reliably.[161] Medical insurance schemes cover only eight percent of the population in Africa and these schemes may not cover prescription medicines.[162] The DFID has found a "'mismatch between pharmaceutical needs in developing countries and the current nature of the global pharmaceutical market.'"[163] This mismatch is the result of two problems that relate directly to intellectual property: the inability of people in low-income countries to pay for medicines and the resulting lack of incentives for pharmaceutical firms to develop medicines for diseases that disproportionately afflict persons in the low-income countries.[164]

The current regime of global intellectual property rights also seems to violate the Rawlsian difference principle. The difference principle essentially provides that inequality must benefit everyone. As long as the primary social goods of the worst off group are increasing, inequality is fair and can continue to increase. As soon as the primary social goods of the worst off group stop increasing, then the society in question has reached the maximum inequality permitted. We can conceptualize low-income countries or people in those countries as the worst-off groups in global society. TRIPS makes people in low-income countries worse off. The current global intellectual property system, with patent protecting prices, makes the worst off groups, the poorest of the poor in low income countries, even worse off while benefiting better off groups such as pharmaceutical firms in high-income countries. Much of the empirics that would support the analysis under the fair equality of opportunity principle would be relevant in the application of the difference principle as well. The main difference in the analysis, however, would be that Rawls's analysis of the difference principle facilitates some mathematization in the form of comparisons of welfare based on the allocation of primary social goods.

The solutions to unfairness in the TRIPS regime would not differ from those suggested in the next section below. Notably, the Rawlsian fairness criteria do not specify a particular solution, but we can use them to understand the fairness of a solution. This is not a controversial point. In this sense, ethical standards do not differ from economic standards. They explain why, but not how. The "how" is up to policy makers and lawyers.

As I have stressed in this article, I have not provided a sufficiently detailed set of testable criteria for assessing TRIPS

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

using Rawlsian criteria, though I have tried to provide a sketch of the issues that need further study. The purpose of this article is facilitate the exploration of methods for assessing fairness, not in providing definitive answers in the application to a particular area.

2. The Scanlonian Approach

The Scanlonian contractualist analysis proceeds in sketch form as follows. First, to use a phrase offered by Lief Wenar, what do we owe to "distant" others?[165] The answer in Scanlon's account would be principles no one could reasonably reject. Using Scanlon's terms, we would examine objections to granting intellectual property rights in pharmaceuticals versus objections to not granting them.[166] The question may not be so binary, and it may be a question of the strength of those rights. Putting this into terms more easily understandable to lawyers, we would examine objections to patent rights versus objections to exceptions or derogations from patent rights. This gets us into examining burdens and benefits. As tentatively sketched out above, the burdens of poor health in low-income countries are substantial. On the other hand, losses to pharmaceutical companies do not necessarily follow.[167] The benefits are improved health in the populations of the low-income countries are substantial. It would seem that strong intellectual property rights are reasonably rejectable while weak (or in some cases non-existent) rights are not. Can we develop these arguments through the articulation of a principle?

Scanlon's Principle of Rescue may be relevant. He articulates his Rescue Principle for these cases: "if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so."[168] The Principle of Helpfulness, on the other hand, applies when someone else would benefit from your help, and your help would mean a slight to moderate sacrifice on your part. It would seem that the Principle of Rescue is more relevant, given the dire need for affordable medicines in the low-income countries.

I have sketched out above the burdens that TRIPS places on

165. Wenar, *supra* note 94.

166. The intellectual property right we will usually be concerned with for pharmaceuticals are almost always patents, so some places in the text will refer only to patent rights.

167. Chaudhuri, et al., *supra* note 127.

168. SCANLON, *supra* note 7, at 224.

consumers of drugs in low-income countries. Recent economic research on antibiotics in the Indian pharmaceutical market indicates that these losses may be substantial, but that profit gains to pharmaceutical firms are orders of magnitude lower.[169] Thus, it would seem that compulsory licensing or some other form of derogation from patent rights in pharmaceuticals could in certain cases result in substantial benefits to persons in low-income countries with only slight or moderate sacrifice to patent holders. The Principle of Rescue would seem squarely to apply in such circumstances.

Could we derive a Principle of Equality in Normal Species Functioning from contractualism? Recall that for contractualism a "priority of the worst off" is a "feature of certain particular moral contexts rather than a general structural feature of contractualist moral argument."[170] Contractualism, lacking a political idea of equality, makes no claims about equality or initial endowments. Therefore, we might have difficulties with strict notions of equality because they might be reasonably rejectable by some. On the other hand, some limited notions of equality will survive the Scanlonian complaint model. A limited form of equality exists in the concept of health care as a means to obtain normal species functioning at the level outlined here. The argument is that health care (which includes availability of essential medicines) "has as its goal normal functioning and so concentrates on a specific class of obvious disadvantages and tries to eliminate them."[171] The focus is not on eliminating all natural and social differences, but on eliminating natural and social disadvantages brought about by disease.

What if derogating from intellectual property rights in pharmaceuticals actually would do substantial harm to the incentive to innovate, to the point where worst off groups, and other groups, are made worse off? Some avenues nevertheless exist that would allow countries to meet the requirements of fair access to essential medicines while still preserving the rights of patent holders. The most obvious solution is donor assistance to low-income countries for the purchase of pharmaceuticals. Low-income countries tend not to have the manufacturing base to take advantage of compulsory licensing. The donor assistance approach would also avoid difficulties associated with parallel importation of generic drugs. Donors would pay patent-protecting prices. Such an approach shifts the question away from discussions of rights to

169. Chaudhuri, et al., *supra* note 127.
170. Scanlon, *supra* note 7, at 228.
171. Daniels, *Health Care Needs and Distributive Justice,* supra note 152, at 166.

health care to requirements on those able to provide assistance to provide it. In the current international legal system, no such obligations exist. Assistance is aid, and aid is charity. Scanlon provides a procedure for deriving principles that no one can reasonably reject and that helps us identify obligations and requirements. Some countries have taken steps toward creating such obligations, though these obligations remain essentially self-imposed. The United Kingdom, for example, has undertaken a purchase commitment of 200 to 300 million doses each of HIV/AIDS and malaria vaccines if such vaccines are developed.[172] One purpose for a purchase commitment is to provide pharmaceutical firms with an incentive to innovate in the area of neglected diseases, which are found in low-income countries, where affordability at patent protecting prices is a major obstacle.[173] Another possible form of obligation are trust funds, if countries could be obligated to submit funds to them.[174]

V. CONCLUSION

Developing and applying principles of fairness to global economic institutions is hard work. It would be easier simply to accept the dictates of power relations within the global economic system as a given and go from there. The limited goal of this article is to produce more reflection on alternatives to economic efficiency and other quasi-utilitarian conceptions of normativity in the international economic order, with special reference to recent work in contractualist moral philosophy. I have tried to develop a few modest insights from moral philosophy into heuristics for evaluating trade agreements. I have tried to offer an account that differs from the Sen/Nussbaum capabilities approach. The broader notion here is that my approach is an alternative to the Sen/Nussbaum approach.

We are not far along on this process, and have much to do. Until we derive and use principles rather than almost totally rely on states of affairs, we will continue to neglect the question of justice in the world trade system.

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172. Harvard University Center for International Development, *UK Chancellor Gordon Brown Announces Vaccine Purchase Commitments for HIV/AIDS and Malaria*, http://www.cid.harvard.edu/books/kremer04_strongmedicine.html (last visited May 9, 2006).

173. MICHEAL KREMER & RACHEL GLENNERSTER, STRONG MEDICINE: CREATING INCENTIVES FOR PHARMACEUTICAL RESEARCH ON NEGLECTED DISEASES (2004).

174. *See, e.g.*, Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 133 (2000).

THE BEST KEPT SECRET IN THE LAW: HOW TO GET PAID TO LIVE ON A TROPICAL ISLAND

MICHAEL J. KEYSER*

I. PSST…

I'm going to let you in on a little secret: an exotic, profound, life-changing opportunity exists to newly minted grads and experienced professionals alike. Your guidance counselor does not know about it, your local job board will never post it, and your senior partner will never tell you about it. It does not require passing another bar exam, but it does require that you bring an adventurous spirit, your swimsuit and your sunscreen. It will quite literally teach you both the practice of law and the secret to life, and, I promise, will change every perception you have ever had about the world you live in. There is little competition for positions, and the benefit package is quite attractive. Oh, and send the tasseled loafers and expensive suits to storage, because here the court decorum is flip-flops and Hawaiian shirts, even for the judges. It is working as an Assistant Attorney General for a United States insular area,[1] and I'm going to teach you how.

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1. The Department of the Interior currently considers the term "U.S. insular area" the proper appellation for all U.S. territories, possessions, commonwealths and freely associated nation-states. Dep't of the Interior, Office of Insular Affairs, Definitions of Insular Area Political Organizations, *available at* http://www.doi.gov/oia/Islandpages/political_types.htm

II. THE MEAT MARKET

In the last thirty years, the number of lawyers in our country has nearly doubled, spawning a $30-plus billion-per-year industry.[2] In fact, Dan Quayle once famously quipped, "Does America really need seventy percent of the world's lawyers?"[3] Within this saturated industry, you have thousands of career choices, but most boil down to four basic forms: (1) the big firm, (2) the small/medium/solo firm, (3) the corporation (all considered "private practice"), and (4) the government. Much has been made in legal journals of lawyer dissatisfaction in the big firm environment, and for the sake of not repeating information currently available, I will only briefly discuss it in order to better convey the message of this piece. I will not go into much detail on the positives or negatives of the corporate ("in-house counsel") position or the small/medium/solo practice, although much of the experience in those environments can be equally applied to this discussion.[4] What this article will explain is why this particular form of government employment — an Assistant Attorney General for a U.S. insular area — is so personally and professionally rewarding and why it is so unknown to most of the legal community.

There is absolutely no question that the large law firm first-year associate position (the "big firm job") is the most coveted and sought-after opportunity one can obtain upon graduation of law school; therefore, we shall use it as our benchmark against which all else is measured. Virtually every law student on the planet has envisioned his- or herself at one time or another as Mitch McDeere, from John Grisham's 1991 novel *The Firm*: being offered a six-figure salary, a low interest mortgage, two country club memberships and the keys to a brand new BMW.[5] However, at

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(last visited Apr. 7, 2006). The term "possession" is no longer correct usage. *Id*. All U.S. insular areas are further discussed in Section IV of this article.

2. Alex M. Johnson Jr., *Think Like A Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1240 (1991) (asserting that the practice of law is "radically changing" from a profession to a "billion-dollar business [in which money is the] only measure of success").

3. Contrary to Mr. Quayle's assertion, it turns out that "the United States has somewhere between 25% and 35% of the world's lawyers." Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 912 (1996).

4. A colleague and close friend in my office recently sold his own small practice to join the Office of the Attorney General of American Samoa. His practice, which included support staff and a few associates, was highly successful. However, he chose to make the move for the same reasons associates leave big firms: not enough personal time, high stress and unbearable client demands.

5. Remember, you pick the color. *The Firm* was also made into a major motion picture by Paramount in 1993. With an all-star cast including Tom Cruise as Mitch McDeere, *The Firm* became one of the biggest box office draws of 1993 and one of the top rental movies in history. THE WORLD ALMANAC AND BOOK OF FACTS 1995, at 301 (1994).

what price do the trappings of material wealth come? And what then can U.S. insular areas offer that would make them more attractive than the prospect of astronomical riches? To answer those questions, we must first analyze the large law firm model.

Large firms prospered in the go-go 1980s[6] and dot-com 1990s, contributing to a proliferation of law firms of massive size.[7] Take for example the prominent Midwest firm Piper Rudnick. As recently as 2004, it negotiated two mammoth mergers, making it one of the largest law firms in the world. After first joining hands with Silicon Valley's Gray Cary Ware & Freidenrich, LLP, Piper Rudnick merged with the United Kingdom-based firm DLA. The resulting behemoth, DLA Piper Rudnick Gray Cary, LLP, "is now the third largest law firm in the world, with over 2,800 attorneys" and annual revenues of over $1 billion.[8] Moreover, consider Skadden, Arps, Slate, Meagher & Flom, LLP, a New York firm with offices in most of the world's major markets. In 1989, it recorded annual revenues of $290 million, making it, at that time, the largest law firm in the U.S. in terms of revenue.[9] For at least nine years since then it has carried that title, becoming the first U.S. firm to exceed the $1 billion mark in annual revenue.[10] This aggressive growth and lust for profitability inevitably comes at a price to someone, and in this case it is the Mitch McDeere of the world who pay dearest — with their time.[11]

Lawyers in large law firms are among the least happy in the entire profession, and without question, "the single biggest complaint among attorneys is increasingly long workdays with decreasing time for personal and family life."[12] This is due in large part to the fact that, in order to be ultra-profitable, law firms structure themselves as sweatshops where the young associates work grueling hours to line the pockets of the senior partners.[13] Though you might rationalize that the window office and the big

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6. Martha Slud, *Scams, Scandals and Swindles: A Look at the Seamy Side of the 20th Century*, CNN MONEY (Dec. 29, 1999), *available at* http://money.cnn.com/1999/12/29/ investing/century_greed.

7. *See* Johnson, *supra* note 2, at 1240.

8. Vera Djordjevich, THE VAULT GUIDE TO THE TOP CHICAGO AND MIDWEST LAW FIRMS, *available at* http://www.vault.com/bookstore/book_preview.jsp?product_id=25652 (last visited February 8, 2006).

9. *See* Johnson, *supra* note 2, at 1241.

10. Skadden, Arps, Slate, Meagher & Flom, WIKIPEDIA, http://en.wikipedia.org/wiki/ Skadden,_Arps,_Slate,_Meagher_&_Flom (last visited May 15, 2006).

11. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 889 (1999) (asserting that "the single biggest complaint among attorneys is the increasingly" long hours they are required to work).

12. *Id.*

13. *See* Johnson, *supra* note 2, at 1250 (asserting that "law firms may have become legalized Ponzi schemes").

salary are worth the price of your time, you will more often than not find that the work will become monotonous, you will never see your family, you will consider your life wasted, and you will seriously question your decision to go to law school.[14]

Let's assume you work in a firm that requires a billable rate of 2,000 hours per year.[15] To satisfy this requirement, you will have to be in the office working sixty hour weeks and will not be able to take any more than two weeks of annual or sick leave.[16] Assuming an average commute time of forty-five minutes, you will most likely wake up at 6:45 a.m. and arrive at the office around 8:30 a.m. You will sit down at your desk and work until 6:30 p.m., without taking a lunch, and arrive home at approximately 7:15 p.m. You will do this every day, six days per week, for many years.[17] This is in theory. Practically, it is impossible to keep up this kind of grueling schedule, let alone bill eight hours in one day.[18] You will inevitably need to take a break for lunch, talk to at least one human being in your office each day, get a cup of coffee, or run a personal errand.[19] Ultimately, this means that you will need to work longer days and go into the office on Sundays, leaving at most a week's vacation per year, if any.

Your initial response is that the pay is worth the sacrifice. What happens, though, if you can't spend your money and enjoy those material benefits because you are always working? It is simple: you will stop enjoying your life. Remember: every hour that you spend at your desk is an hour you do not spend on the golf course, at the beach, at the movies, at the gym, with your significant other, with your kids or with your friends.[20] When your friends invite you for lunch, although you will be wealthy enough to buy their meals, you will rarely have time to join them. When your friends invite you to the movies, you will no doubt be forced to turn them down. No amount of pay compensates for this kind of stress and lifestyle, and very few people have the kind of pain

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14. *Id.* (asserting that many attorneys are learning that the glamorous big firm job they envisioned is actually less glamorous and "downright trivial and boring").

15. Generally speaking, the minimum billable requirement in all law firms is just a threshold level allowing you to keep your job. If you wish to be judged favorably by the partners and ultimately considered for partnership, you will need to bill significantly more than the firm minimum, which equates to significantly more time behind your desk.

16. *See* Schiltz, *supra* note 11, at 894.

17. *Id.* at 894-95.

18. Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61, 62 (1996) (asserting that it is impossible to bill seven and a half hours in one day).

19. *Id.* (asserting that there will be outside influences and distractions that reduce your available time for billing).

20. *See* Schiltz, *supra* note 11, at 895 (asserting that every hour spent at a desk is one less hour to do many things that give life meaning).

threshold to endure this on a long term basis. I hereby pose this question to you: when you are old and gray will you look back on your life and remember the hundreds of hours spent in a sterile office typing in front of a computer, or will you remember the two years you spent working and living on a tropical island in the South Pacific?

Associates in big firms "live to work;" Assistant Attorney Generals for insular areas, all of which are tropical islands, "work to live."[21] I will show you that this type of employment will allow you to live richly but simply, to receive practical, meaningful legal experience in and out of the courtroom, to travel the world and pursue personal interests of your choosing. If money is your biggest motivator, I will prove to you that financially, being a big firm first year associate or an Assistant Attorney General is nearly a wash.

III. LIVING "THE LIFE" ISLAND STYLE: AMERICAN SAMOA

I can only speak from experience in describing daily life as an Assistant Attorney General for an insular area and therefore the discussion in this section will apply directly to my employment within the American Samoa Office of the Attorney General.[22] I cannot conclusively say whether my experiences living in American Samoa and working at the Attorney General's Office are similar to experiences of other Assistant Attorneys General ("AAGs") in other insular areas. However, I have spoken to former AAGs, and many have had similar experiences to those described herein.[23] Other American Samoa Government ("ASG") departments and agencies hire off-island attorneys directly, and a vast majority of my experiences can be similarly applied as well.[24]

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21. *Id.* at 890.

22. American Samoa Government, Department of Legal Affairs, at http://www.asg-gov.net/LEGAL%20AFFAIRS.htm (last visited February 22, 2006).

23. A colleague and friend of mine, who provided much of the impetus for my own journey to the South Pacific, was formerly an associate at McCully, Lannen, Beggs & Melançon in Maite, Guam while his wife worked at the Office of the Attorney General. In comparing my experiences in American Samoa to our many discussions of their experiences in Guam, I have come to realize that there are only minor differences. In short, Guam is more developed, has more tourism and better public beaches. American Samoa on the other hand is significantly more rural, has fewer public beaches, but is located in an (arguably) better geographic area in terms of travel opportunities.

24. Other ASG departments and agencies currently employing attorneys include the Public Defender's Office, the Department of Commerce, and the Tax Office. The American Samoa Environmental Protection Agency is currently seeking an in-house counsel.

Someone once said of American Samoa that "[t]he ocean is so blue, the sky is jealous."[25] Picture this: coconut trees hang over beaches of fine white sand. Warm, inviting crystal blue water shimmers in the midday sun. Lush jungle rainforests blanket stunning mountain peaks plummeting precipitously into the ocean. Schools of colorful fish dance over giant expanses of coral reef. Such are the wonderful realities of working and living on a tropical island. They can be yours.

However, I will warn you now that moving to American Samoa, and every insular area, requires a serious decision, serious sacrifices and a serious effort; it is not as simple as snapping your fingers and settling into the lazy dream vacation often conjured from images on postcards. The World Bank considers five of the eight U.S. insular areas, including American Samoa, to be "developing countries," and as such, your daily life will most certainly not be the same as it is now.[26] You will not have the twenty-four-hour supermarkets, multiplex movie theaters, freeways, restaurants and sometimes even traffic lights that you have grown accustomed to enjoying. Within your first few days after arrival, you will repeatedly second-guess your decision to leave the luxuries of urban and suburban life behind. With all rewards come sacrifices, and you will be forced to make them. Fully appreciating this type of exotic employment experience requires a personal resolve to focus on the positive aspects of island life and minimize the relative poverty and lack of modern conveniences. At rush hour, there will most likely still be gridlocked traffic, except you will have swapped the smog-filled city for the palm tree paradise. Island life means sometimes bypassing the grocery store for a roadside produce stand, and even then not always finding every ingredient you need. You will not find a Best Buy, except maybe on Guam, and your internet will not be as fast. If you have made the commitment to move to a US insular area, though, you should really be in the ocean instead of the shopping mall anyway.

Being an AAG for a U.S. insular area means more time for yourself and for your family. Your frenetic, high-paced and overscheduled former life will seem like ages ago, and you will quickly settle into the pleasant, easygoing lifestyle of the islanders. It is the time and the place to slow down and spend valuable time ex-

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25. Ted Miller, *Talented Players From Tiny American Samoa Are Changing the Face of Football*, SEATTLE POST-INTELLIGENCER (August 31, 2000), *at* http://seattlepi.nwsource.com/cfootball/samo29.shtml.

26. Guam, Puerto Rico and the US Virgin Islands are not on the list. *See* The World Bank, Data and Statistics, Country Groups, *at* http://web.worldbank.org/WBSITE/ EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited February 22, 2006).

periencing the fullness of life: exploring tide pools, connecting with friends and loved ones, swimming in the ocean, buying fresh produce, hiking in the jungle, strumming a guitar, and generally enjoying your surroundings.

A. The Lifestyle

Let's compare the lifestyle of an AAG in American Samoa with that of a big firm associate, as I discussed above. You will wake up around roughly the same time as an associate in a large law firm (7:00 a.m.), but for most of the year the sun will be shining and the palm trees outside your house will be swaying to the gentle breeze of the tropical trade winds. You will put on your *ie faitaga*[27] and a short-sleeve Hawaiian shirt, grab your cup of coffee, and throw on your sunglasses. As you step outside, the sweet tropical air will surround and overwhelm you, as if you were stepping into a candy factory. The drive to work, which snakes along the southern coast of the island, will take you approximately twenty-five minutes and will provide you with the breathtaking scenery of crashing waves, which I can assure you is impossible to become desensitized to.

You will arrive at the office between 8:00 and 8:30 a.m., at which time every staff member — all Samoan — will go out of their way to greet you and offer you a fresh pastry or cup of coffee. Depending upon your daily calendar, you will either then head to the courthouse or will retire to your office to handle the myriad of legal issues consistently presented to you. Around noon, your coworkers, who are also your close friends, will seek you out for lunch, and as a group you will head out to either the Yacht Club at Pago Harbor or to the Sadie Thompson Inn for fine dining, while coworkers place cellular calls to those in court seeking them for the lunch siesta. After lunch, you will return to court or to your office rested, relaxed and ready to tackle the challenges of the afternoon. At around 4:00 p.m., the entire American Samoa government shuts down, and unlike your big firm counterpart, you are under no obligation to burn the midnight oil. You will get back into your vehicle for the return drive along the coast, arriving at home around 4:30 p.m. with enough time to head to the gym, go for a quick swim or simply relax on your couch. You will repeat this scenario every day, except for the five weeks of paid vacation you are allowed to take at virtually any time, whereupon you will visit places like

27. A traditional and formal Samoan lower-body wrap worn in lieu of pants. It is usually made out of suit or dress pant material and contains side pockets and a belt strap with a buckle. In the extreme humidity of the South Pacific, it is a necessary and welcome replacement to pants.

New Zealand, Fiji, Australia, and Tahiti. This does not include any short weekend getaways you might take to places like Apia or Ofu — a small island in the Manu'a chain of American Samoa and home to one of the top beaches in the United States, if not the world.[28]

Weekends will be spent snorkeling at the Blue Hole, a coral reef paradise filled with tropical fish comprising roughly three football fields, hiking out to Palagi Beach, an untouched coconut tree-lined white sand beach, or driving to the top of the Afono Pass for a stellar view of both Pago Harbor and the vast expanse of the Pacific Ocean. Every so often, you might take a day trip by small ferry to Aunu'u, a small island off the coast of Tutuila that is home to a fiery red quicksand lake and Ma'am'a Cove, a breathtaking volcanic rock inlet of crashing waves.

Your salary will be approximately $40,000 per year, which with the standard local income tax deduction equates to a net take-home pay of about $3,000 per month.[29] After paying your rent, you will be left with $2,900 to put towards utilities and expenses. Water, sewer and electricity will run you about $200 per month. You will have no need for a cellular phone plan. Because you drive such short distances, you will only need to fill up the tank, at most, twice a month at a total cost of $80. The vehicle you drive is dictated by the island's conditions. With 200 inches of annual rainfall, the island roads are prone to flooding and potholing, which means a pickup truck is your optimum vehicle choice (this is not taking into account any off-road tracks you might maneuver). A decent used pickup will run you around $12,000 and will hardly lose its value, equating to a car payment of about $256 per month.[30] This wraps up your monthly expenses, leaving you with $2,364 for monthly spending.

Let's compare that to the salary of a first year associate at a large law firm. Your salary will be approximately $98,000 per year, which breaks down to a net monthly salary of about $6,000, not including state income tax. Your modest single-family home

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28. Jenn Plum, *All Time Best Beaches, Ofu Beach, American Samoa*, Travel Channel, http://travel.discovery.com/convergence/beachweek/ofubeach.html (last visited May 15, 2006). Interestingly enough, Ofu beach is part of the United States National Park Service, http://www.nps.gov/npsa/pphtml/nature.html (last visited May 17, 2006).

29. American Samoa's minimum income tax rate is 4%. *See* American Samoa Individual Income Tax Return Form 390. Based on the 2000 IRS tax table, which is currently in use in American Samoa, your effective income tax rate will likely be around 8%.

30. This assumes you do not just pay cash and buy the truck outright. If you do, you could likely resell it at the end of your contract for the same price you paid, rendering your use of the truck over the life of your contract almost free. The loan calculation is based on assuming the overnight interest rate on a 48-month auto loan on February 10, 2006 at 6.5% with 10% down. Auto Loan Calculator *available at* http://www.bankrate.com.

near the city will run you approximately $374,000.[31] Assuming you have good credit and obtain a standard 30-year mortgage at an interest rate of 5.41%, and make a down payment of 20%, your monthly mortgage will likely run you about $1,760, leaving you with $4,240 in net pay.[32] Being a big firm lawyer, you will work long hours, beyond the public bus' scheduled route. Therefore, you will be forced drive to work every day (assuming you live near the city and not in the suburbs, where you will also have no choice). Because you are making such an enormous salary you will want to drive something respectable, so you purchase a modest, pre-owned BMW 325i for $30,000.[33] Your monthly car payment will be $640, reducing your monthly net income to $3,600.[34] You will drive much greater distances than you would on a small tropical island, spending in excess of $100 more per month on gasoline, not to mention the monthly parking fee at your office building of $250. Your water, sewer, electricity, garbage, and gas bills will run you about $450, and you can't be an attorney without a cellular phone, which will run you about $120 per month for a basic plan. After all these expenses, your disposable income will be $2,680. All of this is not taking into account the added stress to your life as you are required to administer to these painful details, constantly knowing that you must consistently bring in a high salary to meet the expensive demands of your life.[35] Is the money still worth it?

B. The Culture

Living in a U.S. insular area means learning about, and being immersed in, a new culture and society in which you are the minority. In American Samoa, life centers around both the village and the family (the '*aiga*).[36] A Samoan village can be made up of several households, each of which is presided over by a chief (a *ma-*

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31. In my hometown of Seattle, Washington, $374,000 is the median home price of a single-family home. Elizabeth Rhodes, Washington Home Prices Rose Fastest in Skagit County, THE SEATTLE TIMES (Jan. 28, 2006), *at* http://seattletimes.nwsource.com/html/ realestate/2002766822_appreciation29.html?syndication=rss.

32. Interest rate is based on standard 30-year fixed mortgage and is the current average rate for February 10, 2006. Mortgage calculator *available at* http://www.bankrate.com.

33. *See* Auto Loan Calculator, *supra* note 30 (assuming the same interest rate, term and down payment). BMW 325i pricing *available at* http://www.bmwusa.com/CPO/cpomain.htm (last visited February 22, 2006).

34. Auto Loan Calculator *available at* http://www.bankrate.com/brm/auto-loan-calculator.asp.

35. Also known as the "golden handcuffs."

36. LOWELL D. HOLMES, QUEST FOR THE REAL SAMOA: THE MEAD/FREEMAN CONTROVERSY & BEYOND 38 (1987), *quoted in* Daniel E. Hall, *Curfews, Culture and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to the U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 71—72 (2001).

tai).[37] Each village has between ten and fifty *matais* of various ranks and importance.[38] Within each village, every household is represented by a chief who represents their interests as a member of the village council (the *fono*).[39] The village council is responsible for administering law and order.[40] The leader of the *fono* is called the *ali'i*.[41] The *ali'i* is considered far too important a person to discuss other people's problems, and therefore he is represented by a talking chief (a *tulafale*).[42] "The *tulafale* acts on behalf of the *ali'i* at social occasions, ceremonies and in discussions with other" village bodies.[43] Samoans have great respect for oration, so the *tulafale* almost always has an imposing figure and a masterful command of the Samoan language.[44] Samoans take the *matai* system very seriously — so seriously, in fact, that the unauthorized use of a *matai* title is a class B misdemeanor.[45]

The Samoan village is a significantly different political and geographic construct than a person from the U.S. might envision.[46] Samoans view their social and family lives through two lenses: their '*aiga* and their village.[47] Being part of a group is of the utmost importance to Samoans and therefore the village takes on much greater significance.[48] Young men without *matai* titles, called the "*aumaga*," and unmarried girls, called the "*aualuma*" are expected to expend their efforts towards improvement of the village. They also are expected to participate in '*aiga* and village social activities.[49] The *aumaga* police their villages under the direction of the village *matai*, and their organization reflects the organization of the *matais* in the *fono*, in that the young men learn to prepare and deliver speeches, learn to conduct themselves with the gravity and decorum befitting of a *matai*, and plan and execute group enterprises.[50]

Although U.S. materialism and individuality is rapidly spreading on the island, the traditional sense of property, both personal and real, is communal; "[o]ver ninety percent of all land is com-

37. *Id.*
38. *Id.*
39. Samoan Sensation, *Matai*, *at* http://www.samoa.co.uk/matai.html (last visited May 15, 2006).
40. *See* Hall, *supra* note 36, at 71—75.
41. Samoan Sensation, *supra* note 39.
42. *Id.*
43. *Id.*
44. *Id.*
45. American Samoa Code Annotated [§ 1.0414 (2005) [hereinafter ASCA].
46. *See* Hall, *supra* note 36, at 72—73.
47. *Id.*
48. *Id.*
49. *Id.*
50. *See* HOLMES, *supra* note 36, at 56.

munally owned, and attempts to return privately held lands to communal status continue today."[51]

C. Employment

The American Samoa Government hires attorneys on a contract basis when no qualified eligible individuals exist on the island.[52] Practically speaking, because no law school exists on the island, and there are few, if any, unemployed native Samoans with a bar license, every attorney is recruited from the United States on an employment contract with the ASG.

The Office of the Attorney General is a division of the Department of Legal Affairs ("DLA"), which is headed by the Attorney General.[53] The DLA also consists "of the Office of Immigration, the Office of the Territorial Registrar, and the Office of Weights and Measures."[54] Within the Office of the Attorney General exists the Bureau of Consumer Protection, with the statutory authority to investigate consumer complaints and initiate civil actions, including class actions, on behalf of the consuming public.[55] The Bureau's director also has the authority to issue subpoenas and appoint investigators who have full police powers.[56] The Office of the Attorney General can be contacted at P.O. Box 7, Pago Pago, AS 96799.[57]

A similar employment contract is executed by all AAGs. You are required to make a two-year commitment, although you are free to break your contract at any time with only minor repercussions.[58] The government will furnish coach class commercial air transportation for you and your dependents to American Samoa.[59] It will also provide you with a shipping allowance for your household goods.[60] If you satisfy the terms of your contract, the fulfill-

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51. *See* Hall, *supra* note 36, at 72.
52. ASAC § 4.1001 (2005).
53. *See* American Samoa Government, Department of Legal Affairs, *supra* note 22.
54. *Id.*
55. ASCA § 27.0402 (2005).
56. ASCA § 27.0402(b) (2005).
57. The telephone number is 684-633-4163; the facsimile is 684-633-1838. *See* American Samoa Government, Department of Legal Affairs, *supra* note 22.
58. The sole consequence to "breaking your contract"—in other words, leaving early—is that if you leave after one year, your return voyage and shipping expenses will not be covered by the government. If you leave within the first year, you may be required to reimburse the government for your original travel costs and shipping stipend to the island.
59. ASAC § 4.1004(a)(1) (2005).
60. ASAC § 4.1004(a) (2005). Under my contract, I received $1,300 in reimbursed shipping expenses. It should be noted that the stipend acts as a reimbursement. If you do not spend your full allotment, you will not receive your full amount. In sum, you must show proof of your shipping expenses, and you will only receive reimbursement up to the contracted amount.

ment of a two-year obligation, the ASG will furnish transportation for you and your dependents to a return destination in the United States.[61] It will again provide you with an identical shipping allowance to send items home.[62]

You will be provided with a government-owned and subsidized single family home, apartment or townhouse, or if none are available, a housing allowance to be applied towards a private residence. Rent obligations will seem ridiculously low: to wit, your rent for a one-bedroom single-family home is $100 per month. While the conditions are by no means fancy, they are comfortable. Your vacation package will be more generous than anything you might receive as a big-firm associate: you will receive approximately five weeks of paid vacation per year.[63] Finally, you and your dependents will be entitled to medical and dental services furnished by the Lyndon B. Johnson ("LBJ") Tropical Medical Center (LBJ).[64] If you contract an illness that requires you to go off-island, your employment contract provides that LBJ will be responsible for covering the costs of treatment, including medivac, if necessary.

At the expiration of your contract, you may request — or your employer has the option to offer — a renewal on your contract.[65] Upon renewal, you will receive a cash bonus of $1,000.[66] You will also receive a round-trip economy class ticket for you and your dependents to take a trip home or elsewhere within the United States.[67]

The nature of the position seems to attract genuinely interesting, adventurous individuals, which in turn makes for a very lively and interesting legal ex-pat community in the office. Having left substantially similar employment environments and with very few *palagis* on the island and none of the pressures of mainland billable hours, the bonds formed among ASG attorneys tend to be some of the strongest you will ever form.

The Office of the Attorney General is divided into two divisions, criminal and civil, with the criminal division comprised of six attorneys and the civil division currently housing just two attor-

61. *Id.*
62. *Id.*
63. ASAC § 4.1005(a) (2005).
64. ASAC § 4.1006(a) (2005).
65. ASAC § 4.1004(f) (2005).
66. ASAC § 4.1004(f)(1) (2005).
67. ASAC § 4.1004(f)(2) (2005). Some restrictions do apply. You may be required to pay the difference for airfare to a destination beyond your original point of hire. However, this may be negotiable with your employer.

neys.[68] Criminal attorneys appear in both the district and High Court, and handle all prosecutions on the island, from minor misdemeanors to class-A felonies. Civil attorneys handle both litigation and transactional law for all government departments and agencies. They negotiate and prepare all government contracts, interpret and provide legal advice on American Samoa law, and appear in court both as civil prosecutors and defense counsel. For example, I currently perform a myriad of duties. In addition to providing legal advice to a dozen government agencies, I defend the government in civil litigation, including drafting pleadings, dispositive and pretrial motions, conducting and responding to interrogatories and depositions, and appearing at trials and appeals.[69] The opportunities for interesting practical experience abound.

American Samoa presents a unique legal environment for mainland attorneys to practice in. Unlike the U.S., it does not have as rich a common law history to fall back upon. Therefore, a government attorney is free to cite to any federal or state jurisdiction for legal precedent. Perhaps the most interesting outcome of combining the American common law legal system with traditional Samoan culture is codification of the traditional *matai* title system. Replacing an ancient traditional system, the American Samoa Code requires persons to register their *matai* titles with the Territorial Registrar's Office, similarly to the registration of real property.[70] A Samoan is qualified to obtain and register a title only if he or she meets certain stringent elements: "he must be of at least one-half Samoan blood, he must have been born on American soil, he must be chosen by his family for the title, and he must live with Samoans as a Samoan."[71] A claim of succession to a *matai* title must be accompanied by a petition signed by twenty-five blood members of the title claimed, along with a certificate from the chiefs of the village to the effect that the title is an old and traditional title of the Samoan people.[72] Before taking effect, notice must be given by a posting on the High Court bulletin board and

68. At the time of publication, there is talk around the office that as many as four additional attorneys may be hired, increasing the total number of attorneys to ten.

69. Currently, the departments and agencies I represent include the Territorial Office of Homeland Security ("TOHS"), the Lyndon B. Johnson Tropical Medical Center, the Office of Procurement, the Department of Human Resources, the Department of Education, the Department of Port Administration, the Department of Human and Social Services, the Department of General Administration, the Department of Parks and Recreation, the Department of Treasury, Customs, and the American Samoa Community College. I also advise the Commerce Commission and the Territorial Planning Commission.

70. ASCA § 1.0401 (2005).

71. ASCA § 1.0403 (2005).

72. ASCA § 1.0405 (2005).

two other public places.[73] To contest the registration of a *matai* title, a person must be a resident of American Samoa for one calendar year immediately preceding the date of objection, and must obtain a petition signed by no less than twenty-five persons related to the title by blood.[74] The High Court of American Samoa is vested with the authority to decide matters of title, and a special division of the High Court exists for this purpose: the Matai Titles Division.[75] In the trial of *matai* title cases, certain considerations are listed in order of importance to guide the High Court's decision.[76] They are: the best hereditary right, with male and female descendants of equal value in families where this has been customary, otherwise male descendants prevail over females, "the wish of the majority or plurality of those clans of the family as customary in that family, the forcefulness, character and personality of the persons under consideration for the title, and their knowledge of Samoan customs; and the value of the holder of the title to the family, village, and country."[77]

An AAG defends the Territorial Registrar on claims of improper registration of *matai* titles, a recognized cause of action against the ASG. However, private lawsuits over *matai* titles occur more frequently than title lawsuits against the government, and as a result, a rich and interesting common law has developed from the original statutory framework.[78] For example, in *In re the Matai Title "Tuiteleleapaga,"*[79] the court weighed the relative value of the "*Sotoa* rule," a *matai* title rule created entirely from common law. The *Sotoa* rule, as established in *In re the Matai Title "Sotoa,"*[80] stands for the principle that blood relationship in the candidate's genealogy is calculated to the original titleholder, rather than to the nearest titleholder.[81] The Appellate Division of the

73. ASCA § 1.0406 (2005).
74. ASCA §§ 1.0404, 1.0407 (2005).
75. ASCA § 1.0409 (2005).
76. ASCA § 1.0409(c) (2005).
77. *Id.*
78. The wish of the majority of the clan is measured by consensus rather than a mere numerical majority. *In re the Matai Title "Le'aeno,"* 24 A.S.R.2d 117 (1993). Factors to consider regarding the consideration of forcefulness, character, personality and knowledge of Samoan customs are leadership ability, honesty, education, public service, involvement in church and village affairs and previous experience as a *matai*. *Id.* Village, county and district councils do not have authority to veto the court's decision, and the court is not required to take into consideration the views of the village, county or district councils in making its decision. *In re the Matai Title "Sotoa,"* 8 A.S.R.2d 10 (1988). Age is a factor in determining the consideration of knowledge of Samoan ancestry, but is not a guarantee of supremacy. *In re the Matai Title "Tuaolo,"* 28 A.S.R.2d 137 (1995).
79. 15 A.S.R.2d 90 (1990).
80. 8 A.S.R.2d 10 (1988).
81. Calculating blood relationships of candidates to the nearest titleholder is referred to as "the traditional rule." The *Tuaolo* court held that the use of the Sotoa rule is inappropri-

High Court had criticized the *Sotoa* rule in several cases[82] stating that it might be of value in cases in which the particular family's tradition was to rotate the *matai* title among different branches of the family.[83] The Court ultimately dismissed the use of the *Sotoa* rule in favor of the traditional rule because it favored the claimant's position and "would do nothing to address the issue raised by [the objector]."[84]

Beyond defending the Territorial Registrar, an AAG handles a wide array of legal issues, and has the fantastic opportunity to plan and carry out his or her own civil litigation strategies, sometimes setting important legal precedents along the way. *Aga v. U.S. Secretary of the Interior, et. al.*[85] involved a medical malpractice claim brought against the LBJ Medical Center, among other parties.[86] In his motion to strike, the AAG argued that the remedy provided under the government's tort liability act is exclusive, and therefore, the plaintiff could only proceed against the American Samoa Government in its sovereign capacity.[87] In granting the motion, the court cited off-island cases that held that without express statutory or constitutional language, a government department or agency cannot sue or be sued.[88] The court reasoned that simply naming a government agency does not create a separate identity from the sovereign entity, and therefore, LBJ must be dismissed from the case.[89] In this case, the AAG was given — and maximized on — an opportunity to establish a legal precedent. No longer was it possible for money hungry plaintiffs to file suit and obtain judgments against individual government agencies. The effect of the holding under this case is that individual departmental budgets are shielded from liability, leaving either a legislative appropriation or the general fund as payment sources.

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ate when candidates do not agree on the identity of the original titleholder or any other common ancestor. *In re the Matai Title "Tuaolo,"* 27 A.S.R.2d 97 (1995).

82. *In re Matai Title "Le'iato,"* 3 A.S.R. 133 (1986); *In re Matai Title "La'apui,"* 4 A.S.R.2d 7 (1987); and *In re Matai Title "Tauaifaiva,"* 5 A.S.R. 2d 13 (1987).

83. 15 A.S.R. 2d at 91.

84. 15 A.S.R. 2d at 92.

85. 3 A.S.R.2d 103 (1986).

86. As referenced earlier, the LBJ Medical Center is a quasi-governmental agency. Originally a division of the Executive branch, it is now self-funded and self-governed by a board of directors. However, it continues to rely upon the Office of the Attorney General for legal advice and representation. Plaintiff additionally brought suit against the American Samoa Government, Dr. Claude Dalton Jagh, as well as the United States Secretary of the Interior.

87. *Id.* at 130.

88. *Id.* at 130—31.

89. *Id.*

You will provide legal advice to various government boards and commissions,[90] advise all government agencies, and defend the interests of the government in litigation. You might also bring suit to recover funds or enforce governmental rights. The autonomy and wealth of experiences provided to you make it one of the most rewarding legal positions you will ever have.

IV. THE UNITED STATES INSULAR AREAS

Now that we've discussed daily life as an AAG, the next step is to explain in detail the employment opportunities available. American Samoa is just one of many insular areas. The following section will discuss all of the U.S. insular areas, provide employment information and will give you contact information for each respective Attorney General's Office.

United States insular areas are rarely discussed in the mainstream media and therefore are seldom understood by the majority of Americans; in fact, they are exotic tropical worlds hundreds of miles away. The current collection of U.S. insular areas was almost entirely acquired for strategic military reasons, but the system itself owes much of its roots to the colonial system established by the British Empire.[91] The British colonial system was comprised of five levels of autonomous nation-states in much the same fashion as the U.S. territory system.[92] The attempt by our founding fathers to improve upon such a system left us with a complex and confusing lexicon of territory terminology, baffling to even the most experienced attorney. The terms sound more like something a corporate counsel needs to know than an international lawyer. Insular areas can be incorporated or unincorporated, organized or unorganized. Alas, we are not finished: insular areas can also be possessions, commonwealths, dependencies, protectorates or freely associated states. No matter how you slice it, it can be confusing.

A United States insular area "is neither a part of one of the fifty states nor is it a part of the District of Columbia."[93] The word "insular area" is the generic term used by the U.S. State Department to refer to any commonwealth, freely associated

90. Such as: the Commerce Commission, the Territorial Planning Commission, and even the Cosmetology Board.

91. The Green Papers, *The Official Name and Status History of the Several States and U.S. Territories, an Explanation*, http://www.thegreenpapers.com/slg/explanation-statehood.phtml (last visited May 15, 2006) [hereinafter The Green Papers].

92. The British colonial system consisted of (1) Crown colonies, (2) Representative governments, (3) Responsible governments, (4) Internal self-governments, and (5) Dominion status. *Id*.

93. Insular Area, WIKIPEDIA, http://en.wikipedia.org/wiki/Insular_area (last visited May 15, 2006).

nation-state, possession, territory, dependency, or protectorate, however, it must be noted that the term "possession," while once was a common moniker, is no longer current colloquial usage.[94] The terms "possession," "territory," "dependency" and "protectorate" are virtually indistinguishable. Residents of insular areas are either U.S. citizens or U.S. nationals.[95] They do not pay American federal income tax and cannot participate in U.S. presidential elections, nor can they cast votes for voting members of the U.S. Congress.[96] Interestingly enough, yet not surprising, goods manufactured in insular areas of the United States can be labeled "Made in the USA."[97]

A. To Organize or Unorganize, that is the Question

Whether an insular area is organized or unorganized depends upon whether Congress has in essence "organized" it into a self-governing unit by enacting an organic act.[98] While some organized insular areas now have constitutions of their own, the organic act was meant to substitute for such a document while retaining ultimate authority over the insular area.[99] The distinction between organized and unorganized insular areas draws its roots from the early nineteenth century, when the term "unorganized" was used to refer to the enormous territory in the Great Plains prior to it being organized into smaller territories.[100] The first organized "territory" in the history of the United States was the Northwest Territory, which was organized in 1787.[101] While use of the term "organized" once connoted a prelude to statehood, it is now generally only a classification for U.S. territories.[102] There are currently

94. *Id*. *See also* Dep't of Interior, Office of Insular Affairs, *supra* note 1.

95. A U.S. national is an "individual who owes his sole allegiance to the United States." Internal Revenue Service, Immigration Terms and Definitions Involving Aliens, http://www.irs.gov/businesses/small/international/article/0,,id=129236,00.html (last visited May 15, 2006). It includes all U.S. citizens, but also includes individuals who are not US citizens. *Id*. U.S. nationals cannot vote or hold elected office in the United States. 8 U.S.C. § 1408 (2006).

96. *See* WIKIPEDIA, *supra* note 93.

97. *Id*.

98. *See* Unorganized Territory, WIKIPEDIA, http://en.wikipedia.org/wiki/Unorganized_territory (last visited May 15, 2006). *See also* Dep't of the Interior, Office of Insular Affairs, *supra* note 1 (An "organic act" is the body of laws that the United States Congress has enacted for the government of a United States insular area, and usually includes a bill of rights and the establishment of a framework for the local tripartite government).

99. See Organized Territory, WIKIPEDIA, http://en.wikipedia.org/wiki/Organized_territory (last visited on May 15, 2006).

100. *See* WIKIPEDIA, *supra* note 98.

101. The Northwest Territory comprised what is now Ohio, Indiana, Illinois, Michigan, Wisconsin and the eastern part of Minnesota. Northwest Territory, WIKIPEDIA, http://en.wikipedia.org/wiki/Northwest_Territory (last visited May 15, 2006).

102. *See* Organized Territory, *supra* note 99.

two organized U.S. territories: Guam and the United States Virgin Islands.[103]

A commonwealth is a special type of organized United States insular area, which has established with the federal government a more highly developed relationship that is usually embodied in a written mutual agreement.[104] Currently, two United States insular areas are commonwealths: the Commonwealth of the Northern Mariana Islands and Puerto Rico.[105]

Conversely, an unorganized insular area refers to an insular area for which Congress has not enacted an organic act, and while they are possessed by the federal government, they have not been "organized" into a self-governing unit.[106] Currently, American Samoa is technically the only unorganized insular area, but, interestingly enough, it is now self-governing under its own constitution passed in 1967.[107]

B. Going Corporate

The difference between being incorporated and unincorporated has to do with to what extent the U.S. Congress has determined that the U.S. Constitution is to be applied to a particular insular area.[108] While the U.S. Constitution applies to the fifty states *ex proprio vigore*, only fundamental rights apply to unincorporated insular areas.[109] Fundamental rights, also referred to as "natural protections," are civil liberties, such as the freedom of religion or freedom of speech,[110] and are distinguishable from "procedural rights" such as the right to equal protection or a trial by jury.[111] The consequence of this distinction is that no procedural rights apply to unincorporated insular areas unless they are expressly gained through a specific act of Congress.[112]

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103. *Id.*
104. *See* Dep't of the Interior, Office of Insular Affairs, *supra* note 1.
105. *Id.*
106. *See* WIKIPEDIA, *supra* note 101.
107. Instead of giving American Samoa an organic act, and therefore making it organized, it gave plenary authority to the Department of the Interior, who in turn allowed American Samoa to draft its own constitution under which it now functions. American Law Sources Online, United States, American Samoa, http://www.lawsource.com/also/usa.cgi?xas (last visited May 15, 2006).
108. *See* Incorporated Territory, WIKIPEDIA, http://en.wikipedia.org/wiki/Incorporated_territory (last visited on May 15, 2006).
109. Dorr v. U.S., 195 U.S. 138, 149 (1904); King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975).
110. *See* The Green Papers, *supra* note 91.
111. *Id. See also* Dorr, 195 U.S. at 149.
112. *See* The Green Papers, *supra* note 91.

Only one incorporated insular area exists: Palmyra Atoll, an uninhabited archipelago of 50 small islands comprising about 1.56 square miles in the North Pacific Ocean.[113] Located halfway between Hawaii and American Samoa, Palmyra Atoll is a U.S. Fish and Wildlife-designated National Wildlife Refuge.[114] Here, rather inconsequentially, the United States Congress has applied the full corpus of the United States Constitution as it applies in the several States.[115]

Incorporation is interpreted as a perpetual state. Therefore, once incorporated, an insular area can not become unincorporated.[116] There are currently thirteen unincorporated insular areas: three in the Caribbean[117] and ten in the Pacific Ocean.[118]

C. The Freely Associated Nation-States

Three of the four formerly called "Trust Territory of the Pacific Islands" are now considered freely associated nation-states with the United States: the Federated States of Micronesia ("FSM"), the Republic of the Marshall Islands (the "Marshall Islands") and the Republic of Palau ("Palau").[119] The Commonwealth of the Northern Mariana Islands ("CNMI") is the only former Trust Territory to have reached commonwealth status.[120] The relationship between these four nation-states and the U.S. began in 1947 as part of a post-World War II United Nations trust agreement which provided that the defense, aid and foreign affairs of these nation-states would be under the province of the U.S. government.[121] On November 3, 1986, the U.S. ended its administration of FSM and CNMI.[122] On December 22, 1990, the United Nations Security

113. *See* Palmyra Atoll, WIKIPEDIA, http://en.wikipedia.org/wiki/Palmyra_Atoll (last visited May 15, 2006).

114. CENT. INTELLIGENCE AGENCY, *United States Pacific Island Wildlife Refuges*, *in* THE WORLD FACTBOOK, (2006), *available at* http://www.cia.gov/cia/publications/factbook/geos/lq.html.

115. *See* WIKIPEDIA, *supra* note 108.

116. *Id.*

117. Navassa Island, Puerto Rico and the United States Virgin Islands. *Id.*

118. American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, the Northern Mariana Islands and Wake Atoll. *Id.*

119. Three of the four insular areas are freely associated nation-states via the Compact of Free Association. *See* Compact of Free Association, WIKIPEDIA, http://en.wikipedia.org/wiki/Compact_of_Free_Association (last visited on May 15, 2006). *See also* Trust Territory of the Pacific Islands, WIKIPEDIA, http://en.wikipedia.org/wiki/Trust_Territory_ of_the_ Pacific_Islands (last visited on May 15, 2006).

120. *See* Dep't of the Interior, Office of Insular Affairs, Commonwealth of the Northern Mariana Islands, http://www.doi.gov/oia/Islandpages/cnmipage.htm (last visited May 15, 2006).

121. *Id. See also* Northern Mariana Islands, WIKIPEDIA, http://en.wikipedia.org/wiki/Northern_Mariana_Islands (last visited May 15, 2006).

122. *See* Trust Territory of the Pacific Islands, WIKIPEDIA, *supra* note 119.

Council terminated the Trust Agreement as it applied to CNMI, as well as the Marshall Islands and the Federated States of Micronesia.[123] Finally, on May 25, 1994, the U.N. ended the trusteeship of Palau.[124]

The Compact of Free Association ("COFA") now defines the relationship that three of the four sovereign nation-states have entered into as "Associated States" with the U.S.[125] Under the COFA, the United States recognizes the island governments as sovereign, self-governing nation-states, and while the COFA's basic provisions are indefinite, military defense and financial assistance is only guaranteed for fifteen-year renewable periods.[126] The U.S. also gives freely associated nation-states access to many U.S. domestic programs, and all are dependent on U.S. financial assistance to meet both government operational and capital needs.[127]

In 2003, the COFAs with the Marshall Islands and FSM were renewed, providing three and a half billion dollars in funding for both nations.[128] In addition, American Samoa, Guam, Hawaii, and CNMI received thirty million dollars in "Compact Impact" funding.[129] This funding helps those governments cope with the expense of providing services to immigrants from the Marshall Islands, FSM, and Palau.[130] The new compacts did change certain immigration rules.[131] For example, Marshall Islands and FSM citizens traveling to the U.S. are now required to have passports.[132] The compact for Palau expires in 2009.[133]

1. *The Marshall Islands*

Lonely Planet calls the Marshall Islands "a collection of islands sparkling like diamonds on a turquoise velvet sea-rug."[134] Located in the Western Pacific Ocean among some 2,100 coral atolls and

123. The Federated States of Micronesia are comprised of Chuuk, Kosrae, Pohnpei and Yap. *Id.*
124. *Id.*
125. The three states are Palau, Federated States of Micronesia, and the Marshall Islands. *See* Compact of Free Association, WIKIPEDIA, *supra* note 119.
126. *See* WIKIPEDIA, *supra* note 98.
127. *Id.*
128. *See* Compact of Free Association, WIKIPEDIA, *supra* note 119.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. Lonely Planet, Marshall Islands, http://www.lonelyplanet.com/worldguide/destinations/pacific/marshall-islands (last visited May 15, 2006).

volcanic islands sits the Marshall Islands.[135] The Marshall Islands are in Micronesia, which means "little islands," and it consists of twenty-nine coral atolls and five major islands.[136] The average annual temperature is about eighty-one degrees Fahrenheit, and the climate is generally sunny.[137] The capital city of the Marshall Islands is Majuro, 2,300 miles southwest of Honolulu, and is home to some 25,000 residents.[138]

The Marshall Islands were claimed by Spain in 1592, but were then left undisturbed for 300 years.[139] In 1885, Germany took control of the islands to oversee a flourishing copra (dried coconut meat) trade, but Marshallese chiefs continued to rule under the German administration.[140] The islands changed hands again at the beginning of World War I, when Japan assumed control of the islands under a civil and then later naval administration.[141] It was not until early 1944 that the United States took the islands following intense fighting by U.S. Marines and Japanese forces.[142] In 1947 the Marshall Islands became part of the Trust Territory of the Pacific Islands, and in 1979 the US recognized the Constitution of the Marshall Islands and the establishment of its government. [143] Finally, in 1986 the Compact of Free Association took effect.[144]

The Republic of the Marshall Islands is recognized "as a sovereign, self-governing state with the capacity to conduct foreign affairs."[145] However, as with many U.S. territories, assistance from the U.S. is necessary to keep the economy afloat, and Through the COFA, U.S. aid comprises 68% of the government's annual budget.[146] In fiscal year 2006, the annual budget was $146.4 million.[147]

The legislative branch of the government consists of the "*Nitijela*" (Parliament) and an advisory council of "*Iroij*" (high chiefs).[148]

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135. Dep't of the Interior, Office of Insular Affairs, Republic of the Marshall Islands, http://www.doi.gov/oia/Islandpages/rmipage.htm (last visited February 22, 2006).

136. Marshall Islands, WIKIPEDIA, http://en.wikipedia.org/wiki/Marshall_Islands (last visited May 15, 2006).

137. *See* Dep't of the Interior, *supra* note 135.

138. *Id.*

139. *See Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. DEP'T OF STATE, BUREAU OF E. ASIAN & PACIFIC AFFAIRS, BACKGROUND NOTE: MARSHALL ISLANDS (2005), http://www.state.gov/r/pa/ei/bgn/26551.htm (last visited May 15, 2006).

147. *Id.*

148. *See* Dep't of the Interior, *supra* note 135.

The parliament has thirty-three members from twenty-five districts who are elected for concurrent four-year terms. Members of the Nitijela bear the title of senator.[149] The executive branch is under the leadership of the President, who is elected by a majority vote of the Parliament.[150] Cabinet members are then appointed by the President.[151]

Article VI of the Marshall Islands Constitution governs the judiciary and provides for separation of powers among the judicial, legislative, and executive branches of government.[152] The highest court is the Supreme Court, followed by a High Court, a Traditional Rights Court, and several District Courts, Community Courts and other subordinate courts.[153] As in the U.S., trial is by jury.[154] Finally, appellate jurisdiction is vested in the Supreme Court, which has final authority to adjudicate cases brought before it and consists of a Chief Justice and two Associate Justices:[155]

> An appeal lies to the Supreme Court as of right from a final decision of the High Court in the exercise of its original jurisdiction; as of right from a final decision of the High Court in the exercise of its appellate jurisdiction, but only if the case involves a substantial question of law as to the interpretation or effect of the Constitution; and at the discretion of the Supreme Court from any final decision of any court. Further, the High Court may remove to the Supreme Court questions arising as to the interpretation or effect of the Constitution.[156]

The High Court consists of a Chief Justice and an Associate Justice and "has original jurisdiction over all cases properly filed with it, appellate jurisdiction over cases originally filed in subordi-

149. Marshall Islands, WIKIPEDIA *supra* note 136.

150. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *Marshall Islands*, *in* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2002 (Mar. 31, 2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18253.htm (last visited May 15, 2006).

151. *Id.*

152. Constitution, art. VI, § 1(1) (Marsh. Is.), *available at* http://www.paclii.org/ mh/ courts.html.

153. Constitution, art. VI, § 1(1) (Marsh. Is.), *available at* http://www.paclii.org/mh/ courts.html.

154. *See* Dep't of the Interior, *supra* note 135.

155. Carl B. Ingram, *Marshall Islands Courts System Information*, *in* Pacific Islands Legal Information Institute, http://www.paclii.org/mh/courts.html (last visited May 15, 2006).

156. *Id.*

nate courts," and jurisdiction to review final decisions of government agencies.[157]

The Traditional Rights Court ("TRC") deals with questions of legal title to land, and other legal interests that depend on customary Marshallese law and traditional practices."[158] Interestingly enough, TRC decisions are "given substantial weight, but are not binding unless the certifying court concludes that justice so requires," meaning that "the certifying court is to review and adopt the decision of the TRC unless that decision is clearly erroneous or contrary to law."[159]

A presiding judge and two associate judges sit on the district court.[160] Generally, it "has original jurisdiction concurrently with the High Court in all civil cases where the amount claimed or the value of the property involved does not exceed $10,000."[161] However, it also has original jurisdiction concurrently with the High Court in criminal cases in which the maximum penalty does not exceed a fine of $4,000 or a prison term of three years or less, or both.[162]

Continental Micronesia Airlines flies three times a week between Guam and the Marshall Islands[163] Service within the islands, as well as to Kiribati, Tuvalu and Fiji is available from Air Marshall Islands.[164] U.S. citizens traveling to the Marshall Islands must have proof of citizenship, meaning either a passport or a birth certificate.[165] Travel for less than 30 days does not require a U.S. citizen to seek entry permission prior to arrival.[166] Anyone wishing to travel longer than 30 days must obtain approval by the immigration office prior to entry.[167] The United States Postal Service serves the Marshall Islands under the postal code "MH."[168] The currency is the US dollar.[169]

AAG positions are solicited through the Office of the Public Service Commission.[170] AAGs prepare all motions, briefs, memos,

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157. *Id.*
158. *Id.*
159. Abija v. Bwijmaron, 2 MILR 6, 15 (Marsh. Is. Sup. Ct. 1994).
160. Ingram, *supra* note 155.
161. *Id.*
162. *Id.*
163. *See* Dep't of the Interior, *supra* note 135.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. U.S. Postal Serv., Official USPS Abbreviations, http://www.usps.com/ncsc/lookups/usps_abbreviations.html (last visited May 15, 2006).
169. *See* Dep't of the Interior, *supra* note 135.
170. Republic of the Marsh. Is., Office of the Pub. Serv. Comm'n, Employment Announcement, *available at* http://www.yokwe.net/index.php?name=News&file=article&sid=180 (last visited February 22, 2006).

Cabinet papers, contracts and research, appearing before all courts and provide legal advice to government agencies.[171] The Public Service Commission's mailing address is P.O. Box 90, Majuro, MH 96960.[172] The salary range is $31,000 to $35,000, and fringe benefits include a housing allowance, group life and health insurance, and vacation and travel to and from the point of recruitment.[173]

2. *The Federated States of Micronesia*

The Federated States of Micronesia ("FSM") is a "feast of exotic experiences and underwater adventures."[174] FSM offers spectacular scuba diving opportunities, with clean, clear water and visibility up to 150 feet; it is "virtually an underwater museum."[175] With over fifty dive spots to choose from, you will see an entire Japanese fleet on the floor of the ocean, unspoiled coral reefs and dozens of manta rays.[176]

The FSM archipelago spreads across some 1,800 miles of the Caroline Islands.[177] Palikir, located on the island of Pohnpei, is the FSM capital.[178] It is 2,900 miles southwest of Honolulu, Hawaii.[179] The climate is tropical with average temperatures remaining around 80 degrees all year round.[180] There are four state capitals in FSM and they are: Kolonia, Pohnpei; Moen, Chuuk; Colonia, Yap; and Tofol, Kosrae. "The islands vary geologically from high mountainous islands to low coral atolls" and the weather is tropical.[181] "Each of the four states has its own culture and traditions, but there are common cultural and economic bonds that are centuries old."[182] For example, like most of the Pacific islanders, the traditional extended family and clan systems continue to be of great importance.[183] Additionally, the island of

171. *Id.*
172. Telephone: 692-625-8298; Facsimile: 692-625-3382; Email: pscrmi@ntamar.net. *Id.*
173. *See id.*
174. Federated States of Micronesia Visitors Board, Visitors Center, http://www.visit-fsm.org/visitors/index.html (last visited May 15, 2006).
175. *Id.*
176. *Id.*
177. Dep't of the Interior, Office of Insular Affairs, Federated States of Micronesia, *available at* http://www.doi.gov/oia/Islandpages/fsmpage.htm (last visited February 22, 2006). [hereinafter DOI, Micronesia].
178. *Id.*
179. *Id.*
180. Federated States of Micronesia, *in* ATLAPEDIA ONLINE, http://www.atlapedia.com/online/countries/micrones.htm (last visited May 15, 2006).
181. *See* Dep't of the Interior, *supra* note 135.
182. Federated States of Micronesia, WIKIPEDIA, http://en.wikipedia.org/wiki/Federated_States_of_Micronesia (last visited May 15, 2006).
183. *Id.*

Yap is home to one of the most interesting cultural artifacts in the Pacific:

> The island of Yap is notable for its stone money, large disks of calcite usually up to 12 feet in diameter with a hole in the middle. The islanders know who owns which piece, but do not necessarily move them when ownership changes. There are five major types of stone money: Mmbul, Gaw, Ray, Yar, and Reng, with Reng being only 1 foot in diameter. Their value is based on both size and history, many of them having been brought from other islands, but most coming in ancient times from Palau. There are approximately 6,500 of them scattered around Yap.[184]

Because FSM is closely located to the Marshall Islands, it has a very similar history of colonial rule. In 1527, Portuguese navigators in search of the Spice Islands came upon two of the Caroline Islands (now a part of FSM) Yap and Ilithi, and claimed sovereignty over the entirety of the Caroline Islands until 1899.[185] At that time, like with the Marshall Islands, Spain withdrew from FSM and sold all the land to Germany, with the exception of Guam, which became a US territory.[186] During World War I, the German administration ended when Japanese naval squadrons took military possession of the Marshall, Caroline and Northern Mariana Islands.[187] Japan began its formal administration by a League of Nations mandate in 1920.[188] Sugar cane, mining, fishing, and tropical agriculture became the major industries.[189] In February 1944, one of the most important naval battles of World War II occurred at Truk, "in which many Japanese support vessels and aircraft were destroyed."[190] In 1947, the US took control of FSM as one of the TTPI.[191]

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184. *See id.*

185. *See* Dep't of the Interior, *supra* note 135; *See also* The Caroline Islands, WIKIPEDIA, http://en.wikipedia.org/wiki/Caroline_Islands. The Caroline Islands form a large archipelago of widely scattered islands in the Western Pacific Ocean, northeast of New Guinea. Presently, the sub-divide into FSM in the eastern part of the group and Palau in the western end. *Id.*

186. DOI, Micronesia, *supra* note 177.

187. *Id.*

188. *Id.*

189. *Id.*

190. Federated States of Micronesia, *supra* note 182.

191. *Id.*

In 1979, FSM adopted its own constitution, and in 1986 independence was attained under the COFA.[192] Like the U.S., the FSM constitution separates the executive, legislative, and judicial branches, and includes a bill of rights and a provision for traditional rights.[193] The legislature is comprised of fourteen members, four of which are elected at-large on a nationwide basis, and ten of which are elected from congressional districts apportioned by population.[194] Subsistence farming and fishing are the most significant economic activities in FSM, and financial assistance from the United States is FSM's largest revenue source.[195] In fiscal year 1993, $101 of FSM's total operating budget of $158 million came from the U.S.[196]

Under Article XI of the Constitution, the Supreme Court is the highest court in FSM.[197] It consists of both a Trial and Appellate division, and has original jurisdiction in cases involving disputes between states, admiralty and maritime cases, Constitutional questions and the FSM laws or treaties.[198]

Like the Marshall Islands, Continental Micronesia serves the FSM via Hawaii and Guam.[199] U.S. citizens wishing to enter the FSM need either a passport or birth certificate as proof of citizenship."[200] Interestingly enough, a thirty-day tourist permit for Americans can be extended an additional 330 days if necessary.[201] The US Postal Service serves the FSM under the postal code "FM."[202]

The FSM Department of Justice accepts applications on an ongoing basis to fill Assistant Attorney General ("AAG") positions.[203] Currently, the FSM Office of the Attorney General is a small office with seven attorneys.[204] Attorneys in the litigation division "are responsible for investigating allegations of violations of national law, determining which cases to prosecute and bringing civil and criminal cases on behalf of the government."[205] Litigation attorneys

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. Federated States of Micronesia, *supra* note 182.
197. Constitution, art. XI, § 2 (Federated States of Micronesia).
198. Micronesia Courts System Information, *in* Pacific Islands Legal Information Institute, http://www.paclii.org/fm/courts.html (last visited May 15, 2006).
199. Getting to the Federated States of Micronesia (Hawaii.com 2006) http://micronesia.hawaii.com/fsm/flights/index.php (last visited May 15, 2006).
200. DOI, Micronesia, *supra* note 177.
201. *Id.*
202. U.S. Postal Serv., Official USPS Abbreviations, *supra* note 168.
203. Gov't of the Federated States of Micronesia, Position for Assistant Attorney General, *available at* http://www.fsmgov.org/press/an011606.htm (last visited May 15, 2006).
204. *Id.*
205. *Id.*

may also be called upon to defend claims brought against the government.[206] An AAG will be exposed to various areas of law that may ultimately be the subject of litigation, including fisheries, elections, use of public funds and contract matters, among others.[207] Conversely, attorneys in the "Division of Law" are responsible for legislative, transactional, and advisory activities, including drafting bills and regulations, negotiating international treaties, drafting agreements and conventions, and the providing legal advice on a wide variety of matters to the executive branch."[208] AAGs in the Division of Law also serve as counsel to various agencies and boards of the national government.[209] FSM requires a degree in law and a bar license in any U.S. jurisdiction.[210] FSM requires execution of a two-year contract, and the salary range is between $38,000 to $39,999 per year (U.S. tax exempt), depending on experience.[211] Additional benefits will likely include a housing allowance, round trip airfare to and from FSM and a shipping allowance for shipment of household goods.[212] Positions may involve domestic and international travel.[213] The FSM Office of the Attorney General can be contacted at Secretary of Justice, FSM Department of Justice, P.O. Box PS 105, Palikir, Pohnpei, FM 96941.

3. *The Republic of Palau*

Palau is considered "one of the top [scuba] dive meccas in the world."[214] It is one of the few places in the world where one can perform "a wall dive, a [ship]wreck dive, [and] a coral garden dive all in one day."[215] The Ngemelis Wall, also called "Big Drop-off," is widely considered by scuba aficionados to be the best wall dive in the world.[216] "From knee-deep water, the wall drops vertically nearly 305 meters," where "divers free float past a brilliant rainbow of sponges and soft corals, and giant black coral trees."[217]

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206. *Id.*
207. *Id.*
208. *Id.*
209. Gov't of the Federated States of Micronesia, Position for Assistant Attorney General, *supra* note 203.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. Sam's Tours; Scuba Diving, http://www.samstours.com/scuba.html (last visited May 15, 2006).
215. *Id.*
216. Lonely Planet, Palau, http://www.lonelyplanet.com/worldguide/destinations/pacific/palau?poi=106644 (last visited May 15, 2006).
217. *Id.*

Located in the westernmost part of the Caroline Islands, Palau is approximately 4,000 miles west/southwest of Honolulu.[218] It consists of more than 200 islands and is home to just 19,000 people, making it one of the smallest nation-states in the world.[219] Palau enjoys a tropical climate all year round with a median temperature of 82 degrees.[220] Palauans place a heavy emphasis on family and clan, and from the moment of birth each individual has "a defined rank in the village, clan and family."[221]

Spain originally controlled Palau from 1686 to 1889.[222] "In 1899, Spain sold Palau, along with the rest of the Caroline and Northern Mariana Islands, to Germany following its defeat in the Spanish-American War."[223] Germany occupied Palau until 1914, increasing the islands' "economic potential by introducing coconut planting and phosphate mining."[224] Japanese forces took control of the islands during World War I and continued the development of economic growth until World War II, where significant fighting occurred between U.S. and Japanese troops.[225] In 1947, Palau joined the TTPI.[226] It was not until October 1, 1994 that Palau was recognized as a sovereign state under the COFA, making it one of the youngest nations in the world.[227] Palau's total budget in fiscal year 1999 was $71 million, with tourism and construction being the two main private sector industries.[228] While steadily growing, the number of tourists in fiscal year 2001 was just 50,000.[229]

Like the United States, the government of Palau is divided into three branches: executive, legislative and judicial.[230] Both the President and Vice President are elected by a popular vote of the people every four years.[231] The legislature is bicameral, consisting of a House of Delegates (sixteen elected members, one from each of Palau's states) and a Senate (fourteen elected members).[232] The Judicial Branch, whose members are appointed for life, consists of

218. Dep't of the Interior, Office of Insular Affairs, Palau page, http://www.doi.gov/oia/Islandpages/palaupage.htm [hereinafter DOI, Palau].
219. Palau, WIKIPEDIA, http://en.wikipedia.org/wiki/Palau; *See also* DOI, Palau, *supra* note 218.
220. *Id.*
221. *See* DOI, Palau, *supra* note 218.
222. *See* Palau WIKIPEDIA, *supra* note 219.
223. *See* DOI, Palau, *supra* note 218.
224. *Id.*
225. *See id.*
226. *See id.*
227. DOI, Palau, *supra* note 218.
228. *See id.*
229. Palau, WIKIPEDIA, *supra* note 219.
230. *See* DOI, Palau, *supra* note 218.
231. *Id.*
232. *Id.*

a Supreme Court, National Court, and a lower Court of Common Pleas.[233] Palau has sixteen states, and each has its own elected state government.[234]

Article X, Section 1 of the Palau Constitution vests judicial power to the Supreme Court, the National Court, and such inferior courts of limited jurisdiction as may be established by law. The Supreme Court consists of an appellate division and a trial division and is composed of a Chief Justice and not less than three or more than six Associate Justices.[235] The Supreme Court "has original and exclusive jurisdiction over all matters affecting Ambassadors, other Public Ministers and Consuls, admiralty and maritime cases, and those matters in which the national government or a state government is a party." "In all other cases, the National Court original and concurrent jurisdiction with the trial division of the Supreme Court."[236]

"Continental Micronesia serves Palau with daily flights to and from Guam."[237] There are also direct flights to and from Manila and the Philippines.[238] In 2004, Palau Micronesian Air was launched with service from Palau to Guam, Saipan and Australia, among others.[239] US citizens traveling to Palau need either a passport or a birth certificate.[240] The US Postal Service serves Palau under the postal code "PW."[241]

The Palau "Office of the Attorney General represents and defends the legal interest of the people of Palau" as well as represents and defends Palau as a sovereign nation.[242] The Office is responsible for the prosecution of criminal cases and appeals, and the Office prosecutes about 500 criminal cases annually, including murder, theft, assault, sex crimes, and misdemeanors.[243] The Office of the Attorney General acts as the legal counsel to the executive branch and provides legal services to the President and all of the Ministers in the Republic of Palau, as well as bureaus and other agencies.[244] The civil division defends Palau against civil claims and cases filed against Palau and its agencies as well as

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233. *Id.*
234. *Id.*
235. Constitution, art. X, § 2 (Palau).
236. *Id.*
237. *Id.*
238. *Id.*
239. Palau, WIKIPEDIA, *supra* note 219.
240. *See* DOI, Palau, *supra* note 218.
241. U.S. Postal Serv., Official USPS Abbreviations, *supra* note 168.
242. Ministry of Justice: Office of the Attorney General (Palau), http://www.palau gov.net/minjustice/attrgeneral.html (last visited May 15, 2006).
243. *Id.*
244. *Id.*

drafts and reviews contracts, drafts legislation and regulations, provides legal advice regarding international treaties, and drafts legal opinions when requested by the executive branch.[245] The Office of the Attorney General can be reached at P.O. Box 1365, Koror, Palau 96940.[246]

D. The Commonwealths

A commonwealth is an organized insular area that has established with the United States a more highly developed relationship, usually embodied in a written mutual agreement.[247] There are currently two United States insular areas holding the status of commonwealth, The Commonwealth of the Northern Mariana Islands and Puerto Rico.[248] The term as used with respect to insular areas must be distinguished from its usage in the names of the states of Virginia, Massachusetts, Pennsylvania, and Kentucky, which officially describe themselves as " commonwealths" but hold the same legal and political status as other states of the Union.[249]

The term was first used by Puerto Rico in 1952 as its formal name in English ("Commonwealth of Puerto Rico") since a strict translation of its name in Spanish would have been unacceptable to the U.S. Congress.[250] The formal name in Spanish for Puerto Rico is "Estado Libre Asociado de Puerto Rico," which translates exactly into "Associated Free State of Puerto Rico."[251] As will be discussed below, many Puerto Ricans wish to maintain and even improve their relationship with the US, albeit with greater autonomy and perhaps even sovereignty.[252] Generally speaking, U.S. commonwealths share common citizenship with US citizens, common defense and common currency.[253]

1. *The Commonwealth of the Northern Mariana Islands*

CNMI is "a tropical paradise offering the relaxing shores of magnificent beaches and crystal clear blue waters, as well as the

245. *Id.*
246. Telephone: (680) 488-2481; Facsimile: (680) 488-3329; email: agoffice@palaunet.com. *Id.*
247. Commonwealth (United States Insular Area), WIKIPEDIA, http://en.wikipedia.org/wiki/Commonwealth_%28U.S._insular_area%29 (last visited May 17, 2006).
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*

lively bustle of night life, shopping, a wide range of ethnic restaurants, and a multitude of outdoor activities."[254]

CNMI is a 300-mile archipelago located in the Northern Pacific Ocean, just north of Guam.[255] The capital of CNMI, Saipan, is 3,300 miles from Honolulu, but only 1,272 miles from Tokyo.[256] CNMI is located in a tropical climate with an average temperature of eighty-five degrees Fahrenheit.[257]

In 1521, Ferdinand Magellan made the first European contact with the area by coming ashore in Guam and claiming the archipelago in the name of Spain.[258] Spain ruled the islands for over 300 years, but finally ceded Guam to the U.S. following the Spanish-American War and selling CNMI to Germany in 1899.[259] Japan took control of the islands during the first year of World War I, 1914, turning them into a military garrison.[260] Between 1914 and 1944, nearly 30,000 Japanese nationals migrated to Saipan.[261] On June 15, 1944, the US Marines landed on the islands and eventually won the three-week Battle of Saipan.[262] The U.S. Congress approved the *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States* in 1976.[263] A year later, CNMI adopted its own constitution and the government took office one year after that.[264]

Generally speaking, federal law applies to CNMI, and legally qualified CNMI residents enjoy full United States citizenship.[265] However, CNMI is outside the jurisdiction of the United States Customs and Border Protection. While the Internal Revenue Code does apply, the income tax system is largely locally determined.[266] The CNMI constitution provides for a governor, a lieutenant governor, a bicameral legislature (eighteen members in the House of Representatives and nine members in the Senate), and a local court system including Superior and Supreme Courts.[267] The U.S.

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254. Marianas Visitors Authority, The Northern Marina Islands: Our Islands, http://www.mymarianas.com/html/display.cfm?sid=1009 (last visited May 15, 2006).

255. Dep't of the Interior, Office of Insular Affairs, CNMI, http://www.doi.gov/oia/Island pages/cnmipage.htm (last visited May 15, 2006).

256. *Id.*

257. Commonwealth Development Authority, Investing in the Marianas, http://www.cda.gov.mp/cnmi_pro.htm (last visited May 15, 2006).

258. Northern Marina Islands, WIKIPEDIA, http://en.wikipedia.org/wiki/Northern_Mariana_Islands (last visited May 15, 2006).

259. Dep't of the Interior, Office of Interior Affairs, CNMI, *supra* note 255.

260. *Id.*

261. *See id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. Dep't of the Interior, Office of Interior Affairs, CNMI, *supra* note 255.

266. *Id.*

267. *Id.*

District Court for the District of the Northern Mariana Islands is located in CNMI as well.[268]

Over the past ten years, CNMI has seen dramatic growth.[269] In fiscal year 1997, the government spent $268 million, going over its annual revenue by $20 million.[270] Tourism drives the economy of CNMI, attracting between 500,000 and 700,000 people annually, mostly from Japan.[271] Recently, however, economic resources have shifted to garment manufacturing because the United States' minimum wage and immigration laws do not apply.[272] In fact, the value of garment shipments from CNMI to the United States increased from under $200 million in 1990 to over $1 billion in just under a decade.[273]

A modern and well-maintained international airport is located in Saipan, offering flights to Guam and Hawaii via Continental Micronesia.[274] A passport is not necessary for U.S. citizens to enter CNMI, but proof of citizenship is required.[275] Thirty day tourist visas are granted upon entering.[276]

The CNMI Office of the Attorney General accepts applications on a continuous basis until positions are filled, and salary is commensurate with experience.[277] The AG's Office can be reached at The Office of the Governor, Hon. Juan A. Sablan Memorial Bldg., Caller Box 10007, Capitol Hill, Saipan, MP 96950.[278] Available employment opportunities can be found at http://www.cnmiago.gov.mp.

2. *Puerto Rico*

Lonely Planet says that "Puerto Rico is where four centuries of Spanish Caribbean culture comes face to face with the American convenience store."[279]

Puerto Rico is located in the northeastern Caribbean and consists of the main island of Puerto Rico as well as various smaller

268. *Id.*
269. *Id.*
270. *Id.*
271. Dep't of the Interior, Office of Interior Affairs, CNMI, *supra* note 255.
272. Northern Mariana Islands, WIKIPEDIA, *supra* note 258.
273. Dep't of the Interior, Office of Insular Affairs, CNMI, *supra* note 258.
274. *See* Micronesia, Getting to the Mariana Islands, http://micronesia.hawaii.com/marianas/flights/index.php (last visited May 17, 2006).
275. *See* Dep't of the Interior, *supra* note 273.
276. *Id.*
277. Commonwealth of the Northern Mariana Islands, Office of the Attorney General, http://www.cnmiago.gov.mp (last visited May 15, 2006).
278. Telephone: (670) 664-2341; Facsimile: (670) 664-2349. *Id.*
279. Lonely Planet, Puerto Rico, http://www.lonelyplanet.com/worldguide/destinations/caribbean/puerto-rico (last visited May 15, 2006).

outlying islands.[280] The mainland, measuring approximately 105 miles long by thirty-five miles wide, is largely mountainous terrain, with some nice beaches on the northern and southern coasts.[281] Puerto Rico has the largest population of all the insular areas with almost four million people.[282] The capital city of San Juan is also Puerto Rico's largest city.[283] With a population of 443,733, it is the forty-second largest city in the United States.[284] It is one of the most densely populated islands in the world, with nearly 1,000 people per square mile.[285] The climate is tropical with a temperature range from 71-85 degrees.[286]

"The first European contact was made by Christopher Columbus, on November 19, 1493."[287] Columbus originally named it "San Juan Bautista," after Saint John the Baptist, but ultimately it took the name "Puerto Rico," meaning "rich port," with Columbus' chosen name delegated to the capital city.[288] Soon after Columbus's discovery, the island was colonized by Spanish and African slave labor.[289] It was briefly an important military stronghold, during which time a number of forts and walls were built to protect the port of San Juan, but lost its importance as colonialism's emphasis changed to the mainland territories.[290] The US invaded Puerto Rico at the outset of the Spanish-American War, forcing Spain to cede the territory.[291] In 1917, the U.S. granted Puerto Ricans U.S. citizenship in order to recruit them as soldiers for WWI.[292] In 1952, Puerto Rico adopted its own constitution, adopting the name "commonwealth."[293] Present-day Puerto Rico struggles to define its political status, with movements toward independence and statehood equally strong in numbers.[294] On December 22, 2005, a task force originally created by President Clinton called on Congress to hold the first federally-authorized vote for Puerto Ricans

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280. Puerto Rico, WIKIPEDIA, http://en.wikipedia.org/wiki/Puerto_Rico (last visited May 15, 2006).
281. *Id.*
282. *Id.*
283. San Juan, WIKIPEDIA, http://en.wikipedia.org/wiki/San_Juan%2C_Puerto_Rico (last visited May 15, 2006).
284. *Id.*
285. Welcome to Puerto Rico, Puerto Rico People (Magaly Rivera, 2006) http://welcome.topuertorico.org/people.shtml (last visited May 15, 2006).
286. Puerto Rico, ATLAPEDIA, http://www.atlapedia.com/online/countries/puertori.htm (last visited May 12, 2006).
287. Puerto Rico, WIKIPEDIA, *supra* note 280.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *See id.*

to decide the fate of the island, namely whether to continue the status quo or to push for statehood or independence.[295]

Like the United States, the government of Puerto Rico consists of the executive, legislative, and the judicial branch.[296] The governor and legislators are elected by popular vote every four years.[297] Puerto is Rico divided into 78 municipalities, each of which elect a mayor and a municipal legislature.[298]

Since the 1970s, US firms have heavily invested in the Puerto Rican economy, making it one of the most dynamic economies in the Caribbean region.[299] Local industries consist of pharmaceuticals, electronics, textiles and petrochemicals, as well as the mainstay, tourism, which supplies close to $1.8 billion annually.[300]

Puerto Rico is similar to a state in the union, however, it does not have voting representation in the U.S. Congress nor does it have any electors in the U.S. Electoral College.[301] Puerto Ricans do not pay federal income tax on income gained from island sources, but they do pay social security taxes.[302] As U.S. citizens, Puerto Ricans are subject to military service and most federal laws"[303]

The Puerto Rican legal system is a combination of common law and civil law.[304] Article V, Section 1 of the Constitution of Puerto Rico establishes the judicial power in a Supreme Court.[305] The Supreme Court, which cannot be abolished[306] and is the court of last resort, consists of a Chief Justice and four Associate Justices.[307] In addition to the Supreme Court, Puerto Rico also has an Appellate Court and a Court of First Instance, which is divided into a Superior Court and a Municipal Court.[308]

US citizens traveling to Puerto Rico are not required to obtain a passport or immunizations for entry.[309] However, proof of US

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295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. Dep't of Interior, Office of Insular Affairs, Puerto Rico [hereinafter DOI, Puerto Rico], http://www.doi.gov/oia/Islandpages/prpage.htm (last visited May 15, 2006).
300. Puerto Rico, WIKIPEDIA, *supra* note 280.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. Puerto Rico Const. art. V, § 1.
306. *Id.* at § 2.
307. *Id.* at § 3.
308. CENT. INTELLIGENCE AGENCY, *Field Listings-Judicial Branch*, *in* CIA WORLD FACTBOOK (2006), *available at* http://www.cia.gov/cia/publications/factbook/fields/2094.html (last visited May 15, 2006).
309. *See* DOI, Puerto Rico, *supra* note 299.

citizenship is required, which ultimately means persons must have a certified copy of their birth certificate or their passport with them.[310]

The Puerto Rico Office of the Attorney General can be reached at P.O. Box 192, San Juan, PR 00902.[311]

E. The Territories

A U.S. territory is defined as "any extent of region under the jurisdiction of the federal government of the United States, including all waters."[312] Technically speaking, many of the insular areas described above would also qualify as territories, however, it is used in this section to distinguish three particular territories that fall under no other classification system: American Samoa, Guam and the U.S. Virgin Islands. The United Nations does not consider any of these three territories to be self-governing.[313] For a territory to be deemed self-governing, the United Nations requires four things be present: (1) "representation without discrimination in the central legislative [process]," (2) "effective participation of the population in the government," (3) "citizenship without discrimination, and (4) eligibility of all individuals to run or be appointed to public office."[314] Currently, none of these three territories meets these criteria.

1. *American Samoa*

The English poet Rupert Brooke once wrote that Samoans are "the loveliest people in the world, moving and dancing like gods and goddesses, very quietly and mysteriously, and utterly content. It is sheer beauty, so pure that it's difficult to breathe it in."[315] Robert Louis Stevenson, perhaps Samoa's most famous expatriate, bestowed upon them the moniker "the happy people"[316] and called them "God's best, at least sweetest work."[317]

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310. *Id.*

311. Telephone: (809) 721-7700. U.S. State and Territory Attorneys General, http://www.oag.state.ny.us/links/other_ags.html (last visited May 15, 2006).

312. United States Territory, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_territory (last visited May 15, 2006).

313. Non-Self-Governing Territories, http://www.un.org/Depts/dpi/decolonization/trust3.htm (last visited May 15, 2006).

314. G.A. RES. 742 (VIII), at 23, U.N. Doc. A/2428 (Nov. 27, 1953).

315. MICHELLE BENNETT, DORINDA TALBOT, & DEANNA SWEANEY, SAMOAN ISLANDS 10 (Lonely Planet Publications 2003).

316. Polynesian Cultural Center, Experience Samo, http://www.polynesia.com/islands/samoa.html# (last visited May 15, 2006).

317. Miller, *supra* note 25.

Nestled in the heart of the Polynesian Triangle in the South Pacific Ocean lies American Samoa, a tropical paradise of six islands and one coral atoll.[318] The territory is a vastly interesting dichotomy of ancient Samoan traditions and pure United States capitalism. The island of Tutuila is American Samoa's economic and political center and plays host to the most renowned harbor in the South Pacific: Pago Pago Harbor.[319] The island is approximately 19 miles long and never more than four miles wide, yet it is home to more than 95% of American Samoa's 63,000 inhabitants.[320] Fast food, expensive sport utility vehicles, full size pickups, cable television and NFL football all feature prominently in an island lifestyle traditionally accustomed to subsistence living and a slower pace of life.[321] In addition to the hustle and bustle of downtown Pago Pago, American Samoa has all the trappings of a tropical island lifestyle: palm-fringed white sand beaches, jungle waterfalls, colorful coral reefs and sleepy villages complete with thatched roof homes.[322] American Samoa also consists of the islands of Aunu'u, Ta'u, Ofu, Olosega and Swains Island and Rose Atoll.[323] The climate is tropical, with a year round temperature of 80 degrees.[324] Annual average rainfall is a whopping 200 inches.[325]

The traditional Samoan culture, commonly referred to as "fa'a Samoa" ("the Samoan Way"), is ancient, with evidence of human occupation in the Samoan islands as early as 1000 B.C.[326] At the center of the system is the extended family, or "aiga", and it includes as many relatives as can legitimately be claimed.[327] Although materialism is rapidly encroaching upon American Samoa, most of the wealth and property is owned communally by the extended family. This is in direct contrast to the European form of property ownership and sometimes quite literally clashes with the "everybody for himself" American attitude. Perhaps the most important aspect of traditional Samoan life, and certainly the most

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318. *See* BENNETT, *supra* note 315 at 10, 149, 150. American Samoa is comprised of Tutuila, Aunu'u, Ofu, Olosega, Tau and Swains Island, as well as Rose Atoll. The "Polynesian Triangle" is an imaginary triangle delineating the geographic region known as Polynesia. The triangle is drawn from New Zealand to Hawaii, from Hawaii to Easter Island, and from Easter Island to New Zealand. *Id.*

319. *Id.* at 129.

320. *Id.*

321. *Id.* at 10.

322. *Id.* at 130. The locals simply refer to the capital city of Pago Pago as "Pago."

323. American Samoa, WIKIPEDIA, http://en.wikipedia.org/wiki/American_Samoa (last visited May 15, 2006).

324. Env. Protection Agency, Territory of American Samoa, http://www.epa.gov/Region 9/cross_pr/islands/samoa.html (last visited May 15, 2006).

325. *Id.*

326. *See* BENNETT *supra* note 315 at 12.

327. *Id.* at 25.

immediately noticed by a "*palagi*,"[328] is respect for those higher than oneself.[329] The most respected individuals on the island are doctors, politicians, ministers, attorneys and priests.[330] As legal counsel for the government, you will undoubtedly encounter situations reminding you why you became a lawyer. More often than not, you will be referred to by locals as "counselor," doors will be held open for you, and as word travels across the island of your position you will experience a greater amount of ease in accomplishing everyday tasks. It harkens back to a day before ambulance chasers gave lawyers a bad name, when law schools focused on quality and not quantity, and I assure you that it will surprise and delight. The Samoan Way also places strong emphasis upon personal discipline and pride, which can be adhered to almost to a fault.[331]

Under the American Samoa Constitution, the governor of American Samoa is chosen by popular election every four years.[332] Laws are passed by a bicameral legislature known as the Fono, and it consists of a House of Representatives and a Senate.[333] Representatives are elected by popular vote, and all adult U.S. nationals who are at least twenty-five years old and have lived in American Samoa for five or more years are eligible for election to the House.[334] The Senate, on the other hand, is a chamber of chiefs.[335] Senators must be registered *matais* of Samoan families, and are "elected in accordance with Samoan custom by the county councils of the counties they are to represent."[336]

In addition to laws created by the Fono, village councils "may enact village regulations concerning the cleanliness of the village, planting of the lands, making and cleaning of the roads, and any other matters of a strictly local nature."[337] The Office of Samoan Affairs must approve all regulations of the village councils in order for them to be effective.[338] Violations of village regulations may be punished with fines not to exceed $25.00 and village work not to

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328. A "*palagi*" (pronounced pahlahngi) means "one who bursts from the sky" and is the word for white person. *Id.* at 160.

329. *Id.* at 25.

330. *Id.* at 25.

331. Personal pride is one of the most important values of Samoan culture, and disrespect causes such anger among some individuals that excessive levels of violence are sometimes relied upon to protect one's pride from damage. *Id.*

332. American Samoa Const. art. IV, § 2.

333. *Id.* at art. II, § 1.

334. *Id.* at art. II, § 3.

335. *Id.*

336. *Id.* at art. II, § 4.

337. AM. SAMOA CODE § 5.0305(a).

338. AM. SAMOA CODE § 5.0305(b).

exceed 25 hours, with all other forms of punishment imposed by a court of law.[339]

The judicial branch is comprised of a High Court, district court, "and such other courts as may from time to time be created by law."[340] The Secretary of the Interior appoints the Chief Justice and the Associate Justice of the High Court.[341] The Associate Judges of the High Court are Samoan leaders with knowledge of Samoan custom.[342] The independence of American Samoan courts has been questioned because the appointment and removal power of the Chief Justice and Associate Justice lies with the Secretary of the Interior and because the Secretary also possesses the authority to reverse or amend the decisions of the courts; however, this authority has not been exercised in recent memory.[343]

American Samoa represents the only void of federal district court jurisdiction in the world.[344] The High Court is not a federal district court, nor has it been given the authority to act as a federal district court.[345] Further no current federal district court claims jurisdiction over American Samoa.[346] The only exception to this rule occurs when a specific act of Congress explicitly bestows the High Court with federal district court jurisdiction.[347] I recently encountered this problem within the Consumer Protection Bureau when attempting to enforce the Federal Alcohol Administration Act.[348] While the Act applies to "the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, Wake Island, the Midway Islands, Kingman Reef, and Johnston Island,"[349] the Act vests jurisdiction for enforcement actions in "[t]he several district courts of the United States," making no mention of American Samoa.[350] Thus, Congress created a statute that applies to American Samoa but is

339. AM. SAMOA CODE § 5.0305(c) & (e).
340. American Samoa Const., art. III, § 1.
341. *Id.* at art. III, § 3.
342. Presiding Bishop v. Hodel, 830 F.2d 374, 377 (D.C. Cir. 1987).
343. Hall, *supra* note 36, at 75.
344. Alamoana Recipe, Inc. v. ASG, 25 Am. Samoa 2d 97 (1993); *See also* Dep't of the Interior, ASG Main Page, http://www.doi.gov/oia/Islandpages/asgmain.htm.
345. Alamoana Recipe, Inc., *supra* note 344, at 100.
346. *Id.*
347. For purposes of foreclosing a ship's preferred mortgage lien, the High Court is considered a federal district court. *See* United Airlines Employees' Credit Union v. The MV Sans End, 15 Am. Samoa 2d 95, 100 (1990). Congress intended to incorporate the High Court as a federal district court for purposes of enforcing the Ocean Dumping Act and the Marine Mammal Protection Act. The Vessel Pacific Princess v. Trial Division of the High Court of American Samoa, 2 Am. Samoa 2d 21, 23 (1984).
348. 27 U.S.C. § 213 (2005).
349. 27 U.S.C. § 214(12) (2005).
350. 27 U.S.C. § 219(a) (2005).

completely unenforceable! My frustration is shared by others. It is probably best and most comically embodied in the concurring opinion of Justice Gardner in *Pacific Princess*.[351] In voicing his frustration over the lack of access by residents to a court with federal jurisdiction, he says that, "a resident of American Samoa can rob a federally insured bank in American Samoa and not worry about the F.B.I. On the other hand, he can't go into bankruptcy."[352]

American Samoa "is a traditional Polynesian economy in which more than 90% of the land is communally owned."[353] Tuna fishing and tuna processing is the single biggest industry, with roughly one-third of the workforce employed by one of the two tuna canneries on the island.[354] Another one-third of the workforce is employed by the government.[355] The final third is employed in various retail and service jobs, many of which provide goods and services to government, its employees and the canneries.[356] American Samoa is home to the only U.S. national park south of the equator, featuring some 9,000 acres of rain forest and coral reef.[357] The American Samoa government has plans to boost the economy and capitalize on this opportunity by developing and implementing an eco-tourism plan.[358]

American Samoa is one of the few insular areas where the U.S. Immigration and Naturalization Service does not have jurisdiction, and therefore, U.S. citizens wishing to enter the territory must comply with certain American Samoa immigration laws.[359] In order to gain entry, a U.S. citizen must have in his or her possession a valid U.S. passport and either a ticket for onward passage out of American Samoa or proof of employment in the territory.[360] Tourists or business people may stay in American Samoa for up to thirty days, at which time they must acquire the approval of the Attorney General to extend their visa an additional thirty days.[361]

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351. Pacific Princess, 2 Am. Samoa 2d at 25.

352. *Id.*

353. Economy of American Samoa, WIKIPEDIA, http://en.wikipedia.org/wiki/Economy_of_American_Samoa (last visited May 15, 2006).

354. The two tuna canneries are Starkist and Chicken of the Sea Samoa Packing. *Id.*

355. *Id.*

356. *Id.*

357. National Park Service, National Park of American Samoa, http://www.nps.gov/npsa (last visited May 15, 2006).

358. Funealii Lumaava Sooaemalelagi, Steve Brown, & John Wasco, *Ecotourism Plan Proposal for American Samoa*, ECOCLUB.com, E-Paper Series, (Jan. 2003), http://ecoclub.com/library/epapers/5.pdf.

359. Dep't of the Interior, Office of Insular Affairs, American Samoa, http://www.doi.gov/oia/Islandpages/asgpage.htm (last visited May 15, 2006).

360. *Id.*

361. *Id.*

2. *The US Virgin Islands*

Lonely Planet says that "[i]f people are going to persist with an American dream, they may as well wake up to some of this . . . some of the most magnificent coast on earth" and "a taste of paradise."[362]

The U.S. Virgin Islands are a group of islands in the Caribbean Sea that are geographically part of the greater Virgin Islands.[363] They are principally made up of four main islands - St. Thomas, St. Croix, St. John and Water Island, and are the only U.S. territory where traffic drives on the left side of the road.[364] The U.S. Virgin Islands are located approximately 1,000 miles south of Miami, Florida and 50 miles east of Puerto Rico.[365] The most recent population estimate is 120,000, with a majority living on St. Croix and St. Thomas.[366] The climate is tropical with the temperature ranging from 70 to 90 degrees year-round, with relatively low humidity for a US insular area.[367]

The Virgin Islands were named by Christopher Columbus on his second voyage in 1493, after Saint Ursula and her virgin followers.[368] Over the next 300 years, the islands were held by many European powers, including Spain, England, the Netherlands and France.[369] During World War I, the United States offered to purchase the islands from Denmark, fearing that the Germans might

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362. Lonely Planet, U.S. Virgin Islands, http://www.lonelyplanet.com/worldguide/ destinations/caribbean/us-virgin-islands (last visited May 15, 2006).

363. United States Virgin Islands, WIKIPEDIA, http://en.wikipedia.org/wiki/U.S._Virgin_ Islands (last visited May 15, 2006).

364. *Id.*

365. *Id.*

366. Estimate from 1999. Dep't of the Interior, Office of Insular Affairs, Virgin Islands, http://www.doi.gov/oia/Islandpages/vipage.htm (last visited May 15, 2006) [hereinafter DOI, Virgin Islands].

367. *Id.*

368. *See supra* note 363.

> Saint Ursula is a Christian saint whose legend, probably unhistorical, is that she was a British princess who, at the request of her father King Donaut, set sail along with 11,000 virgin handmaidens to join her future husband, the pagan Governor Conan Meriadoc of Armorica (Brittany). However, a storm brought them over the sea in a single day to a Gaulish port, where Ursula declared that before her marriage she would undertake a pan-European pilgrimage. She headed for Rome, with her followers, and persuaded the Pope, Cyriacus (unknown in the pontifical records), and Bishop of Ravenna, Sulpicius, to join them. After setting out for Cologne, which was being besieged by Huns , all the virgins were beheaded in a massacre. The Huns' leader shot Ursula dead, supposedly in 383.

Saint Ursula, WIKIPEDIA, http://en.wikipedia.org/wiki/Saint_Ursula (last visited May 15, 2006).

369. *See supra* note 363.

seize them for use as a submarine base.[370] On January 17, 1917, under pressure to sell the islands for fear the U.S. would invade Denmark sold what were then known as the Danish West Indies to the U.S. for $25 million.[371] Ten years later, the U.S. granted citizenship to all the inhabitants of the islands.[372]

The U.S. Virgin Islands are an organized, unincorporated territory, meaning that while Congress has passed an organic act for the territory, not all protections of the US Constitution apply.[373] Like Puerto Ricans, U.S. Virgin Islanders are U.S. citizens, but they are not allowed to vote in presidential elections.[374] The territory elects a delegate to Congress; however, while the delegate is able to vote in committee, he cannot participate in floor votes.[375] At the territorial level, fifteen senators are elected for two-year terms to the unicameral Virgin Islands legislature, and the governor is elected every four years by a vote of the people.[376] The territory has both a district court and a superior court, and judges are appointed by the President of the United States and the Governor.[377]

In recent history, the U.S. Congress has organized several local referenda to aid in the territory's self-determination.[378] Like Puerto Ricans, U.S. Virgin Island residents have been given the choice of independence, status quo, or statehood; however, these measures have failed to attract sufficient civic interest or voter turn-out to produce even a noteworthy plurality, much less a majority, and thus the islands will retain their current territorial status for the foreseeable future. [379]

In fiscal year 1995, the government's annual operating budget was $500 million, of which $158 million were federal grants.[380] Tourism is the primary economic driver of the territory, with the islands hosting close to 2 million visitors per year — many of whom visit on cruise ships.[381] As such, the territory spends approximately $800 million annually towards tourism.[382] Being a

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370. *Id.*
371. Convention Between the United States and Denmark, Cession of the Danish West Indies, Jan. 25, 1917; 39 Stat. 1706, January 25, 1917, *available at* http://www.doi.gov/oia/pdf/vitreaty.pdf.
372. *See supra* note 363.
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *See* DOI, Virgin Islands, *supra* note 366.

top tourist destination, United, U.S. Airways, Delta, Continental Airlines and American Airlines serve the U.S. Virgin Islands.[383] The U.S. Postal code for the territory is VI.

The Office of the Attorney General can be reached at The Department of Justice, G.E.R.S. Complex, 48B-50C Kronprinsdens Gade, St. Thomas, VI 00802.[384]

3. *Guam*

You will not find a postcard in Guam depicting it as a typical tropical paradise. While there "is sun, sand and wilderness," it is also "all about the duty free shopping."[385] In fact, Lonely Planet describes it this way: "Think palm trees, white beaches, coral reefs — and the world's biggest K-Mart."[386]

Like the U.S. Virgin Islands, Guam is an organized unincorporated territory of the United States.[387] It is located in the Western Pacific Ocean at the southernmost tip of the Marianas Islands.[388] Guam is located in a tropical climate and temperatures range between 75 and 86 degrees.[389]

Guam was originally occupied by the Chamorros, who first populated the island almost 3,500 years ago.[390] Its first contact with western civilization occurred in 1521, when Ferdinand Magellan reached the island during his circumnavigation of the globe.[391] In 1565, Spain claimed the island and thereafter commenced colonization, making it one of the most important resting stops along the Spanish trade route between the Philippines and Mexico.[392] The US took possession of Guam in 1898 during the Spanish-American War.[393] During World War II, Guam was attacked and invaded by Japanese armed forces who already had control over the Northern Marianas Islands.[394] In 1944, the U.S. reclaimed Guam at the Battle of Guam, and in 1950, an organic act was

383. *Id.*
384. Office of N.Y. Attorney General Elliot Spitzer, U.S. State & Territory Attorneys General, http://www.oag.state.ny.us/links/other_ags.html (last visited May 15, 2006).
385. Guam, Lonely Planet, http://www.lonelyplanet.com/worldguide/destinations/pacific/guam (last visited May 15, 2006).
386. *Id.*
387. Guam, WIKIPEDIA, http://en.wikipedia.org/wiki/Guam (last visited May 15, 2006).
388. *Id.*
389. Dep't of the Interior, Office of Insular Affairs, Guam, http://www.doi.gov/oia/Islandpages/gumpage.htm (last visited May 15, 2006).
390. *See* Guam, Lonely Planet, *supra* note 387.
391. *Id.*
392. *Id.*
393. *Id.*
394. *Id.*

passed providing for the structure of the island's government and allowing for U.S. citizenship.[395]

Guam in recent years has pushed for commonwealth status through the Guam Commonwealth Act, promulgated by the Guam Commission on Self-Determination.[396] The government's structure is very much like a state government with a governor, legislature, and local judiciary.[397] The executive branch is comprised of a popularly elected governor and lieutenant governor, each serving a four-year term.[398] The legislative branch is a fifteen member unicameral legislature whose members are elected every two years.[399] The judicial system includes a territorial court called the Superior Court, a Supreme Court and a US District Court.[400] The U.S. District Court handles federal constitutional questions and other federal cases.[401] Appeals are channeled through the Ninth Circuit Court of Appeals in San Francisco and from there to the U.S. Supreme Court.[402] Finally, like most territories, Guam has a nonvoting representative in the U.S. Congress.[403]

The Guam economy is supported by Japanese tourists and the U.S. military, the latter of which occupies one-third of the island's land mass.[404] Guam is a much shorter flight from Japan than is Hawaii and tourist hotels and golf courses were built to accommodate the demand.[405]

Guam is known throughout the world as one of the worst cases of bioinvasion.[406] The brown tree snake, which is slightly venomous, came to Guam aboard a U.S. military transport during the second World War and killed almost the entire native bird population on a previously snake-free island.[407] Without any natural predators, the snake population flourished and Guam now claims the dubious distinction of an area with one of the greatest snake densities in the world.[408] Although nocturnal and therefore largely unseen, they are popularly known for being prodigious tree and power pole climbers, regularly shorting out the electricity to areas

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395. *Id.*
396. *See* Guam, WIKIPEDIA, *supra* note 389.
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *See* Guam, Lonely Planet, *supra* note 387.
405. *Id.*
406. *Id.*
407. *Id.*
408. Estimated snake density of 2,000 snakes per square kilometer. *Id.*

of the island.[409] The disappearance of Guam's bird and fruit bat population may have an impact on plants, which rely on them to spread their seeds. Guam is perhaps one of the most well-traveled U.S. territories, with an international airport serving six air carriers and providing more than one-hundred flights per week to Hawaii and the U.S. mainland.[410]

The U.S. Congress, together with the government of Guam, recently empowered Guam's voters to elect their first Attorney General.[411] The current Attorney General was inaugurated on January 6, 2003, for a four-year term.[412] The office is comprised of five divisions, including both civil and criminal, all empowered with prosecutorial authority.[413] The five divisions are: (1) general crimes, (2) government corruption, (3) child support enforcement, (4) civil, and (5) the compiler of laws.[414] The Office of the Attorney General can be reached at The Guam Judicial Center, Suite 2-200E, 120 West O'Brien Drive, Hagatna, GU 96910.[415]

V. FORTUNE FAVORS THE BOLD

If I have been successful, this article has peaked your interest in a legal opportunity that you never knew existed. I freely admit that this career path is not for everyone, and that a large majority of attorneys, by nature, would not be able to handle such a transition, let alone daily life in the tropics. I paint this picture with a rosy glow, in large part because it was the best decision I ever made. In a relatively short period of time, I have made life-long friends, expanded my perception of the world, gained an incredible amount of practical experience and visited foreign countries most Americans never see. My decision was not without some level of discomfort, and yours won't be either. My wife and I were forced to sell our house, sell both of our cars and place the lion's share of our possessions in storage. Nor is life on a tropical island entirely pristine; you will from time to time encounter cockroaches, centipedes, and strikingly hot and unbearably humid temperatures. I hope you will find, as I have, that such unpleasantries are offset by the extraordinary natural beauty of the islands.

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409. *Id.*
410. *See* Guam, WIKIPEDIA, *supra* note 389.
411. *See* The Office of the Attorney General of Guam website, http://www.guamattorneygeneral.com (last visited May 15, 2006).
412. *Id.*
413. *Id.*
414. *Id.*
415. Telephone: 671-475-3324; Facsimile: 671-472-2493; Email: law@mail.justice.gov.gu. *Id.*

I leave you with these parting words: whether you are in your third year of law school or twenty years into your practice, the opportunity is now before you. The fancy car, the big house and the golden parachute are not going anywhere. Do you want a position that could bring you depression, alcoholism, drug abuse, divorce and suicide, or do you want peace, happiness and palm trees?[416] It could be the best decision you ever made. You won't know until you try it.[417]

416. *See* Schiltz, *supra* note 11 at 874-889.

417. Congratulations on making it this far. You have taken the first step in your journey. For further questions or comments, you can contact the author at keysermike@gmail.com. Hope to see you in paradise.

THE PARADOXICAL NATURE OF THE SARBANES-OXLEY ACT AS IT RELATES TO THE PRACTITIONER REPRESENTING A MULTINATIONAL CORPORATION

JASON THOMPSON*

I. INTRODUCTION

Many people are unfamiliar with the Sarbanes-Oxley Act ("SOA"), despite the fact the Act impacts many people within the United States, as well as those purchasing American goods in other countries or working for American companies outside the U.S. The SOA not only has a tremendous impact on the way businesses are run, but also costs businesses significant amounts of money to comply with the many different sections.[1] Many legal practitioners lack an understanding of what the Sarbanes-Oxley Act actually does and how to advise clients on compliance if their company chooses to expand on an international level. If pressed, many likely would respond that the Sarbanes-Oxley Act has something to do with corporate fraud and avoiding scandals, such as Enron and WorldCom, along with all the financial difficulties these events caused their stockholders and U.S. citizens. This article addresses extraterritorial aspects of the Sarbanes-Oxley Act, and

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1. Deborah Solomon, *Corporate Governance (A Special Report); At What Price? Critics say the cost of complying with Sarbanes-Oxley is a lot higher than it should be*, WALL ST. J. Oct. 17, 2005, at R3. In fiscal year 2001, the average cost of auditing fees among S&P 500 companies was $2,934,000, S&P Mid-Cap 400 was $716,000, and S&P Small-Cap 600 was $362,000. In 2002, the year Sarbanes-Oxley became law, the cost was $4,048,000 for S&P 500 companies, $951,000 for S&P Mid-Cap 400, and $485,000 for S&P Small-Cap 600. In 2003, the amount increased to $4,809,000 for S&P 500 companies, $1,135,000 for S&P Mid-Cap 400, and $567,000 for S&P Small-Cap 600. In 2004, the average amount was $7,443,000 for S&P 500 companies, $2,177,000 for S&P Mid-Cap 400, and $1,042,000 for S&P Small-Cap 600. *Id.*

explores generally the many conflicts that arise when companies must comply with the Act.

II. SARBANES-OXLEY ACT

In response to corporate scandals of the late 1990s and early 2000s,[2] Congress enacted the SOA.[3] The SOA is perhaps the most sweeping set of laws relating to public companies since the passage of the depression-era laws.[4] The SOA passed almost unanimously through both the House of Representatives[5] and the Senate.[6] At the time of passage, it was, and remains, the largest piece of legislation to pass through Congress since the Patriot Act. At the time of signing, President George W. Bush said: "My administration pressed for greater corporate integrity. A united Congress has written it into law. [T]oday I sign the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt. This new law sends very clear messages that all concerned must heed."[7] The President went on to say, "[w]ith this law [SOA], we have new tools . . . and we will use those tools aggressively to defend our free enterprise system against corruption and crime."[8]

The SOA is a colossal piece of legislation in both size and scope. It created the Public Company Accounting Oversight Board, an independent board that regulates and provides supplementary oversight of the Securities and Exchange Commission ("SEC"), which is responsible for regulating certified public accountants practicing before it.[9] The SOA also limits simultaneous audit and non-audit services that a public accounting firm can perform for

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2. Brian Kim, *Recent Development: Sarbanes-Oxley Act,* 40 HARV. J. ON LEGIS. 235, 236 (2003). In December of 2001, Enron filed the largest bankruptcy in U.S. history and as a result 20,000 employees of Enron lost a total of $1,200,000,000 in 401(k) plans as the stock fell from $90 per share to pennies. Enron executives sold $994,000,000 in shares of Enron stock from January of 1999 to May 2002. *Id.*

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1702, 116 Stat. 745 (codified as amended at 15 U.S.C. §§ 78j-o, 7201(2002)).

4. EDWARD F. GREENE, LESLIE N. SILVERMAN, DAVID M. BECKER, EDWARD J. ROSEN, JANET L. FISHER, DANIEL A. BRAVERMAN & SEBASTIAN R. SPERBER, THE SARBANES OXLEY ACT: ANALYSIS AND PRACTICE 1 (Aspen 2003).

5. *See id.* at 1 (citing 148 CONG. REC. H5480 (daily ed. July 25, 2002) (House of Representatives approving bill by vote of 423-33)).

6. *See id.* (citing 148 CONG. REC. 57365 (daily ed. July 25, 2002) (Senate approving bill by vote of 99-0)).

7. President George W. Bush, Remarks by the President at Signing of H.R. 3763 (2002 WL 1751366) (July 30, 2002).

8. *Id.* at 4.

9. HAROLD S. BLOOMENTHAL, SARBANES-OXLEY ACT IN PERSPECTIVE § 1:10 (Audrey M. Simon et al. eds., Thomson West 2004).

the same client.[10] This process is aimed at avoiding situations similar to the Arthur Andersen scandal, of early 2000.[11] This means a firm cannot both perform accounting work and auditing for a company.[12]

The SOA also contains a certification requirement focused on improving the quality and reliability of reports filed with the SEC.[13] One goal of the SOA is to ensure that corporate disclosures are enhanced with more information and reporting done in real time.[14] The SOA mandates that accounting firms producing reports cannot have a conflict with the company that is the subject of the report (as was the case for the accounting firm representing Arthur Andersen).[15] Thus, the current SOA requires more reporting than ever, with increased reliability. Additionally, it requires more people to get involved with the preparation of reports and conduct the necessary audits.[16]

III. THE CONFIDENTIALITY CONFLICT: THE SARBANES-OXLEY'S IMPACT ON ATTORNEYS

Although the main focus of Congress' wrath in passing the SOA was chief executive officers (CEOs), chief financial officers (CFOs), and accountants, attorneys did not entirely escape the SOA's expansive reach as evidenced by section 307.[17] Section 307 sets minimum requirements of professional conduct for lawyers, and proscribes that anyone who fails to comply will be disqualified from practicing before the SEC.[18] Additionally, this section requires "an attorney representing an issuer to report evidence of a material violation of securities laws, a breach of fiduciary duty, or similar violations by the company or any agent of the company" to the chief legal officer (CLO) or CEO of the company.[19] If this does not result in appropriate corrective measures, the attorney must then go "up-the-ladder to the audit committee, or a committee of the board consisting of non-management directors, or to the board of directors."[20] The SEC, in establishing this rule stopped short of

10. *Id.*
11. In 2000, Arthur Andersen earned $27 million in consulting fees and $25 million in accounting fees from Enron. *See* Kim, *supra* note 2, at 244.
12. *Id.*
13. *See* BLOOMENTHAL, *supra* note 9, at § 1:10.
14. *Id.*
15. *Id.*
16. *Id.* § 1:13.
17. *Id.* § 1:17.
18. *Id.*
19. *Id.*
20. *Id.*

requiring an attorney to disclose information to the SEC; however, an attorney may choose to disclose confidential information to the SEC in certain cases.[21] One such case, allows an attorney to use contemporaneous records or reports in defending himself or herself in an investigation for violations of the SOA.[22]

The problem with this requirement is that it conflicts with the American Bar Association's (ABA) Model Rules of Professional Conduct, which shape most state rules of professional conduct.[23] The ABA's Model Rules of Professional Conduct state that a lawyer shall not release any information relating to the representation of the client without first gaining the client's permission, which requires consultation and full- disclosure.[24] Exceptions to this rule allow an attorney to violate client confidence "to the extent the lawyer reasonably believes it is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in *imminent death or substantial bodily harm*."[25] The attorney may also use client confidential information in defending or prosecuting an action against the client.[26] Further, an attorney may use client confidential information in the defense of a criminal claim or civil suit against the lawyer, based on the conduct involving the client, or in response to allegations pertaining to the attorney's representation of the client.[27]

The ABA's Model Rules of Professional Conduct clearly conflict with the provisions of the SOA. The SOA disclosure likely will not fall under the exception allowing for disclosure in the case of death or substantial bodily harm. Although disclosure to the SEC is permissive, disclosure to the CEO and auditor is not. If such a disclosure is not made in accordance with the rules of professional conduct established by the ABA and most states, attorneys will be in direct violation of the SOA. If it is made, attorneys will be in violation of the rules of professional conduct. Both the SOA, and most rules of professional conduct, allow for potential disbarment for violating the rule. Based on the SOA provisions for keeping auditors separate and independent, how is this not a contradiction? The most obvious answer is that it is, and will remain a contradiction.

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21. *Id.* § 4:25.
22. *Id.*
23. MODEL RULES OF PROF'L CONDUCT (2004), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html. The practitioner should consult his or her own state rules of professional conduct to determine whether a conflict exists.
24. *Id.* at R. 1.6 (2004), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html.
25. *Id.* (emphasis added).
26. *Id.*
27. *Id.*

The best course for an attorney to follow is compliance with the SOA, as he or she may later use such compliance as a defense in the event that a complaint is brought in front of the regulatory board for the state where the attorney practices. However, the complying attorney must do so with the realization that he or she is violating the ethics rules he or she took a vow to uphold. On the other hand, potential penalties for violating the SOA are quite severe. If any provision of the Securities and Exchange Act, or rule or regulation adopted there under, is willfully violated, the maximum prison sentence is 20 years, with a maximum fine of $5 million for a natural person,[28] or $25 million for a violator other than a natural person, which includes businesses that must comply with the SOA.[29]

The primary purpose of the SOA is to prevent the type of corruption and crime that marked the downfall of companies such as Enron, WorldCom, and Arthur Andersen.[30] As a means to that end, the U.S. government must obtain information about companies doing business in the U.S. and abroad, as it is not practical for the SEC to investigate all companies within its jurisdiction to determine if proper practices are being observed.[31] The far more practical means of accomplishing the goals of the SOA is to get the information from those who work for each individual company. Thus, all companies registered with the SEC are required to file with the SEC and certify that all aspects of the SOA are being followed.[32] The issue with this solution is that those who are in the position to perpetrate fraud are the same people who file the disclosure statements.

To combat this problem, the SOA provides for employees of a company to have the ability to report the illegal deeds of superiors that fall under the SOA without fear of retaliation.[33] The idea is similar to the whistleblower theory, but the SOA gives the employee a greater sense of security that retaliation against the employee will not occur.[34] This is accomplished through anonymous tip-lines where an employee can phone-in information regarding the company they work for, without giving personal information, and without the knowledge of the person about whom the report is

28. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1106, 116 Stat. 810 (codified as amended at 15 U.S.C. §§ 78j-o, 7201(2002)).

29. *Id.*

30. *See* Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 68 (2005).

31. *Id.*

32. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1106, 116 Stat. 810 (codified as amended at 15 U.S.C. §§ 78j-o, 7201(2002)).

33. *Id.*

34. Vaughn, *supra* note 30, at 68.

being made.[35] Moreover, information provided over a tip-line will not force the reporter to appearing as a witness to testify at a later date.[36] This anonymous whistleblower provision of the SOA applies to all companies that are required to file with the SEC pursuant to the terms of the Securities and Exchange Act of 1934, including "companies with any security registered under the Securities Exchange Act of 1934 or any company required to file any reports under that Act."[37]

Based on the breadth of the SOA and its extraterritorial application, the SOA is one of the most important whistleblower acts.[38] Due to the broad reaching definitions of the SOA, certain companies that are either chartered in, or do business in another country, are also required to comply with the SOA's whistleblower provision.[39] This is where the inherent problem occurs with this section of the SOA due to its direct conflict with the laws of the European Union.

Generally speaking, courts are hesitant to enforce laws extraterritorially without a direct statement of intent. In the case of the SOA's whistleblower provision, this intent is specifically expressed through five particular aspects of the provision.[40] First, the provision explicitly applies to foreign entities and foreign companies.[41] Second, the term "employee" is not limited to company employees located within the U.S. or to U.S. citizen employees, employed by companies within the U.S.[42] Third, disclosures are based on the standards of U.S. law, thus protecting only those disclosures made to regulatory agencies of the U.S. (such as the SEC), members of Congress, and members of congressional committees.[43] Fourth, the provision overtly creates a cause of action resulting from its violation, and directs the enforcement to the United States Department of Labor and the courts of the U.S.[44] Fifth, the law concentrates on the protection of the securities markets of the U.S.[45] As a result of the whistleblower provision of the SOA, a citizen of a foreign country can be subject to the jurisdiction of the U.S. simply because he or she happens to be employed by a company that is a subsidiary of

35. *See id.*
36. *Id.*
37. Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 78a-78kk; Vaughn, *supra* note 300, at 68.
38. *Id.*
39. *Id.*
40. *See id.* at 69.
41. *Id.* at 69-70.
42. *Id.* at 70.
43. *Id.*
44. *Id.*
45. *Id.*

a U.S. company or, more broadly, because a company that is chartered in, and does business in, a foreign country chooses to register with, and have securities in the U.S. as a means of raising capital.[46]

The real issue arises when companies fall under the reach of the whistleblower provision of the SOA, as well as the laws of another jurisdiction because of its presence within that country. The companies in this circumstance must comply with the laws of each jurisdiction, even when a specific conflict arises between the laws.[47] This is impossible for both domestic and foreign companies. The result is that companies failing to comply with the laws of every jurisdiction, in which it is present, are being sued for failure to comply, as evidenced by the recent *McDonald's* and *Exide Technologies* cases.[48]

IV. EUROPEAN LAWS: *MCDONALD'S* AND *EXIDE TECHNOLOGIES*

In addition to the inherent difficulties of complying with the SOA in terms of necessary disclosures, and reports, as well as efforts to avoid corruption and fraud, attorneys and companies also have a litany of other issues to confront when companies choose to go multinational. Provisions of the SOA, such as the anonymous tip-line, conflict with laws in other jurisdictions such as the European Union. One of these conflicts arose with the European Union's enactment of a law dealing with the transfer of personal information to a third country.[49] The law states that the "data subject" should have access rights to all the information relating to him and have the right to erase or block the data.[50] This right causes major problems for a system operating off an anonymous tip-line. The law further mandates that in transfers of data to a third country, the "data subject" should have the proper information to object or withhold consent for the transfer of the data.[51]

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46. *See id.*
47. *Id.*
48. Exide Technologies, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-111 (May 26, 2005), *available at* http://www.theworldlawgroup.com/newsletter/details.asp?ID=1246367122005 (English translation); McDonald's France, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-110 (May 26, 2005), *available at* http://www.theworldlawgroup.com/newsletter/details.asp?ID=1243487122005 (English translation).
49. Commission Decision 2001/498, 2001 O.J. (L 181) 19 (EC).
50. *Id.* §13.
51. *Id.* §14.

Furthermore, the data exporter and the data importer, are deemed to be jointly and severally liable for any violations.[52]

McDonald's and Exide Technologies, two American companies doing business in France, have both discovered the problems with being multinational corporations that must comply with the SOA. Both companies have had identical cases in French courts.[53] As the facts and analysis of the cases are in essence identical, only the *McDonald's* case will be analyzed in this article.[54]

The *McDonald's* action involved La Commission Nationale de L'Information et des Libertés ("CNIL"), the French Data Protection Authority, and McDonalds' failure to comply with the CNIL.[55] McDonald's made a request of the CNIL for authorization to put into place a system of "professional integrity."[56] Under the requested system, found in international McDonald's Group's "Code of Ethics," the staff of the French subsidiaries would be allowed to report to the American parent company about the behavior of coworkers and that of their colleagues.[57] This action was "deemed contrary to the French legal rules, as well as the Code of Ethics."[58] The procedures proposed by McDonald's would not affect all of the employees of McDonald's in France.[59] McDonald's project would only apply to head office employees, managers, and executives of the one hundred seventy-five restaurants amounting to approximately one thousand people.[60] The contents of the reports sent to the parent company in the U.S. would be recorded in a central file under the direction of the Director of Ethics for McDonald's.[61] Each report would receive a report number so as to ensure the confidentiality of the report and the anonymity of the informant.[62] Once the Director of Ethics received the report, he or she would communicate its contents to general counsel for McDonald's

52. *Id.* § 18.

53. Exide Technologies, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-111 (May 26, 2005), *available at* http://www.theworldlawgroup.com/newsletter/details.asp?ID=1246367122005 (English translation); McDonald's France, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-110 (May 26, 2005), *available at* http://www.theworldlawgroup.com/newsletter/details.asp?ID=1243487122005 (English translation).

54. *Id.*

55. McDonald's France, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-110 (May 26, 2005), *available at* http://www.faegre.com/articles/downform2.asp?doc_num=2&aid=1691 (English translation).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

France.[63] General Counsel would then forward the information to the appropriate service manager depending on the nature of the alleged offense.[64] The department director would then decide whether or not to open an investigation, and if so decided, the director would send the information only to those persons involved in the investigation.[65] The department director would inform the general counsel (in France) of the investigation and coordinate with him or her regarding the investigation.[66] If the investigation is of a member of management of McDonald's France, the investigation would be dealt with by the American parent company.[67]

The French court analyzed the provisions of McDonald's plan under the provisions of several relevant laws.[68] First, the court analyzed McDonald's plan in light of the January 6, 1978 law (Article 3).[69] This law is used by the court to determine whether jurisdiction was proper over McDonald's plan.[70] The court relied heavily on the encouragement of McDonald's France to use the system and the steps taken by the company to ensure the anonymity of the person who makes reports about colleagues.[71] The court thus, determined that jurisdiction was proper to review McDonald's plan, but found that McDonald's plan did not comply with French law.[72] In so finding, the court held:

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63. *Id.*

64. *Id.* (including the Human Resources Director, Security Director, and Financial and Accounting Director).

65. *Id.*

66. *Id.*

67. *Id.*

68. McDonald's France, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-110 (May 26, 2005), *available at* http://www.theworldlawgroup.com/newsletter/details.asp?ID=1243487122005 (English translation).

69. *Id.* (the law is unnamed, only represented by date).

70. *Id.*

71. *Id.*

72. The law dated January 6, 1978 is also known as the "Data Protection Act," *available at* http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-83516#_ftnref3.

> The Data Protection Act was enacted in 1978 and covers personal information held by government agencies and private entities. This act provides that anyone wishing to process personal data must register and obtain permission in many cases relating to processing by public bodies and for medical research. Individuals must be informed of the reasons for collection of information and may object to its processing either before or after it is collected. Individuals have rights to access information being kept about them and to demand the correction and, in some cases, the deletion of this data. Fines and imprisonment can be imposed for violations.
>
> *Id.*

> implementation by an employer of a system designed to gather personal data from employees, in any form whatsoever, concerning behavior contrary to company rules or contrary to the laws attributable to their colleagues, which could lead to an organized system of professional denunciation, can only give rise to a reservation in regard to the Law dated January 6, 1978 as amended and notably Article 1 of such law.[73]

The French court also held that the possibility of establishing the tip-line in an anonymous manner "could only re-enforce the risk of slanderous denunciations."[74] Based on the application of French law, the court denied McDonald's request for permission to implement the plan of the tip-line.[75]

Similar to the difficulties encountered by McDonald's and Exide Technologies in France, Wal-Mart attempted to implement a similar anonymous tip-line in Germany.[76] A labor group in Germany sued Wal-Mart of Germany based on Wal-Mart's implementation of an anonymous hotline.[77] The case went before the Wuppertal Labour Court on oral argument on June 15, 2005.[78] The German court reached the same decision that the anonymous tip-line instituted by Wal-Mart, much like that of McDonald's and Excide, was in violation of local law; however, the German court based the decision on a different rationale.[79] The case was brought by the Central Works Council in Germany, established in the area

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73. McDonald's France, CNIL (La Commission Nationale de L'Information et des Libertés) (The French Protection Authority) Decision 2005-110 (May 26, 2005), *available at* http://www.faegre.com/articles/downform2.asp?doc_num=2&aid=1691 (English translation).

74. *Id.*

75. *Id.*

76. Mark E. Schreiber et al., *Anonymous Sarbanes-Oxley Hotlines in the E.U.: Practical Compliance Guidance for Global Companies*, BNA INTERNATIONAL WORLD DATA PROTECTION REPORT, at 3 (Aug. 2005).

77. Wuppertal Labour Court, 5th Division, 5 BV 20/05, June 15, 2005 (F.R.G.).

78. This case is not listed in any of the official American case law databases. A limited translation is available at http://cms-hs.com. The author of this work received a translation of the case courtesy of Christian Runte of CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern Registerangaben located in Muenchen, Germany (English translation on file with author).

79. Global Compliance Services, *Update Regarding Compliance with Sarbanes-Oxley in Europe*, *available at* http://www.globalcompliance.com/pdf/sarbox-alert3.pdf (last visited Oct. 28, 2005). Wal-Mart appealed the decision and oral argument on the appeal was set for November 14, 2005. The appellate court stated that an opinion on the appeal should be released approximately three weeks after the argument. *Id.*

of work that Wal-Mart is engaged within Germany.[80] The defendant in this action was classified by the court as a German subsidiary of the U.S. firm of Wal-Mart, Inc.[81]

In this case, Wal-Mart operated a telephone hotline.[82] The employees of Wal-Mart in Germany were encouraged to utilize the telephone hotline for anonymous reporting of violations of the internal code of conduct at Wal-Mart by both co-workers and members of management.[83] Wal-Mart issued a "quick guide" of the code of conduct that Wal-Mart distributed to its employees.[84] The quick guide stated in relevant part: "Should you have any questions or want to report a possible violation of the code of conduct: 1. Please make use of the open door policy and/or 2. Please call the code of conduct telephone hotline."[85] The store managers were given posters regarding Wal-Mart's code of conduct that were to be permanently displayed at every Wal-Mart human resources department.[86] In the action, the German group requested that Wal-Mart stop using the ethics guide of the code of conduct and from the operation of the ethics hotline.[87] The German group argued that publishing the code of conduct, and compelling the employees to take note of the code, forced employees to abide by the terms of the code.[88] Wal-Mart contended that the hotline was voluntary and that employees were not forced to use the line.[89] Wal-Mart also contended that the implementation of the hotline was "a permissible concretization of the employee's ancillary duty to prevent harm."[90]

The court held that the tip-line and displaying of the poster were in violation of German law.[91] The Court determined it had jurisdiction under the German Works Constitution Act.[92] The court held further, that the German Works Constitution Act is applicable to all businesses in Germany whether or not they originated as German or international businesses.[93] In determining

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80. Wuppertal Labour Court, 5th Division, 5 BV 20/05, June 15, 2005 (F.R.G.) at I. Wal-Mart is a commercial business that operates 74 branches in Germany and employs approximately 10,500 employees. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at II.

92. *Id.*

93. *Id.*

jurisdiction, the court also held that when a company introduces a standard of conduct the employee representative in each affected country may exercise the rights provided in that country.[94] The court determined that the provision of rights in the German Works Constitution Act are mandatory and cannot be affected by instructions from the foreign parent company.[95] The court reasoned that encouraging employees to report unethical conduct, or violations of an internal code of conduct by means of an anonymous tip-line violates section 87(1) of the German Works Constitution Act.[96] The court reasoned that even though the provisions of Wal-Mart's code of conduct do not require employees to utilize the tip-line, it still provides for a means of reporting misconduct and further, it is tantamount to the order of conduct within the company. The court also reasoned that a certain provision of the code of conduct states that failure to comply with the code of conduct will result in disciplinary action and possibly termination.[97] Thus, employees of Wal-Mart are effectively obligated to act a certain way within the company.[98]

The court determined that the installation of the hotline was done with the intent to monitor employee conduct.[99] The fact that the hotline would be operated anonymously was irrelevant.[100] The court took issue with the fact that under the current state of technology, tip-line caller identities could be determined.[101] The court determined that in order for Wal-Mart to avoid a €250,000 fine for each case of violation, Wal-Mart must stop from advising employee compliance with the ethics directives in the code of conduct and stop placing posters in locations throughout Germany.[102] The German court also determined that in order for Wal-Mart to avoid a fine of €250,000 for each case of violation, they must stop operating the telephone hotline.[103]

It is interesting to note that although the courts of France and Germany resulted in a decision against an anonymous hotline to allow employees of subsidiaries of American companies to report unethical behavior, the French court based its decision on the right

94. *Id.*
95. *Id.*
96. *Id.* The German Works Constitution Act (Betriebsverfassungsgesetz) states: "the works council shall have the right of co-determination . . . in matters relating to the rules of operation of the establishment and the conduct of employees in the establishment." *Id.*
97. *Id.*
98. *Id.*
99. *Id.* §5.
100. *Id.*
101. *Id.*
102. *Id.* at I.
103. *Id.*

of the person about whom the report is made to know the contents of such a report.[104] The French court relied heavily on the potential of the falsity of accusations when anonymity is allowed for the accuser.[105] The German court, on the other hand, worried that the person who made the accusation might have his or her identity revealed through technology even though the hotline is intended to be anonymous.[106] No matter what the reason, the problem is still the same for American companies. How can a company comply with the SOA while avoiding hefty fines from E.U. countries?

V. THE SOLUTION

In response to the *McDonald's* and *Excide Technology* cases, CNIL issued a statement on September 28, 2005, stating it is preparing to issue recommendations regarding SOA compliance, along with compliance with French data protection laws.[107] The statement reiterates that the CNIL refuses to authorize projects that involve the use of hotlines that will presumably be used to encourage or allow workers to report the inappropriate behavior of coworkers.[108] The CNIL acknowledged the difficulty of compliance with the SOA and the data protection laws of France. As such, CNIL sent a letter to the SEC on June 29, 2005, and again on July 29, 2005, regarding conflicts in the two sets of laws.[109] In the letter, the CNIL asked whether the SEC plans to use its capabilities to sanction U.S. companies that do business in France that are not in full compliance with the SOA.[110] The French requested that the SEC grant an additional three months beyond August 31, 2005 in order to attempt to reach an agreement whereby companies can comply with both U.S. and French (European Union) laws.[111] The SEC responded on August 10, 2005, and indicated a willingness to be flexible and work with the CNIL to reach a conclusion that is acceptable to both countries.[112]

The CNIL drafted guidelines and invited comments in an attempt to fix the matter in France and deal with the conflict of law

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104. *Id.*
105. *Id.*
106. *Id.*
107. *See Lignes Éthiques, Whistleblowing: La CNIL Prepare des Recommandations à l'Usage des Enterprises,* http://www.cnil.fr/index.php?id=1870 (English translation on file with author).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

issue. [113] The guidelines of the CNIL appear as though they will deal at least with some of the difficulties of the SOA and data protection laws, but they by no means fix all the problems.[114] The guidelines do show progress as they are the result of a collaboration of the CNIL, attorneys and firms working in the multinational arena.[115]

Although it appears as though the issue may be settled in France, it still remains for the other 24 countries of the E.U. Within the 25 countries of the E.U., each country has the ability to enforce and interpret the E.U.'s data protection laws as each country sees fit.[116] This may lead to 25 different interpretations of the tip-line provision of the SOA.[117] For example, the United Kingdom Information Commissioner's Office does not find error in the SOA hotlines.[118] If the companies properly investigate the hotline claims, inform the accused, and provide the accused due-process rights, the U.K. apparently will continue to not have an issue with the hotlines.[119] However, the U.K. does caution that British law might be violated if a company was to take the anonymous tip without question and act without conducting an impartial investigation.[120]

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113. *See* Robert Bond & Greg Campbell, *Sarbanes Oxley Ethical Hotlines: CNIL Publish Draft Guidelines*, Nov. 7, 2005, http://www.faegre.com/article_1729.aspx; *see also* http://www.cnil.fr.

114. *See* Global Compliance Services, *Sarbanes Oxley Compliance*, Oct. 28, 2005, http://www.globalcompliance.com/pdf/sarbox-alert3.pdf. It is likely that the guidelines adopted by the CNIL will serve as a model for other E.U. member states. The CNIL stated that whistleblower hotlines such as those contemplated by the SOA are not generally forbidden under French law. However, given that personal information is being collected through the hotlines, there must be adherence to the French Data Protection Laws. This mandatory compliance means that information must be collected fairly, those having their information collected must be informed, and have the ability to object to the collection for "legitimate reasons," as well as the right to remove incorrect information. In the guidelines, the CNIL recognized that SOA requires anonymous tip-lines and thus, did not prohibit anonymous reporting. The CNIL did require that hotline operators give the option to those reporting whether to provide their name. Further, the CNIL requires operators to inform reporters that reporting is not required. Companies operating tip-lines are prohibited from publicizing or encouraging anonymous reporting. The CNIL rejected general hotlines, but approves those limited to information regarding auditing and accounting issues. The CNIL also wants to limit the type of personnel that have access to tip–lines, allowing access to those involved in financial matters, excluding categories of employees such as factory workers. *Id.*

115. *Id.*

116. David Reilly & Sarah Nassauer, *Tip-Line Bind: Follow the Law in U.S. or E.U.?* WALL ST. J., Sept. 6, 2005, at C1.

117. By definition of the SOA having a stock listed on a U.S. exchange subjects the company to the SOA and thus, the tip-line requirement. *See* BLOOMENTHAL, *supra* note 9.

118. *See* Reilly & Nassauer, *supra* note 116. The U.K. is the E.U. country with the most companies listed on the U.S. markets. *Id.*

119. *Id.*

120. *Id.*

The lack of uniformity among E.U. nations and conflict between the SOA and E.U. data protection laws place multinational companies in precarious positions.[121] As a result of the conflicting laws, some European companies are presently seeking to deregister their stocks on U.S. markets.[122] Doing so would remove the companies from the requirements of the SOA, allowing them to operate without the restrictions imposed by it, and clear them from the tip-line requirement.

Practitioners who represent clients that are either subject to the SOA and conduct business in Europe or are European companies subject to the SOA, are faced with a difficult situation. At present, it appears as though a company cannot comply fully with both the SOA and E.U. laws. So, what is the proper course of action? It appears as though the best course of action is to comply with E.U. laws because the SEC has not shown an inclination to act on the tip-line bind. Certain countries within the E.U. are clearly not opposed to taking action as indicated by the *Excide Technologies, McDonald's* and *Wal-Mart* actions.[123] Although this seems to be the prudent course of action at present, the SOA and its hefty penalties will hang over the heads of companies and attorneys like the sword of Damocles.[124]

What is the proper solution? If the SEC exempts the portions of companies that do business in Europe from the tip-line provision of the SOA, it will in effect give those wishing to commit fraud a road map — simply move the fraud to the European portion of the company. European countries will also not want to simply exclude those companies that fall under the SOA from compliance with the E.U. data protection laws.

It seems as though the appropriate solution lies in the middle. Those companies that are subject to the SOA merely because of registration with the SEC, but that are located in and do business in Europe, should be excluded from the tip-line provisions of the SOA. By contrast, those companies that are in effect American companies doing business in Europe should be exempt from E.U. data protection laws and allowed to comply fully with the SOA. This will keep companies from deregistering in the U.S. and not discourage American companies from doing business in Europe for fear of non-compliance with the SOA or E.U. laws.

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121. *See id.*
122. *Id.*
123. *Id.*
124. *See id.*

VI. CONCLUSION

The Sarbanes-Oxley Act causes difficulty for the practitioner in representing clients who are subject to the Act, as well as laws of other countries. When representing a client that is subject to Sarbanes-Oxley, as well as laws of other countries, it is prudent to determine if compliance with Sarbanes-Oxley will conflict with foreign laws. Also, the practitioner should be concerned with reporting requirements of Sarbanes-Oxley as they relate to the rules of professional conduct of both the American Bar Association and the relevant state jurisdiction of the attorney.

If the practitioner is representing a company that is subject to the SOA and foreign laws, especially a country within the E.U., it is prudent to be aware of the data protection laws within that country.[125] A company may potentially find itself in a position where it is impossible to comply fully with all laws. Although the SEC has verbally stated it will not pursue those cases, it should make the practitioner uncomfortable to rely on such unofficial verbal statements.

The SOA also raises the issue of disclosure in the event of wrongdoing relative to the SOA. The practitioner should consult the rules of professional conduct in his or her state and compare his or her ethical duty with the SOA reporting requirements. It is also essential for the practitioner to define who he or she represents — the corporation, board of directors, or company management.

125. Or equivalent if not in the E.U.

STRENGTHENING INVESTOR CONFIDENCE IN EUROPE: U.S.-STYLE SECURITIES CLASS ACTIONS AND THE *ACQUIS COMMUNAUTAIRE*

STEFANO M. GRACE

I. INTRODUCTION

Law and economics scholars provide strong empirical evidence that effective disclosure laws and the availability of private enforcement mechanisms benefit securities markets through encouraging issuers to provide more reliable information to market participants and promoting investor confidence.[1] As the European Union (EU)[2] strives to build a single securities market among its

1. *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andre Shleifer, *What Works in Securities Laws?*, 61 J. FIN. 1 (Feb. 2006) (noting procedural rules in common law countries provide greater incentives for issuers to provide truthful information to market participants through private enforcement and that private enforcement in turn promotes shareholder wealth); *see also* Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law & Finance in Transition Economies*, 8 ECON. OF TRANSITION 2, 325 (2000) (noting the importance of private enforcement measures in transitioning economies).

2. It is worth noting the European Union is not yet a legal entity, a status that the adoption of the constitutional treaty recently voted down in France and the Netherlands, would have provided. The current powers of the EU are granted through a series of treaties

member states through the *acquis communautaire*,[3] it faces growing concerns regarding investor protections and strengthening corporate governance in Europe.[4] Recent corporate scandals in Europe[5] have affected individual investors on a large scale with similar injuries.[6] This has led to a recent shift in the role of enforcement in several EU member states, from solely state and public consumer group enforcement mechanisms to the inclusion of private enforcement.[7] As a result, European member states are increasingly adopting variations of U.S.-style securities class action[8] mechanisms that may soon help restore investor confidence and provide greater protections against corporate malfeasance in Europe.[9] The European Ministers of Justice have also called for EU-wide reforms to provide for U.S.-style securities class action devices and private enforcement mechanisms, and such reforms may soon become a reality in light of the current trend of EU member states amending procedural rules to facilitate private enforcement through securities class actions in Europe.[10]

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comprising the European Community. *See* Europa, The EU at a Glance, http://europa.eu.int/abc/history/index_en.htm (last visited March 3, 2006).

3. Europa, European Commission: Justice and Home Affairs Glossary, http://europa.eu.int/comm/justice_home/glossary/glossary_a_en.htm (last visited Apr. 3, 2006) (defining *acquis communautaire* as the "entire body of legislation of the European Communities and Union, of which a significant body relates to justice and home affairs" and noting that "[a]pplicant countries must accept the *acquis* before they can join the EU").

4. *See, e.g.,* Mark Wegener & Peter Fitzpatrick, *Europe Gets Litigious: Class Actions and Competition Enforcement May Change Europe's Legal Culture*, LEGALTIMES, May 23, 2005 (noting the shift in Europe to protect investors in light of recent financial scandals and efforts in the U.S. to restrict class action litigation); *see also* Europa, European Commission: Internal Market – Securities & Investment Funds, http://europa.eu.int/comm/internal_market/securities/index_en.htm (last visited Apr. 3, 2006) (noting the aim of EU directives under the European Commission's Financial Services Action Plan is to "ensure the development of a single securities market").

5. References to Europe in this article apply generally to the European Union and its member states, as this article focuses on the efforts to promote a single securities market within the European Union.

6. Kerry Capell, Gail Edmondson, Carol Matlack, Ariane Sains, Jack Ewing & Juliane von Reppert-Bismarck, *Europe's Old Ways Die Fast*, BUSINESSWEEK, May 17, 2004, *available at* http://www.businessweek.com/magazine/content/04_20/b3883018.htm (discussing recent corporate scandals in Europe and the relatively quick response to reform old business practices).

7. *See generally* Linda A. Willett, *U.S.-style Class Actions in Europe: A Growing Threat?*, 9 BRIEFLY (June 2005), *available at* http://www.nlcpi.org/books/pdf/BRIEFLY_Jun05.pdf (discussing the shift in enforcement mechanisms in Europe).

8. *See generally* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02 (2005) (noting the purpose of the U.S. class action mechanism "is to make multi-party litigation expeditious and economic").

9. *See, e.g.*, Brendan Malkin, *UK Firms Gear Up as Class Action Culture Hits Europe*, THE LAWYER, Feb. 7, 2005, *available at* http://www.thelawyer.com/cgi-bin/item.cgi?id= 113914&d=122&h=24&f=46.

10. *Concern Grows over Exposure to U.S. Lawsuits*, FINANCIAL TIMES, May 30, 2005, *available at* http://news.ft.com/cms/s/f55c94f8-d0a6-11d9-abb8-00000e2511c8.html.

While the debate continues at the Community[11] level, individual EU member states have begun implementing class action legislation.[12] However, current procedural devices vary with regard to the kinds of enforcement mechanisms that are available to individual investors in EU member states. As the European Commission works to implement pan-European securities regulations,[13] a directive on class action procedural rules would likely benefit EU member states as they attempt to provide legal certainty[14] for market participants and restore investor confidence in Europe.[15] Additional EU member states will likely recognize the benefits of private enforce mechanisms leading to greater natural convergence[16] among EU member states, and unification of law[17] may soon follow through the development of the *acquis communautaire*. When adopting securities class action mechanisms, EU member states have taken divergent approaches in an attempt to avoid the

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11. Community refers to the European Union and its member states collectively as they are "governed by the Treaty establishing the European Communities." European Commission: Justice and Home Affairs Glossary, http://europa.eu.int/comm/justice_home/glossary/glossary_c_en.htm (last visited Apr. 3, 2006).

12. Quinn Emanuel, Trial Lawyers: Practice Description, Class Actions Abroad: Opening Pandora's Box?, http://www.quinnemanuel.com/news/article_detail.aspx?recid=6 (last visited Apr. 3, 2006) (discussing recent developments to introduce class action mechanisms in Europe and other countries).

13. *See, e.g.*, Europa, European Commission: Internal Market—Financial Services Action Plan, http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm (last visited Apr. 3, 2006) (setting forth a plan to adopt legislative measures in support of a single EU securities market); *see also* EILÍS FERRAN, BUILDING AN EU SECURITIES MARKET, 1-5 (2004).

14. *See, e.g.*, Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. OF COMP. & INT'L L. 157, 158 (noting the importance of legal certainty in "national and international markets and financial systems" and that the absence of "enforceable rule of law can hinder investment and growth"). Further noting, that public enforcement is more effective at stopping rather than preventing conduct, but even though private enforcement is more effective at remedying and preventing harmful conduct it is often not worth pursuing when individual claims are small. *Id*.

15. *Id*. (noting also that a class action mechanism can enable aggregation of claims to seek a remedy for harm caused that is otherwise too small to seek individually).

16. At first glance it might appear that the convergence is a form of legal transplant, but it is more likely driven by the shift in societal needs and recognition that the state cannot act alone in meeting those needs. Further, some class action mechanisms may be borrowed in part from the U.S. model, yet no EU member state has transplanted the U.S. model as a whole. *See generally* John Henry Merryman, *On the Convergence (and) Divergence of the Civil Law and the Common Law*, 17 STAN J. INT'L L. 35, 359-73, 387-88 (1981), *quoted in* JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, CASES AND MATERIALS 17 (LexisNexis ed., 1994) (discussing different kinds of divergence and convergence that occur in adoption of legal systems). Merryman further notes that while civil law codes are much older than common law codes and arguably more developed, there still exists convergence in both directions. *Id*. at 17-18.

17. This is often referred to as "hard convergence" in the context of international treaties such as those of the European Community. *See* Mark Bauer, Professor of Law, Stetson University College of Law, Class Lecture in International and Comparative Competition (Antitrust) Law, Estonia Summer Abroad Program 2 (Aug. 8, 2005) (on file with author).

procedural flaws of U.S.-style securities class actions.[18] However, EU member states can learn from recent attempts in the U.S. to curb such procedural abuses in securities class action litigation, and should consider new forms of private enforcement mechanisms as they seek to restore investor confidence and promote more efficient securities markets in Europe.

This article examines the recent trend to adopt variations of U.S.-style class action mechanisms in Europe in an effort to provide greater investor protections while avoiding abuses of the devices seen in the United States. This Note considers the divergence of procedural mechanisms and emphasizes that greater convergence will likely follow as the EU strives to build a single securities market and seeks better corporate governance. Part II provides a brief overview of the perceived deficiencies of the U.S. class action model and reluctance to adopt certain procedural elements in EU member states. Part III considers the shift in Europe away from exclusive state enforcement measures towards private enforcement, examining the recent class action mechanisms adopted in Sweden and the Netherlands, the class action proposal in France, and attempts to avoid the feared "legal blackmail"[19] and "floodgate" effects of the U.S. class action model. Part IV examines the German "model case proceeding" for capital markets and its apparent attempt to protect German issuers from U.S.-style securities litigation through a new class action approach. Part V looks at recent trends in the United States to limit the perceived abusive use of U.S. class action devices in securities litigation, as well as the lessons that EU member states can learn from these measures. This article concludes that while EU member states have recently adopted diverging class action mechanisms to provide greater private enforcement in Europe, future harmonization efforts to promote a single securities market at the EU level will likely create greater convergence in Europe through unification of laws.

II. OVERVIEW OF CONCERNS IN EUROPE WITH U.S.-STYLE SECURITIES CLASS ACTIONS

As the *acquis communautaire* and legal systems of EU member states continue to evolve, the European Commission and Ministers of Justice in Europe have expressed growing concern that it

18. *See infra* Part III.

19. This espouses the view that plaintiff lawyers abuse U.S. class action devices as leverage to obtain large settlements from corporate defendants based on non-meritorious claims. *See, e.g.,* Oikeusministeriö, Introducing Class Actions in Finland?, at 3. (Fin.), http://www.om.fi/14421.htm.

has become increasingly difficult for public authorities to police and monitor corporate misconduct.[20] These concerns are supported by recent empirical studies noting that strong private enforcement measures help mitigate agency costs of aligning the interests of management with those of the outside shareholders.[21] Such measures promote greater disclosure and deter management from expropriating resources for personal gain.[22] Private enforcement has thus, been recognized as a means of addressing these concerns, yet fears of becoming overly litigious and cultural considerations have led to questioning certain elements of the U.S. class action model.[23] The primary concern among EU member states is that certain mechanisms of the U.S. model encourage "legal blackmail" and conflicts of interests for attorneys litigating such claims.[24] These concerns primarily involve the U.S. model's: (1) contingency fee; (2) "opt-out" provision of Rule 23(b)(3); and (3) rejection of the "loser pays" rule (or the "English rule"). The reluctance to adopt these procedural mechanisms in Europe is further supported by the substantial debate regarding the value of these mechanisms and recent attempts to limit abuse of class action devices in the United States.[25] These devices are often enhanced by discovery devices, punitive damage awards and attorney advertising, which are predominantly features of the U.S. judicial system and are generally not available in EU member states.[26]

A combination of the devices that comprise the U.S. class action model makes U.S. courts attractive to foreign plaintiffs seeking recovery. However, the adoption of such procedural devices in EU member states may soon pave the way for greater investor pro-

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20. Quinn Emanuel, *supra* note 12; *see also* Concern Grows over Exposure to U.S. Lawsuits, *supra* note 10.

21. *See* La Porta, Lopez-de-Silanes & Shleifer, *supra* note 1.

22. *Id*.

23. *See, e.g.*, Hon. Roberth Nordh, Group Actions: The Swedish Approach, Cour de Cassation, http://www.courdecassation.fr/manifestations/colloques/Colloques2005/actions_collectives/judge_nordh.pdf (discussing the impact of globalization over the past 20-30 years as creating a new need in society for revamping old civil codes that did not foresee the kinds of disputes societies face today). Judge Nordh co-led the Swedish commission that examined the need for revisions to the Swedish civil code. He notes further revisions to the current Swedish model will likely be necessary to promote access to justice. *Id*. at 7.

24. *See generally* Willett, *supra* note 7 (discussing reservations in Europe to adopt U.S. class action mechanisms).

25. *See, e.g.*, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2005); Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p (2005); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711-15 (2005).

26. *See* John H. Beisner & Charles E. Borden, Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience, O'Melveny & Myers LLP, http://www.omm.com/webdata/content/newsevents/beisnerpdf2.pdf (last visited Apr. 3, 2006) (noting lack of availability of these devices in Europe serves as an added obstacle to plaintiffs and plaintiff firms).

tections in Europe.[27] Empirical evidence suggests that issuers who cross-list on U.S. securities markets achieve permanent increases in stock value and greater liquidity on home exchanges.[28] Cross-listing allows firms to signal to investors that it has implemented the stricter corporate governance procedures required to withstand the strong private enforcement mechanisms in the United States, thus, mitigating agency costs.[29] Lord Denning provided the following view commonly espoused by opponents of the U.S. class action model:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their services but instead they will take forty percent of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such cost deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their forty percent before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.[30]

As long as adequate private enforcement mechanisms are unavailable in Europe, European investors will likely continue to seek protection under U.S. securities laws when possible[31] because of the procedural appeal noted by Lord Denning. Thus, as dis-

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27. *Id.*

28. Piotr Korezak & Martin T. Bohl, *Empirical Evidence on Cross-Listed Stocks of Central and Eastern European Countries*, 6 EMERGING MARKETS REV. 121, 122 (2005); *see also* John C. Coffee, Jr., *Racing Towards the Top? The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002).

29. Coffee, *supra* note 28, at 1763-64.

30. *See* BERNHARD GROSSFELD, THE STRENGTHS AND WEAKNESSES OF COMPARATIVE LAW 67-68 (Tony Weir trans., Oxford Press 1990) (quoting Lord Alfred Thompson Denning).

31. *See infra* Part V (noting U.S. courts are often willing to exercise extraterritorial jurisdiction over foreign plaintiffs, even where securities were purchased or sold on a foreign exchange where elements of the conduct or effects test are met).

cussed in Part IV, there may soon be a shift in Europe to prevent non-EU judicial systems from binding absent class members in securities disputes pertaining to European issuers.[32] Such action would be to protect European issuers from the abuse of U.S.-style class action mechanisms that EU member states have sought to avoid. However, this may lead to increased forum shopping within EU member states for judicial systems with the most plaintiff-friendly procedural devices as Europe creates a single securities market.

A. Contingency Fees and No-Win-No-Pay Rules

While usage of contingency fees is most prevalent in the United States and Canada, a growing number of EU member states permit risk agreements such as "no-win-no-pay" rules, typically not tied to a percentage of the awards or only partially tied to the awards, and limited contingency fee arrangements that could promote a U.S.-style class action culture in the EU.[33] Estonia, Hungary and Latvia currently permit unrestricted contingency fee agreements, while Greece caps such agreements at 20 percent of the recovery, and the Czech Republic, Finland, France, Lithuania, Slovakia and Sweden permit limited forms of contingency fee agreements.[34] Ireland, Malta and the United Kingdom permit "no-win-no-pay" agreements not tied to a percentage of award recoveries.[35] However, other member states such as Germany, the Netherlands and Italy have rejected such fee agreements.[36] Absent a harmonizing directive, this divergence will likely make jurisdictions that permit forms of contingency or "no-win-no-pay" fee agreements more attractive as private enforcement actions become more prevalent in Europe.

One of the primary criticisms of contingency fee arrangements, especially in the context of securities class actions, is the perceived windfall for attorneys who arguably receive more than their hourly

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32. *See infra* Part IV (noting the German attempt to limit extraterritorial jurisdiction over German issuers).

33. *See*, *e.g.*, Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 341-42 (2001).

34. *See* Europa, Comparative Report Prepared by Ashurst for the Competition Directorate General, 103-04 (Aug. 31, 2004), *available at* http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf.

35. France permits fees based partially on a percentage of the award, while Sweden only permits risk agreements in the class action context. *See id*. at 104; *see also* Willett, *supra* note 7, at 15-16; Hodges, *supra* note 33, at 341.

36. Comparative Report, *supra* note 34, at 104.

rate for winning a case.[37] Such fees are often seen as creating a conflict of interest because attorneys may choose to settle for less than is in the client's interest to avoid perceived risks or to favor entrepreneurial incentives.[38] However, a common justification for permitting contingency fees is to provide greater access to justice for those who could not otherwise afford the often high costs of litigation by providing incentives for attorneys to represent such clients.[39] In most state-centered EU member states, free public legal assistance is available for those who can show a need for assistance and the "loser pays" rule is also often suspended for actions against the state.[40] Yet, such state assistance is not expressly available in cases of securities litigation and would not likely cover the high costs of litigating securities claims.[41]

B. FRCP Rule 23(b)(3) "Opt-Out" Provision

A predominant feature of the U.S. class action model that provides for private enforcement is the *res judicata* binding effect of the "opt-out" provision under Rule 23(b)(3) of the Federal Rules of Civil Procedure.[42] While "opt-out" provisions have previously been non-existent in Europe, the Dutch parliament recently adopted the first "opt-out" class action device in Europe that closely resembles the U.S. class action mechanism. The Dutch provision displays a shift among EU member states towards favoring finality regarding disputed questions of law or fact.[43] As with Rule 23(b)(3) proceed-

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37. U.S. contingency fee arrangements typically award 33.3% of any recovery to the plaintiff's attorney, but in the securities litigation context the median fee award is substantially lower at 22% percent of the recovery. *See* Theodore Eisenberg & Geoffrey P. Miller, Attorneys Fees in Class Action Settlements: An Empirical Study, Cornell Leg. Stud. Research Paper No. 04-01, 12, 33 (Sept. 24, 2003), http://ssrn.com/abstract=456600 (last visited March 28, 2006); *see also* Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361 (1999).

38. *See* Herbert M. Kritzer, *2002 Institute for Law and Economic Policy Litigation Conference: Litigation in a Free Society: Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739, 741 (2002); *see also* Hodges, *supra* note 33, at 341.

39. *Id.*

40. *See* Willett, *supra* note 7, at 12.

41. *Id.*

42. Prior to class certification under Rule 23, the representative parties must first meet the prerequisites of Rule 23(a): (1) joinder is impracticable; (2) a common question of law or fact exists; (3) there is typicality with the class; and (4) a fair and adequate protection of class interests is ensured, and second meet the notice and opportunity to opt-out of a Rule 23(b)(3) proceeding. Fed. R. Civ. Proc. 23(a); *see also* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL. PROC. § 16.2 (2d ed. 1993) (explaining the elements of Rule 23). The pre-1966 Rule 23 required an "opt-in" approach seen as an obstacle to finality as it did not resolve all claims against the defendant, exposing them to possible further liabilities and discouraging settlements. *Id.*

43. This is evident from recent criticisms of the "opt-in" device in Sweden as it does not encourage settlement or finality of claims. The German model also seeks to address

ings, absent class members must "opt-out" or be bound by the *res judicata* binding effect of the courts ruling.[44]

European scholars have often criticized the binding effect of Rule 23 based on the perception that it may deprive absent class members of adequate determination of their individualized claims that are not entirely common to the class, further noting that the device provides lawyers with too much leverage that may encourage large corporate defendants to settle "speculative claims" in the form of "legal blackmail."[45] However, the "opt-out" provision also has clear benefits as it promotes the interests of: (1) economy by litigating a single claim and avoiding litigation of multiple cases at a greater expense; (2) consistency by avoiding differing outcomes of separate trials; and (3) finality by resolving all claims against the defendant once and for all.[46] Such a device in Europe will likely promote private enforcement through aggregating claims, thus helping mitigate agency costs on European exchanges.[47]

C. Loser Pays Rule and FRCP Rule 11

The "loser pays" rule or "English rule" in Europe is often seen as one of the biggest deterrents of non-meritorious litigation, but critics argue that the rule limits access to justice by increasing financial barriers to bringing small claims.[48] The "English rule" is the predominant rule in Europe, and only one EU member state, Luxembourg, has rejected the rule requiring each party to pay their own litigation costs similar to the American approach.[49] This could become an important factor if Luxembourg adopts a class action mechanism, or if an EU directive is implemented harmonizing procedural rules in Europe, as Luxembourg courts would likely become more attractive to individual investors because there would be less risk if the plaintiff's suit ultimately fails.[50]

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these concerns through a different binding mechanism. *See* Quinn Emanuel, *supra* note 12; *see also* Beisner & Borden, *supra* note 26, at 7.

44. *See* Beisner & Borden, *supra* note 26, at 7.

45. *See, e.g.*, *id*; *see also* Nordh, *supra* note 23; Kritzer, *supra* note 38. This argument lends support for the German "model proceeding" measure that tries to address the individualized elements of each claim separately. *See infra* Part IV.

46. Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 132 (2003).

47. *See, e.g.*, Korezak & Bohl, *supra* note 28.

48. *See, e.g.*, Kritzer, *supra* note 38.

49. Comparative Report, *supra* note 34, at 104-05 (noting while the general rule in the Netherlands is that each party pays its own costs, the court may make an exception for payment of partial fees).

50. For comparison, in a recent suit against Railtrack, 55,000 shareholders in Britain brought a group action represented by an association and the High Court judge denied a request to cap shareholders' potential liability for the defendant's fees and the case was subsequently placed on hold in light of the risk to shareholders (fees were estimated to

In the United States, rejection of the "English rule" facilitates greater access to justice, yet it is often criticized because the substantial costs of litigation may lead a defendant to settle non-meritorious cases.[51] Conversely, the "English rule" that is predominant in Europe is often viewed as a substantial obstacle to litigating small claims that are meritorious as it often blocks access to justice due to the potential high risk of having to pay the defendant's fees.[52] Courts in the United States use Rule 11 sanctions as a mechanism for punishing non-meritorious suits by making the attorney pay some or all of the other side's fees.[53] However, Rule 11 is not as substantial a deterrent as the "loser pays" rule and is not frequently utilized.[54] As EU member states continue to adopt class action mechanisms, the "loser pays" rule may continue to be a substantial deterrent to private investor enforcement measures in Europe.[55]

III. SHIFTS IN EUROPE TOWARDS U.S.-STYLE SECURITIES IV. CLASS ACTIONS

While "representative actions" are arguably not new to Europe, the shift from public to private enforcement is a relatively new phenomenon with regard to representative actions.[56] Current trends in EU member states to adopt class action mechanisms that provide for private enforcement and recovery of damages in securities cases may soon lead to greater corporate governance in the EU.[57] As Europe recently experienced its own share of large scale corporate scandals with Royal Ahold in the Netherlands (misstating financials), "France's Vivendi Universal (opaque accounting, princely compensation), Marconi and Cable & Wireless in Britain (totally somnolent boards), Ireland's Elan Corp. (really creative accounting), Deutsche Telekom in Germany (addicted to debt), and

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reach more than $2.3 million). Ted Allen, Interest in Class Actions Grows Outside the U.S., Securities Litigation Watch (June 14, 2005), *available at* http://slw.issproxy.com/securities_litigation_blo/2005/06/the_state_of_fo.html.

51. *See* Willett, *supra* note 7, at 13.

52. *Id*.

53. *Id*; *see also* Fed. R. Civ. Proc. 11.

54. *See* Willett, *supra* note 7, at 13.

55. *See* Allen, *supra* note 50.

56. *See* Willett, *supra* note 7; *see also* William B. Fisch, *European Analogues to the Class Action: Group Action in France and Germany*, 27 AM. J. COMP. L. 51 (1979) (comparing earlier forms of group actions in France and Germany to the U.S. class action mechanism).

57. *See* PricewaterhouseCoopers LLP, 2004 Securities Litigation Study 6 (Mar. 31, 2005), *available at* http://www.10b5.com/2004_study.pdf (last visited Apr. 3, 2006) (indicating a rise in private securities class action litigation in the U.S. with 203 cases filed in 2004, noting the rise in private securities class actions against foreign issuers accounted for nearly 15% of the cases).

ABB in Sweden (for a staid engineering company, they sure knew how to make a golden parachute)" European bourses and shareholders were greatly affected.[58] The scandals led to further decline of voter confidence in Europe.[59]

When examining the decisions of a specific country to adopt new procedural mechanisms for private enforcement, it is worth noting in general terms the different kinds of political economies that exist and may influence the process. The United States is often considered a heavily market-centered political economy that discourages government regulation, and when the government does regulate, it favors supplementing public enforcement with private rights of action.[60] However, Western European social welfare states, like France and Germany, are considered substantially more state-centered political economies that historically favor government regulation and public enforcement measures.[61] By contrast the United Kingdom emphasizes a mix of the state-centered and market-centered political economies that often helps ease a shift towards market-centered goals in Europe.[62] The mixed traits of the United Kingdom are often seen as an attribute to European harmonization, as they promote unity with state-centered political economies in Europe while also often raising market-centered goals.[63]

A notable shift in representative action occurred in 1998 in Europe with the adoption of a European Commission Directive seeking greater protection for consumer interests and providing for qualified public group actions in addition to state enforcement measures.[64] While no EU member state has adopted a true U.S.-style class action model, in 2002 Sweden was arguably the first EU member state to enact a similar mechanism permitting private enforcement through an aggregated class action device, signaling a shift in Europe to address the current needs of society through re-

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58. Kerry Capell, Gail Edmondson & David Fairlamb, *Opening Up the Boardroom*, BUSINESSWEEK, May 19, 2003, *available at* http://www.businessweek.com/magazine/content/03_20/b3833015_mz047.htm (last visited Mar. 28, 2006) (quoting cover text referring to recent changes in corporate governance in Europe in the wake of these large scale scandals).

59. *Id*.

60. John C. Reitz, *Symposium: Interrogating Globalization: The Impact On Human Rights: Doubts About Convergence: Political Economy as an Impediment to Globalization*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 139, 141 (2002).

61. *Id*. at 141-42.

62. *Id*. at 142.

63. *See generally id*. at 143 (noting the United Kingdom has aligned with decision-making measures in the EU because of its state-centered tendencies, but has been the lone dissenter on issues of political economy. The latter can be attributed to its market-centered tendencies).

64. *See* Quinn Emanuel, *supra* note 12.

visions to their civil codes.[65] However, the Swedish mechanism more closely resembles the pre-1966 Rule 23 provision in the United States, as it provides for an "opt-in" class device.[66] The Netherlands recently adopted a class action device that closely resembles the current Rule 23(b)(3) provision in the United States providing for binding absent class members through an "opt-out" provision.[67] The United Kingdom[68] recently changed its interpretation of representative actions that have existed for over two hundred years, and France and others[69] are considering adopting similar U.S.-style class action devices. In stark contrast, however, Germany recently adopted a substantially different class action device for securities disputes that differs greatly from the U.S.-style class action device.[70] The Germany model further seeks to limit application of the U.S.-style class action devices against German issuers.[71] As additional EU member states consider adopting class action devices, there will be a greater need for a harmonizing directive at the EU level to ensure equal treatment of market participants in Europe's single securities market and to avoid forum shopping within the EU.

A. EU Directives: A Sign of More to Come Through the Acquis Communautaire

As the European Commission continues to enact directives to create a single securities market and promote cross-border securities transactions in Europe through the *acquis communautaire*,

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65. *Id.*

66. *Id.*

67. *Id.*

68. While the United Kingdom has permitted "representative actions" for over 200 years, application of the rule had been limited by courts adopting a narrow interpretation of the procedural rules (requiring claims to be identical). However, in 2000 with the adoption of new procedural rules the court now permits consolidation of claims, which is a step in the direction of U.S.-style class actions. *See id.*

69. Spain has adopted an approach similar to the "opt-in" association representation mechanism in the United Kingdom, Norway (not a member state of the EU, but part of the European Economic Area) has followed the Swedish model and Finland and Italy are currently considering adopting U.S.-style class action measures. *See* Beisner & Borden, *supra* note 26, at 8-9.

70. *Country Reports: Europe: Germany: Shareholder Actions Facilitated Under Two Newly Adopted Laws*, 11 World Sec. L. Rep. 8 (Aug. 2005), http://pubs.bna.com/ip/ bna/ wsl.nsf/f89826265796c0c985256fa9006a29a8/d2f49aba1646590b8525705f0066eef0?OpenDocument; *see also* Burkhard Schneider, *Country Reports: Europe: Germany: Germany's Proposed Capital Investors' Model Proceeding Law May Require Revision To Achieve Goals*, 11 World Sec. L. Rep. 5 (May 2005), *available at* http://pubs.bna.com/NWSSTND/IP/BNA/wsl.nsf/SearchAllView/30F5585EFC08DDD585257004006F9A4F?Open&highlight=GERMANY (discussing draft proposals) [Hereinafter referred to collectively as "World Sec. L. Rep"].

71. *Id.*

the Commission has also presented a number of draft directives to protect individual investors and provide checks on corporate behavior in Europe.[72] The Commission's goals to promote investor confidence and encourage disclosure of information in an effort to strengthen the securities market would be further enhanced by private enforcement mechanisms in Europe.[73]

In 1998, the European Commission shifted away from traditional state enforcement measures in Europe through the adoption of a harmonizing directive "on the injunctions for the protection of consumers' interests" through group actions.[74] The directive required each EU member state to enact national laws by the end of 2000 providing for minimum standards for group actions by "qualified entities" in Europe, such as approved consumer associations.[75] While the shift did not endorse U.S.-style class actions or private attorney generals, it introduced public group actions for injunctive or declaratory relief by actors other than the state.[76] The Commission further adopted a regulation for recognition and enforcement of judgments among EU member states.[77] Under current EU legislation, courts of EU member states must recognize judgments issued by courts of other EU member states.[78] This is important as it promotes an environment for forum shopping within the EU and allows individual EU member states to decide how to treat non-EU judgments.

B. Sweden: Adoption of Elements of the Pre-1966 U.S. Class Action Model

The adoption of a class action device in Sweden began a shift in Europe to allow private rights of action for securities disputes

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72. *See* Securities & Investment Funds, *supra* note 4 (providing an overview of EU harmonization directives to be implemented by member states); *see also* Europa, European Commission: Internal Market – Company Law & Corporate Governance, http://europa.eu.int/comm/internal_market/company/index_en.htm (last visited Apr. 3, 2006) (providing an overview of proposed EU harmonization directives on cross-border transactions, disclosure requirements and shareholder rights). The current Company Law & Corporate Governance Action Plan calls for implementation of harmonization directives by 2010 and consultation documents call for greater private enforcement mechanisms and harmonization of class action devices. *Id.*

73. *See* Hsianmin Chen, *The EBRD and Corporate Governance Reform in Central and Eastern Europe and the CIS*, EBRD 6 (2004) (discussing the Commission's basis for adopting the action plan).

74. Council Directive 98/27, 1998 O.J. (L 166/51) (EC), *available at* http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just09_en.pdf.

75. *Id.; see also* Quinn Emanuel, *supra* note 12; Beisner & Borden, *supra* note 26, at 6.

76. *See* Quinn Emanuel, *supra* note 12.

77. Counsel Regulation (EC) No. 44/2001 of 22 Dec. 2000, 2001 O.J. (L 12/1), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf.

78. *See* Beisner & Borden, *supra* note 26, at 6.

and to ease procedural rules to allow for greater recovery.[79] In the early 1990s, the Swedish Parliament (*Sveriges Riksdag*), commissioned a working group to determine the need for an aggregated representative action mechanism.[80] After the ABB scandal, where ABB's CEO received a $78 million severance package after he stepped down in late 1996 without the knowledge of the ABB board, and other corporate scandals in Europe, the Swedish government recognized the increased need for private enforcement.[81] Like other critics in Europe, *Sveriges Riksdag* was skeptical of the U.S. approach, yet it recognized a need to protect investor confidence and encourage private enforcement in Sweden.[82] The Swedish working group noted the incentives in the United States to abuse the U.S.-style class action devices, yet it looked to Australia and Canada[83] as examples of countries that have adopted variations of the device without creating a market for frivolous lawsuits.[84] The working group further acknowledged that the "loser pays" rules in Australia and Canada serve as an added deterrent to the abuse in the United States.[85]

In June of 2002, *Sveriges Riksdag* passed the *Lag om Grupprättegång* ("Group Proceeding Act"), which went into effect on January 1, 2003. [86] The Act provides for private group actions (class actions) in Sweden similar to U.S.-style class actions in all areas of civil law where a legal issue could otherwise be litigated, including private causes of action in securities disputes.[87] While the Group Proceeding Act requires standing to bring a class action, the Act simply requires that the class representative be a member

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79. *See* Nordh, *supra* note 23.

80. *Id*.

81. Stanley Reed & Ariane Saines, *Outraged in Europe Over ABB*, BUSINESSWEEK, March 4, 2002, *available at* http://www.businessweek.com/magazine/content/02_09/b3772140.htm (quoting Swedish Prime Minister Goran Persson as saying "I have great difficulty understanding how [Barnevik] could have done something so lacking in judgment"). The article further discusses the uproar caused in Sweden by labor unions blaming layoffs on the severance package and the claims by the Swedish Shareholders Association calling the action "obscene." *Id*.

82. *See, e.g.*, Sveriges Advokatsamfund, Till Justitiedepartementet, http://www.advokatsamfundet.se/platform/components/upload/consume/streamFile.asp?id= 692 (last visited Apr. 3, 2006) (discussing concerns with the proposed Group Proceeding Act).

83. While Australia and Canada have both adopted "opt-out" provisions, both countries implement the "loser pays" rule, which serves as a substantial obstacle to class action litigation. *See* Quinn Emanuel, *supra* note 12.

84. *See* Nordh, *supra* note 23, at 8.

85. *Id*.

86. § 1 Lag om Grupprättegång (Svensk författningssamling [SFS] 2002:559) (Swed.), *available at* http://www.notisum.se/rnp/sls/lag/20020599.HTM (last visited Apr. 3, 2006). The law also provides for group actions brought on behalf of consumer organizations and public groups. The statute notes that group refers to the "persons for whom the plaintiff brings the action" commonly referred to as the "class" in the United States. *Id*.

87. *Id*.

of the class with common or similar claims.[88] Thus, unlike Rule 23, the Swedish model does not require class certification.[89] More notably, the Act implements an "opt-in" provision similar to the pre-1966 Rule 23 provision,[90] only binding members of the class who choose to become part of the proceeding.[91] The class representative may enter a settlement agreement on behalf of the class, yet it will only have a binding effect on all class members if the court approves the settlement.[92] Sweden further adopts the "loser pays" rule whereby the class representative together with other members of the class who intervene in the suit bear the risk of having to pay the defendant's costs if the suit fails.[93]

As part of the *Lag om Grupprättegång*, *Sveriges Riksdag* added an additional provision allowing for "risk agreements" as a limited contingency fee arrangement based primarily on a higher hourly rate.[94] Moreover, the new fee arrangement provision only applies in the context of the new class action device.[95] Despite the relatively new Swedish class action mechanism, there has been minimal usage of the rule for private actions.[96] Critics of the Swedish class action model opposed the adoption of the measure on the grounds that it would encourage forum shopping and create a European class action culture.[97] The "loser pays" rule and "opt-in" mechanism have served as deterrents to use of the class action device in Sweden.[98] While some favor the rule, recent criticism notes that cultural and sociological shifts indicate a demand for an "opt-out" provision to provide greater incentive for settlement and finality.[99] As the class action procedural devices continue to shift towards more favorable measures for plaintiffs, it is more likely that greater corporate governance will be achieved in Europe.

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88. *Id*. at §§ 4-8.

89. *See* Nordh, *supra* note 23, at 4-5.

90. *See* Edward H. Cooper, *Class Action Advice in the Form of Questions*, 11 DUKE J. OF COMP. & INT'L L. 215, 256 (discussing implications of the 1966 amendment to Rule 23 in the United States).

91. *Id*. at 4; *see also* Nordh, *supra* note 23, at 5.

92. Lag om Grupprättegång, *supra* note 86, § 26.

93. *See* Nordh, *supra* note 23, at 5.

94. Lag om Grupprättegång, *supra* note 86, §§ 38-40; *see also* Nordh, *supra* note 20, at 5.

95. Lag om Grupprättegång, *supra* note 86, § 40.

96. *See* Nordh, *supra* note 23, at 7.

97. The International Class Action: Comments on the Geneva Group Action Debates, 1 Class Action L. Rep. 9 (Aug. 25, 2000).

98. *See* Sveriges Advokatsamfund, *supra* note 82, at 8.

99. *Id*. (noting the initial recommendation was for an "opt-out" class action mechanism).

C. The Netherlands: A Closer Step towards the U.S. Class Action Model

The Dutch Parliament recently passed the Act on the Collective Statement of Mass Claims in the Netherlands that closely resembles the U.S. Rule 23(b)(3) class action mechanism.[100] This new provision comes in the wake of several corporate scandals that affected Dutch investors, including Royal Ahold and Royal Dutch Shell.[101] Unlike the Swedish model, the Dutch have adopted an "opt-out" provision that will enable a group representative to seek a binding settlement for all absent class members and will further provide for damage awards.[102] A feature of the Dutch Act distinguishing it from the U.S. class action model is that it does not provide for a named class representative, but instead requires the suit to be brought by a representative association.[103] This could arguably be an attempt to avoid the professional plaintiff problem, as it requires forming a group to represent the claims of the class.[104]

While in the U.S. corporations typically oppose class action measures, the Dutch Act received substantial praise from the Dutch business community largely because of its binding effect and finality.[105] The provision is welcomed as a means of providing finality for meritorious claims.[106] Unlike the Swedish and U.S. models, the Dutch government has rejected all forms of contingency fee agreements as conflicts of interest for the class counsel.[107] The Dutch apply the "loser pays" rule, further diverging from the U.S.-style class action model.[108] The absence of contingency fees and the risks associated with the "loser pays" rule may still serve as a deterrent in the Netherlands, but this new class action device furthers the shift towards U.S.-style private enforcement measures and will likely promote greater efficiency because of its binding effect.

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100. Quinn Emanuel, *supra* note 12.

101. *See* Beisner & Borden, *supra* note 26, at 7.

102. *Id.; see also* Quinn Emanuel, *supra* note 12.

103. Beisner & Borden, *supra* note 26, at 8.

104. *Id.*

105. *Id.*

106. Global Legal Group, The International Comparative Legal Guide: Product Liability 2005: Class Actions in the EU 4, http://www.iclg.co.uk/khadmin/Publications/pdf/498.pdf (last visited Apr. 3, 2006).

107. Justitie, Dutch Government is Against a 'No-Win-No-Fee' System (Mar. 4, 2005), http://www.justitie.nl/english/press/press_releases/archive/archive_2005/%5C50309Dutch_Government_is_against_a_nowinnofee_system.asp; *see also* Comparative Report, *supra* note 34, at 104.

108. *See* Comparative Report, *supra* note 34, at 105.

D. France: Reinforcing the Shift

French law currently provides for *action representation conjointe* ("action in joint representation") permitting claimants to bring an action as a group, provided each individual claimant must plead their own claim and each claim is evaluated separately.[109] However, in 2005 French President Jacques Chirac announced plans to permit class action law suits in an effort to protect consumers and investors in France.[110] After the turmoil of the Vivendi Universal corporate scandal, President Chirac noted that the class action device will cover securities litigation in an effort to protect investors and promote investor confidence in France.[111] The French government has sought comments and advice from class action consultants around the world, including Sweden, Canada, the Netherlands and the United States, and has indicated that it will likely adopt a Canadian-style class action model.[112] Like the U.S. model, it provides for private representative actions and an "opt-out" device.[113] However, Canada retains the "loser pays" rule. Thus, the French will likely adopt an "opt-out" approach, while retaining the "loser pays" rule.[114] As one commentator recently noted, "[i]f France has it, then it wants everyone else to have it too."[115] The French approach could have a significant affect on private enforcement in Europe if an "opt-out" device is adopted as France provides for partial contingency arrangements tied to damages awards. If the French succeed at providing a strong private enforcement device it will likely lead to improved corporate governance and serve to promote investor confidence in France.

V. GERMAN MODEL PROCEEDINGS ACT & REJECTION OF U.S.-STYLE CLASS ACTIONS

The German approach is of great significance as it can be seen as an express rejection of U.S.-style class action mechanism by the *Bundesregeirung* (German Federal Government) and the

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109. *See* Global Legal Group, *supra* note 105, at 4.

110. Mondaq, Canada: Davies Lawyers Called To France For Important Class Action Conference, Apr. 21, 2005, http://www.mondaq.com/content/pr_article.asp?pr_id=1639.

111. Allen, *supra* note 51.

112. *Id.*

113. *See* Global Legal Group, *supra* note 106, at 4.

114. *See Id.*

115. Peggy Hollinger, *France Mulls Allowing Class-Action Suits*, FINANCIAL TIMES, Jan. 7, 2005.

Bundestag (German Federal Parliament).[116] It represents greater divergence in the approaches taken in Europe to remedy investors injuries arising in today's global economy and place checks on corporate behavior in Europe, yet the German model could serve as an alternative approach that other countries could build upon in the future. The new device can be likened to the manner by which Germans codified German law as they attempted to capture the *Volksgeist*[117] (national character) and be innovative through change while not divorcing themselves from their past too quickly.[118] Here the Germans appear to be heavily influenced by protecting issuers, rather than providing greater enforcement for investors.

Since 2000, Germany has experienced a large backlash in shareholder confidence in light of recent corporate scandals, notably Deutsche Telekom, and a drastic decline in the number of Germans investing domestically by more than 26 percent.[119] In an effort to restore investor confidence, Germany enacted two laws that became effective November 1, 2005, making it easier to bring private actions to recover losses and introducing an innovative class action mechanism.[120] The first Act, *Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts* (Integrity of Businesses and Modernization of the Rules on Shareholder Actions Act or "UMAG"), provides a private right of action and amends the German business judgment rule.[121] The second Act, *Kapitalanleger-Musterverfahrensgesetz* (Capital Investor's Model Proceeding Act or "KapMuG"), provides for a model procedure as a "test case" to allow courts to issue a binding ruling on common elements of claims.[122] The KapMuG further provides for an *elektronischer bundesanzeiger* (online central litigation registry) where plaintiffs can seek information on common complaints, law firms

116. *Id.*

117. *See* University of Virginia, Dictionary of History of Ideas, *Volksgeist*, http://etext.lib.virginia.edu/cgi-local/DHI/dhi.cgi?id=dv4-66 (providing a history of the term *Volksgeist*); *see also* Tahirih V. Lee, Class Lecture in Comparative Law at Florida State University, College of Law (Sept. 1, 2005) (on file with author).

118. *See* Lee, *supra* note 117.

119. Zurich, Industry Insight: New Laws and a New Landscape in Europe, Nov. 2005, http://www.zurich.com/main/productsandsolutions/industryinsight/2005/november2005/industryinsight20051026_003.htm (last visited Apr. 3, 2006) (discussing new laws in Germany and corporate scandals leading up to their enactment). The article further notes that 15,000 shareholders brought actions against Deutsche Telekom for its failure to disclose risks in its prospectus. *Id.*

120. *Id.*

121. *Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts* [Integrity of Businesses and Modernization of the Rules on Shareholder Actions Act], BRDrucks 15/5092 (July 8, 2005).

122. *Kapitalanleger-Musterverfahrensgesetz* [Capital Investor's Model Proceeding Act], BRDrucks 15/5093 (July 8, 2005).

can monitor claims, and notice can be effected electronically on the class.[123] However, unique elements of each claim and requests for damages must be litigated individually.[124]

Under the KapMuG, a plaintiff may seek a model proceeding to determine a common question of law or fact, and all related proceedings will be suspended for a four-month notice period.[125] If at least ten similar petitions are made within the notice period, a model proceeding will commence and the other proceedings will remain suspended pending its outcome.[126] The determination of the proceeding is binding with *res judicata* effect on all parties with claims pertaining to the decided issue of law or fact, like that of Rule 23(b)(3) except there is no "opt-out" option under German law.[127]

Another important element of the new German Capital Investor's Model Proceeding Act is that it expressly rejects upholding judgments against German issuers issued by non-EU member state jurisdictions.[128] One commentator notes that this is an effort to expressly limit U.S. class action litigation against German issuers.[129] This will likely have an impact on U.S. Courts that are often willing to exercise extraterritorial subject matter jurisdiction over securities class action suits with *conduct* in the United States or with *effects* impacting investors in the U.S. or U.S. securities markets, and on the American court's analysis regarding binding absent German class members in disputes against German issuers.[130] This rule could negatively affect the benefits associated with cross-listing of German issuers' shares in the form of depository receipts on U.S. exchanges, if doing so does not provide protections for purchasers in the German market.[131] Critics of the Kap-

123. *See* World Sec. L. Rep., *supra* note 70.

124. *Id.*

125. *Id.*

126. Kapitalanleger-Musterverfahrensgesetz, supra note 122.

127. *See* World Sec. L. Rep., *supra* note 70. It is worth noting that Rule 23(b)(3) includes an "opt-out" option as a matter of fairness to ensure due process for individual plaintiffs. Recent criticism of the Act points out that it fails to provide adequate due process to absent class members (which is also the basis for adopting the "opt-out" approach in other countries); *see also* European Group for Investor Protections, Fostering an Appropraite Regime for Shareholders Rights – Second Consultation by the Services of the Internal Market Directorate General, July 15, 2005, http://forum.europa.eu.int/irc/DownLoad/k4eXA9J HmgG-phOO1C4B-dAl6fk2p4nUqi8Ju4Fx-BCSO0MtEmBq64hPz04u-AdRuqN2GrGuypb4pq1Cq6z/egip_en.pdf (last visited Apr. 3, 2006).

128. *Id.*

129. *Id.*

130. *See infra* Part V (noting U.S. courts are often willing to bind absent foreign class members if foreign courts will likely recognize the U.S. judgment – this is done in part as a matter of fairness to the defendant in an effort to prevent defending a second claim by dissatisfied absent class members). However, it is unlikely that this will affect the court's analysis when the claims involve American residents.

131. *See generally* Coffee, *supra* note 28.

MuG claim that it will not substantially reduce costs to plaintiffs because there is no real aggregation of claims and point out that the 15,000 Deutsche Telekom cases will take years to litigate with large costs to the individual investors.[132] Thus, it likely will not decrease the burden on the courts because parties must still file their individual claims and prove certain elements to obtain recovery.[133] The "loser pays" rule applies and Germany does not permit contingency fee arrangements, thus limiting access to private enforcement necessary to mitigate agency costs.[134]

It is also important to note that this model is seen as an alternative approach to common class action mechanisms and could lead to greater tensions at the EU level as the European Commission attempts to harmonize minimum standards to protect investors across a common securities market and to provide access to justice. Further, unlike other class action models, the German approach is specifically designed for use in securities litigation and does not apply to other areas of substantive German law.[135] Germany traditionally has a highly technical and highly organized code system, and this may further explain why this model is not fully plaintiff-centric but rather focused on improving investor confidence while protecting issuers.[136]

VI. LESSONS FROM RECENT CLASS ACTION REFORMS IN THE UNITED STATES

As Europe attempts to provide greater investor protections and strengthen its securities markets through private enforcement measures, it is worth noting the failures and successes of the American private enforcement measures as well as learning from recent attempts to curb abuses in U.S. securities class action litigation. Under the common law legal system in the United States, courts have recognized an implied private right of action creating private attorney generals[137] for enforcement of U.S. securities

132. *See* World Sec. L. Rep., *supra* note 70; *see also* European Group for Investor Protections, *supra* note 127 (calling for private enforcement measures at the EU level and claiming that the new German class action model is inadequate to promote investor rights and protect the market).

133. *Id.*

134. *Id.*

135. *Id.*

136. *See, e.g.,* Tahirih V. Lee, Class Lecture in Comparative Law at Florida State University, College of Law (Sept. 6, 2005) (on file with author) (discussing Germany's civil code).

137. *See* 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 1.06, at 1-19 (3d ed. 1992) (discussing the "private attorney general" notion that is unique to American jurisprudence).

laws, and the U.S. Supreme Court has upheld such rights despite the apparent silence of Congress on the matter of not codifying such a right.[138] The private attorney generals frequently supplement public enforcement measures of the Securities and Exchange Commission because of the Commission's limited resources and inability to closely police corporate behavior together with their deterrent effects.[139] Empirical data shows that the U.S. private enforcement model promotes disclosure by issuers mitigating agency costs and the information asymmetry in U.S. securities markets.[140] However, the perceived abuses of the U.S. class action model have led to much debate and several attempts to restrict class action lawsuits in the United States over the past decade.[141] The Private Securities Litigation Reform Act of 1995 ("PSLRA") and Securities Litigation Uniform Standards Act of 1998 ("SLUSA") sought to address some of these concerns while also addressing procedural mechanisms such as discovery, sanctions and avoiding compassionate juries of state courts that are often seen as features that promote non-meritorious suits.[142]

The PSLRA created heightened pleading standards requiring plaintiffs to set forth facts with specificity and to prove loss causation, placing a greater burden on the plaintiff at the outset to limit frivolous lawsuits.[143] Further, PSLRA enacted additional requirements for securities class action litigation.[144] First, it created

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138. *See*, *e.g.*, Kardon v. Nat'l Gypsum Co., 69 F. Supp 512 (E.D. Pa. 1946); Superintendent of Ins. V. Bankers Life & Cas. Co, 404 U.S. 6, 13 n.9 (1971), *noted in* DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 414 (West 2003) (acknowledging the implied private Rule 10b-5 right of action in a footnote).

139. This theory is often widely criticized due to its effect of punishing the firm's shareholders by requiring large sunk costs in litigation and settlements of often frivolous strike suits. *See*, *e.g.*, Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563 (Sept. 2005).

140. *See* Coffee, *supra* note 28.

141. *See, e.g.*, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2005); Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p (2005); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711-15 (2005); *see also* Joseph A. Grundfest, *Why Disimply?,* HARV. L. REV. 727, 742-43 (1995); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?,* 7 J.L. ECON. & ORG. 55, 84 (1991); Janet Cooper Alexader, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 522-57 (1991); *cf* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997); Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438 (1994), *noted in* NAGY, PAINTER & SACHS, *supra* note 138, at 395.

142. *See generally* Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the Senate Comm. on Banking, Housing, and Urban Affairs, 103d Cong., 1st Sess. (1993); *see also* Beisner & Borden, *supra* note 26, at 13-14.

143. 15 U.S.C. § 78u-4(a); *see also* NAGY, PAINTER & SACHS, *supra* note 138, at 395-404.

144. 15 U.S.C. § 78u-4(a).

a presumption in favor of the plaintiff with the largest claim who seeks appointment as lead plaintiff in order to avoid the professional plaintiff problem and end the race to the courthouse, while ensuring the class is adequately represented.[145] The Act further shifts control of the litigation to the lead plaintiff, allowing the lead plaintiff to select the class counsel.[146] Second, it requires increased scrutiny by judges of attorney fees awarded in settlement agreements to ensure that fees are not excessive in proportion to recovery.[147] Third, it created an automatic stay of discovery during the pendency of a motion by the defense to dismiss the action.[148] Finally, it requires courts to issue a written finding regarding compliance with Rule 11 of the Federal Rules of Civil Procedure and apply sanctions if a violation of the rule is noted.[149] The SLUSA further limited securities class actions by preempting state law class action litigation that concerns nationally covered securities and staying discovery of any state proceedings when a federal action is pending.[150] This was an effort to limit sympathetic jury awards, provide access to punitive damages, and circumvent discovery stays.[151]

Despite Congress' efforts, securities class action settlements are at an all time high and the number of actions against foreign issuers continues to climb in the United States.[152] It is worth noting that U.S. courts are often willing to recognize implied extraterritorial subject matter jurisdiction over claims involving foreign issuers under the conduct or effects tests,[153] even where the is-

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145. *Id*.

146. *Id*. The lead plaintiff provision has created incentives for U.S. plaintiff's firms to seek large institutional investors in Europe who have U.S. securities in their portfolios to seek lead plaintiff appointment, enabling them to appoint the firm as lead counsel; *see, e.g*., Mary Jacoby, *Courting Abroad: For the Tort Bar, A New Client Base: European Investors*, WALL ST. J., Sept. 3, 2005, at A1, *available at* http://users1.wsj.com/lmda/do/checkLogin?a=t&d=wsj&sd=users1&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB112562234766929791.html.

147. 15 U.S.C. § 78u-4(a); *see also* NAGY, PAINTER & SACHS, *supra* note 138, at 396-97.

148. 15 U.S.C. § 78u-4(a).

149. *Id*.

150. NAGY, PAINTER & SACHS, *supra* note 138, at 419-22; *see also* 15 U.S.C. § 77p.

151. NAGY, PAINTER & SACHS, *supra* note 138, at 419-22.

152. *See* PricewaterhouseCoopers LLP, *supra* note 57; *see also* PricewaterhouseCoopers LLP, 2003 Foreign Securities Litigation Study (Sept. 27, 2004), *available at* http://www.10b5.com/2003_foreign_sl.pdf (last visited Apr. 3, 2006).

153. The "conduct" test examines whether any conduct occurring within the United States played a part in perpetrating a securities fraud on investors abroad and the "effects" test examines actions occurring outside the United States that have caused "foreseeable and substantial harm to interests in the United States" in the form of harm to either American markets or investors. *See* Kauthar SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1998) (discussing application of the conduct and effects test and noting that the two tests are sometimes applied together).

suer's securities are not traded in the United States.[154] Moreover, courts are often willing to certify classes binding absent foreign class members under Rule 23(b)(3).[155] Thus, foreign plaintiffs often find American courts more attractive than courts of their home countries. As the EU considers the expansion of private enforcement measures and amendments to its procedural rules, a careful examination of the American securities litigation experience is worthwhile. Even though the securities class action culture in the United States is often perceived as frivolous, empirical evidence shows that it benefits growth of securities markets by mitigating agency costs and leading to maximization of shareholder wealth.[156]

VII. CONCLUSION

As EU member states continue to recognize the important role of private enforcement in promoting a more efficient securities market, U.S.-style class action devices will likely become more prevalent in Europe. Differing goals among EU member states will continue the current trend of adopting diverging class action models across Europe as each EU member state attempts to limit abuse of representative actions while providing greater enforcement mechanisms. The shift towards permitting contingency fees or "no-win-no-pay" agreements and binding class action devices will likely make private enforcement more feasible in Europe, but the prevalent "loser pays" rules will continue to deter wide-spread use of such devices in the near future.

As the European Commission works to promote a single securities market in Europe through the adoption of increased disclosure requirements and shareholder protections, legislation at the Community level harmonizing private enforcement mechanisms would further these goals and lead to greater convergence of procedural rules in Europe through the *acquis communautaire*. EU member states should continue to learn from the perceived benefits and abuses of the U.S.-style class action procedural devices as they seek greater private enforcement through securities litigation in Europe.

Absent harmonizing legislation in Europe to address these concerns, we may see additional countries adopt new procedural

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154. *Id.* (discussing requirements of the conduct and effects tests among circuit courts); *see also* Adam J. Levitt, Christopher Hinton, *Foreign Investors Serving as Lead Plaintiffs in U.S.-Based Securities Cases: Part II of II*, 12 Assoc. of Trial Lawyers of America, International Practice Section Newsletter 3 (forthcoming, Spring 2006).

155. Levitt & Hinton, *supra* note 153, at 3.

156. Coffee, *supra* note 28; *see also* La Porta, Lopez-de-Silanes & Shleifer, *supra* note 1.

approaches, like Germany, in an attempt to protect their issuers from U.S.-style class action devices while seeking to provide private enforcement through new measures. However, as the new class action models in Europe continue to diverge, the divergence may lead to increased forum shopping within Europe in light of the European regulation requiring recognition of judgments among EU member states. Regardless of the ultimate approach that each EU member state adopts, the goal should be to seek private enforcement mechanisms that promote greater disclosure by issuers in Europe and mitigate agency costs between minority shareholders and firm management or controlling shareholders. Better corporate governance should be encouraged in Europe through strong disclosure rules coupled with adequate private enforcement mechanisms to help align interests of firm management and shareholders.

THE U.S. CONSTITUTION AND INTERNATIONAL LAW: FINDING THE BALANCE

CHRISTOPHER LINDE

> Our country! In her intercourse with foreign nations, may she always be in the right; but our country, right or wrong.[1]

I. INTRODUCTION

In the summer of 1989, Francis Fukuyama declared the "end of history."[2] To him, the emergence and success of liberal democracy as a system of government — conquering rival ideologies like monarchy, fascism, and communism — marked "the end point of mankind's ideological evolution" and the "final form of human government."[3] That seemingly prescient prediction received much attention,[4] but while optimistic, it is one that nonetheless has been largely discredited. The fact that Fukuyama lamented a future void of a "willingness to risk one's life for a purely abstract goal, [a] worldwide ideological struggle that call[s] forth daring, courage,

1. Stephen Decatur, Toast at a Dinner in Norfolk, Virginia (Apr. 1816), *in* ALEXANDER SLIDELL MACKENZIE, LIFE OF STEPHEN DECATUR 295 (1848).

2. Francis Fukuyama, *The End of History?*, NAT'L INT., Summer 1989, *available at* http://www.wesjones.com/eoh.htm#source.

3. *Id.*

4. *See* Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. 1491, 1494 n.9 (1993) (book review).

imagination and idealism"[5] is short-sighted in hindsight, as terrorist groups such as al-Qaida, whose aim is to establish a pan-Islamic caliphate throughout the world,[6] surely demonstrate.[7] Not only does al-Qaida provide an alternative to the "unabashed victory of economic and political liberalism,"[8] it challenges liberal democracies to remain dedicated to their core principles and, most importantly for this paper, tests the permanence and strength of international law.

Of course, Fukuyama wrote as the Cold War was coming to an end. At that time, the triumph of liberalism over communism was certainly something to celebrate, as that outcome was not necessarily assured. The thaw that followed the fall of the Iron Curtain was promising, as the threat of mutually assured destruction abated and the hope of economic and political liberalism spread across Eastern Europe. It has not, however, reached all corners of the globe, and it is from these historical laggards that the most recent threat — terrorism — originates. Terrorism and specifically the events of September 11, 2001 have been described as "the failure of the ideology of the open society,"[9] and they challenge liberal democracies to balance security while ensuring that individual liberties are protected.

To the extent that Fukuyama sees liberalism, as defined by Kant, as the ultimate form of governance, I agree that this outcome will bring an end to history or, in Kantian terms, perpetual peace. I am just not convinced that time has come. To ensure that the liberal trend continues, governments must ensure that the ideals upon which they are based are not sacrificed. Among the pillars of an open, liberal society are respect for fundamental human rights, limited and balanced government, and respect for the rule of law. But perhaps the greatest offspring of the liberal success is the emergence of the international rule of law. To some, international law is only a restraint to U.S. hegemony and a catalyst to the erosion of its sovereignty.[10] This characterization is misplaced; instead, I argue that by following a policy of measured acceptance of international

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5. Fukuyama, *supra* note 2.

6. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2000 app. G (2001).

7. Fukuyama does devote one paragraph of his essay to the possibility of religious fundamentalism as an alternative, but he swiftly dismisses this possibility.

8. Fukuyama, *supra* note 2.

9. THE ECONOMIST, Apr. 20, 2002, at 24.

10. One professor has dubbed those who base their anti-internationalism on notions of sovereignty "New Sovereigntists." Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000. The new sovereigntists base their arguments on three lines of attack, which will be discussed *infra* Part V. The first questions the emerging legal order as vague and illegitimately intrusive on domestic affairs; the second sees international lawmaking as unaccountable and unenforceable; the third assumes the U.S. can choose to ignore legal norms as a matter of power or legal right. *Id.*

norms, the United States can secure a lasting peace, no doubt the goal of all policy makers, irregardless of political persuasion.

Divergence and disagreement among liberal democracies concerning the weight of authority of international law could be yet another chapter in mankind's ideological evolution. The United States has reacted most aggressively in pursuing terrorists, testing the limits of international law, most notably with its policy of preemptive warfare and for its treatment of detainees. To some extent seen as a pariah among liberal democracies for its lack of respect for international law, the United States struggles to balance effectively prosecuting the war on terrorism while abiding by international standards. Yet the attacks of September 11, 2001 and the U.S. response have highlighted the role that international law plays in American foreign relations. This leads to a fundamental question: To what extent does the Constitution bind the United States to norms of international law? Until recently, the role of international law within the constitutional structure had been unclear and hotly debated. With its recent decision in *Sosa v. Alvarez-Machain*, the Supreme Court finally, although not definitively, explained the Constitution's requirements.

In this paper, I discuss the Court's recent decision and its impact on the role of international law within the constitutional scheme. Part II begins by detailing the two building blocks to understating: the evolution of both international law and constitutional common law. Part III then discusses the scholarly debate surrounding the Constitution's requirements, particularly in light of the change in federal court's common law making power. Part IV details the Supreme Court's decision, *Sosa v. Alvarez-Machain*. Part V outlines the concerns of those who argue that the U.S. should not pursue an internationalist, human rights agenda, but it proceeds in explaining why pursuing an active role in shaping and following international norms is in the United States' interest. In concluding in Part VI, this paper acknowledges that the political branches must determine the extent to which the United States will follow international norms, but I posit that it should be done in a way that respects the carefully crafted constitutional scheme yet advances the international rule of law.

II. THE BUILDING BLOCKS

To understand the recent debate surrounding the role of international law in general and the specifics of customary international law, one must first understand the nature of international law and its recent evolution. International law has historically involved the relations among states. However, there is now a shift in emphasis,

which occurred during the end of World War II, to the relationship between states and their citizens. The Constitution, explicit in its treatment of treaties, one source of international law, is virtually silent on the subject of customary international law, the second source. While customary international law has historically been considered part of the general common law, that body of law too has changed dramatically. In the early 20th century, general common lawmaking powers of the federal courts were abolished (save a few specialized areas), and all judicial pronouncements required a definite source, be it the Constitution or a federal statute. This change engendered a fierce academic debate concerning customary international law, as it has no positivist source, instead relying on the conduct on nations. The following sections describe the evolution of both international law and constitutional common law, so as to provide background for understanding the recent debate and the Supreme Court decision.

A. General Concepts

1. *International Law*

International law[11] does not enjoy the respect that other areas engender. While no one questions the existence of family law or contracts law, international law does not have the firm footing that most bodies of law have.[12] Historically, international law has concerned the behavior of nation states, defining the rights and responsibilities of those principal international actors.[13] Beginning in 1919, concepts developed that allowed for restrictions to sovereign rights and a heightened awareness of individual human rights.[14] The ultimate decline of the "objective theory" of international law, in which the individual was only an object of international regulation, to the rise of the human rights movement were profound developments in the mid- to late-20th century.[15] The complementary development of institutionalization of international law, through organizations like the United Nations, the GATT-WTO, and International Court of Justice also highlights the evolution.

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11. Throughout this paper, international law and the law of nations will be used interchangeably. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 (4th ed. 2003) ("Nowadays, the terms the law of nations and international law are used interchangeably.")

12. This is exemplified by the first chapter in ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT, called "Is International Law Really 'Law'?".

13. JANIS, *supra* note 11, at 2.

14. *Id.*

15. Otto Kimminich, *History and the Law of Nations: Since World War II*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 849, 857 (1995).

Modern international law has two sources: international agreements, or treaties, and customary international law. The Supremacy Clause is clear that treaties "shall be the supreme law of the land,"[16] but there is no mention of customary international law. Customary international law is that which "results from a general and consistent practice of states followed by them from a sense of legal obligations."[17] This two-part definition contains both an objective and subjective component. The "practice of states" is the objective element, and it usually encompasses diplomatic acts, public measures, and other official governmental acts and statements of policy.[18] To be "general and consistent," a practice need not be universally followed; rather, that a few significant nations fail to adopt the practice can prevent it from becoming general customary law.[19] The subjective "sense of legal obligation," or *opinion juris*, is described as the "conception that the practice is required by, or consistent with, prevailing international law."[20]

The status of customary international law within the constitutional framework has never enjoyed the clarity that the treaties have. Although a primary purpose of the Constitution was to divide among the branches the foreign relations powers of the United States, and its allocation of treaty-making power is clear, the Constitution's treatment of customary international law is limited. While there are several references to the treaty-making power of the federal government,[21] customary international law is only mentioned once.[22] That the Supremacy Clause does not explicitly declare that the law of nations has prominence in the hierarchy of applicable law does not mean that international law has no place in the constitutional scheme. Exactly where within that scheme remains a hotly debated question. Some view customary international law as a fundamental incident of state sovereignty, just as the law of treaties (*pacta sunt servanda*), the concept of treating foreign nationals in accordance with international principles of justice, and

16. U.S. CONST. art. VI.

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2).

18. *Id.* cmt. b.

19. *Id.*

20. IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 8 (6th ed. 2003).

21. U.S. CONST. art. 1, § 10 (denying states the power to enter into treaties); art. II (granting the President the power to enter into treaties with the advice and consent of the Senate); art. III (granting federal courts the power to adjudicate cases arising under treaties); and art. IV (making treaties the supreme law of the land).

22. U.S. CONST. art. I, § 8, cl. 10 (authorizing Congress to "define and punish . . . Offenses against the Law of Nations"). Louis Henkin has suggested that this dichotomy does not reflect the Framers' judgment about the comparative constitutional significance of the two forms of international law. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 237 (2d ed. 2002).

the freedom of the seas, among others, are.[23] In fact, less than a decade after the Constitution was ratified, the Supreme Court unequivocally pronounced that upon independence, the United States was "bound to receive the law of nations, in its modern state of purity and refinement."[24] Despite this declaration, the law of nations is a term of art whose meaning and role has transformed throughout constitutional history. This transformation has given rise to the current debate, because while the traditional customary norms involved diplomatic practices with virtually no judicial remedy available, 21st century customary international law contemplates adjudication of claims in domestic courts.

2. *General and Federal Common Law*

The transformation from general to federal common law is at the heart of the current debate surrounding the proper role of customary international law, as it was historically thought to fall within the realm of general common law. A "useful definition [of general common law] is the federal law created by a court 'when the substance of that rule is not clearly suggested by federal enactments.'"[25] Thus it is not derived from a particular text, namely the Constitution or a federal statute; rather, it can be seen as purely judge-made law. Federal diversity jurisdiction, authorized by Article III, provided federal courts with the biggest opportunity to announce federal common law principles, and the Supreme Court gave the courts almost unrestrained power to do so following *Swift v. Tyson*.[26] In deciding which law to apply in the diversity suit, the Supreme Court announced that, just as states look to general common law principles to decide disputes, so too can the federal courts.[27] There are some rare instances of federal common law competence granted by the Constitution, such as admiralty jurisdiction, but these are limited.[28]

For almost a century this paradigm went unchallenged. Justice Holmes, in a sardonic dissent, famously questioned the ability of

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23. HENKIN, *supra* note 22, at 232. *Pacta sunt servanda* refers to the concept that treaties create obligations that must be observed. *Id.* Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 NYU J. INT'L L. & POL. 1, 10 (1999). Many such principles have later been codified in by treaty. *See, e.g.*, HENKIN, *supra* note 22, at 506 n.2 (noting the law of the seas conventions, among others).

24. Ware v. Hylton, 3 U.S. 199, 3 Dall. 281, (1796) (Wilson, J.)

25. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL Law § 3-23 n.1 (quoting Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986)).

26. 41 U.S. (16 Pet.) 1 (1842).

27. *Id.* at 18.

28. *See* U.S. CONST. art. III, § 2; *Swift,* 41 U.S at 18.

federal courts to impose their views of general common law on the states:[29]

> The prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.[30]

Regarding the general common law, Holmes says there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute. The fallacy and illusion [of its existence] consist in supposing that there is this outside thing to be found." Noting this criticism, the Supreme Court in 1938 overruled *Swift* in *Erie Railroad Co. v. Tompkins*.[31] In that decision, the Court recognized that "in performing their common law functions, state courts do not truly look to 'general' law as contemplated by *Swift*, but rather persist 'in their own opinions on questions of common law.' "[32] The result was a disconnect between the federal courts' version of common law and that of the various states.[33] Accordingly, the Supreme Court changed course and essentially removed federal courts' ability to make common law doctrines, which was not a " 'brooding omnipresence in the sky,' but rather 'the articulate voice of some sovereign' that could be identified.' "[34] The common thread among those few areas remaining reflect principle that the "federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as a sovereign are intimately involved or because the interstate or international nature of the controversy make it inappropriate for state law to control."[35]

The *Erie* Court "ruled that federal court development of general common law was illegitimate not because it was a form of judicial lawmaking per se, but rather because it was *unauthorized* lawmaking not grounded in a sovereign source." This "grounding" in a sovereign allows the new federal law fall "within the meaning of Arti-

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29. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting).
30. *Id.* at 532-33.
31. 304 U.S. 64 (1938).
32. TRIBE, *supra* note 25, at 470.
33. *See Id*.
34. *Id.* at 472 (quoting S. Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917)).
35. Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

cle II ('take care' clause), Article III (arise under jurisdiction), and Article VI (Supremacy Clause)."[36] Because the only legitimate sovereigns in the U.S. constitutional scheme are either the federal government or the states, all law applied by federal courts must come from either source. Hence, the debate: Where does customary international law fit? With a general understanding of the fundamental concepts, the development of the two is discussed next.

3. *Constitutional History*

*(a) Pre-*Erie *cases*

The following quotes are offered merely as evidence that the Supreme Court had, prior to *Erie*, regularly relied on and was not reluctant to invoke principles of international law where appropriate. Chief Justice Marshall wrote that "the Court is bound by the law of nations which is part of the law of the land."[37] In another case, discussing various areas of federal jurisdiction, the Supreme Court said that such areas, like maritime and admiralty, "belong to national jurisdiction" because they "are regulated by the law of nations and treaties."[38] Finally, citing relevant international treaties, a unanimous Supreme Court upheld constitutionality of an act of Congress regarding territorial acquisition, saying that "the law of nations, recognized by all civilized States . . . affords ample warrant for the legislation of Congress."[39]

Often dubbed a cannon of construction and citied to support the proposition that the United States is bound to international law, the *Charming Betsy* principle holds that acts of Congress should not be construed to violate the law of nations. This case arose from events surrounding the undeclared war with France during which the Nonintercourse Act of 1880 was passed.[40] To enforce this Act, which prohibited a U.S. resident from trading with France or its territories, the U.S. Navy was charged with seizing any vessel suspected of violating the statute.[41] The schooner *Charming Betsy* was seized pursuant to the Act, but the owner argued that because he was a citizen of a neutral country (Denmark), the seizure violated the international law rules of neutrality.[42] The Court construed the

36. CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 439 (2003).
37. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).
38. Chisholm v. Georgia, 2 U.S. (2 Dallas) 419 (1793).
39. Jones v. United States, 137 U.S. 202, 212 (1890).
40. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 64-65 (1804).
41. *Id.* at 65-67.
42. *Id.*

Act as inapplicable to the owner, as a non-U.S. resident.[43] In doing so, the Marshall stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[44]

The Paquete Habana, an oft-quoted decision written by Justice Gray, deals with the ancient concept of prize of war, in which a coastal fishing vessel pursuing normal activities is exempt from capture.[45] As a result of the Spanish-American War, the United States imposed a blockade around Cuba.[46] In enforcing the blockade, a U.S. naval squadron seized two Cuban vessels engaged in catching fish and transporting them to Havana.[47] The owners of the vessels challenged their capture, and after a federal district court condemned the fishing vessels as prizes of war, an appeal to the Supreme Court was made.[48] After describing the history of prize of war doctrine, the Court famously states, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ."[49] Finding the exception of true fishing vessels from prize of war capture, the Supreme Court ruled that the seizure was unlawful.[50]

*(b) Post-*Erie *Cases*

The next decision, although its holding is narrow, illuminates the Court's difficulty with the subject. The facts surrounding *Banco Nacional de Cuba v. Sabbatino* involve multiple parties to a sugar sale and are unnecessarily confusing; therefore, a truncated version is supplied here. In response to a reduction in the United States' sugar quota, the Cuban government expropriated property of C.A.V., whose stock was principally owned by U.S. residents.[51] When a suit was brought to recover the property, the government of Cuba claimed that the act of state doctrine prevented U.S. courts from ruling on the legitimacy of the expropriation.[52] Both the dis-

43. *Id.* at 120
44. *Id.* at 118.
45. 175 U.S. 677 (1900).
46. *Id.* at 678.
47. *Id.* at 678-79.
48. *Id.* at 678.
49. *Id.* at 677.
50. *Id.* at 714.
51. BRADLEY & GOLDSMITH, *supra* note 36, at 62.
52. *Id.*

trict court and court of appeals held that the expropriation violated international law and that title of the expropriated property had not validly passed to Cuba.[53] The Supreme Court first decided that neither international law nor the text of the Constitution itself require the act of state doctrine.[54] Instead, its constitutional underpinnings arise from the concept of separation of powers.[55] The Court then noted that it could avoid deciding whether federal or state law is applicable, as the state law of New York, where the case was raised, is similar to the federal decisions regarding the act of state doctrine.[56]

However, the Court went on to stress that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[57] The Court noted the difficulty of applying the decision in *Erie* to problems affecting international relations, and it recalled that there were areas protecting "uniquely federal interests" for which a "a national body of federal-court-built law" has been controlling.[58] It gave both a statutorily guided example and areas where positive sources were not available: boundary disputes between states and apportionment of interstate waters.[59] The Court then narrowly held that in the absence of a treaty, the act of state doctrine prevents U.S. courts from ruling on the validity of a foreign government's expropriation.[60]

In the first decision after *Erie* to contemplate the nature of customary international law within the American legal framework, Judge Learned Hand in *Bergman v. De Sieyes* explained that the interpretation of New York state courts "was controlling upon [the federal courts],"[61] which seems to mean that customary international law had the status of state law. The federal court heard the diversity case to decide whether a French minister enjoyed diplomatic immunity from service of process.[62] En route to the Republic of Bolivia, the French minister was served with process while passing through New York.[63] He claimed that as a diplomat, he was ex-

53. *Id.*
54. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-23 (1968).
55. *Id.* at 423.
56. *Id.* at 424-25.
57. *Id.* at 425.
58. *Id.* at 426.
59. *Id.*
60. *Id.* at 428.
61. Bergman v. De Sieyes, 170 F. 2d 360, 361 (2d Cir. 1948).
62. *Id.* at 361.
63. *Id.*

empt from personal service.[64] After analyzing New York state law, which the Judge Hand found to be unclear, the court used various international sources to determine that "the courts of New York would today hold" that the diplomat in transit deserved immunity.[65]

Over three decades later, the same federal court held that the constitutional basis for federal jurisdiction in diversity suits where principles of international law are dispositive "is the law of nations, which has always been part of the federal common law."[66] The Second Circuit Court of Appeals' decision in *Filartiga v. Pena-Irala* marked a watershed moment for the debate. The *Filartiga* decision reversed a district court's dismissal of a complaint for lack of federal jurisdiction. The Filartigas were citizens of Paraguay who brought a cause of action in the Eastern District of New York against Alerico Norberto Pena-Irala (Pena), another citizen of Paraguay, for the wrongful death of Joelito Filartiga.[67] The Filartigas alleged that Pena, who was Inspector General of Police in Asuncion at that time, participated in the kidnapping and torture of Joelito, in retaliation for his father's political leanings.[68] The criminal proceedings in Paraguay were fruitless, as the confessed killer had never been brought to justice.[69] Eventually, Pena moved to the United States, but after a Filartiga relative learned of his presence, Pena was arrested for violating his visa after a tip from the relative.[70] Shortly thereafter, Pena was served with a summons and complaint by the Filartigas for wrongful death, in contravention of customary international law.[71] Pena moved that the complaint be dismissed for lack of subject matter jurisdiction; it was granted.[72] An appeal to the Second Circuit followed.

The circuit court found that "an act of torture committed by a state official against one hold in detention violates established norms of the international law of human rights, and hence the law of nations."[73] Because the ATS requires a violation of the law of nations, the court was satisfied that torture was such a violation, noting that this finding was established using appropriate sources of international law and citing *The Paquete Habana* for the proposition that courts should interpret international law as it presently

64. *Id.*
65. *Id.* at 363.
66. Filartiga v. Pena-Irala, 630 F. 2d 876, 885 (2d Cir. 1980).
67. *Id.* at 878.
68. *Id.*
69. *Id.*
70. *Id.* at 878-79.
71. *Id.* at 879.
72. *Id.*
73. *Id.* at 880.

exists.[74] The court then dismissed the claim that federal jurisdiction was inconsistent with Article III, stating that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[75] The court concluded that its decision to give effect to a two-centuries-old jurisdictional statute is a "small but important step," heralding the "true progress" that has been made on ushering in an era that respects fundamental human rights.

In a suit similar to *Sosa*, discussed below, plaintiffs used the ATS in a claim of violation of the law of nations. In *Tel-Oren*, several Israeli citizens brought an action for damages for tortuous acts occurring on March 11, 1978.[76] On that day, members of the Palestinian Liberation Organization (PLO) entered Israel via boat and terrorized civilians along the highway between Haifa and Tel Aviv.[77] Several vehicles were seized, and passengers were taken hostage, tortured, and murdered.[78] In all, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded.[79] A suit later followed to recover damages for the barbarous acts. The district court dismissed the action for, *inter alia*, lack of subject matter jurisdiction.[80] The D.C. Circuit affirmed, with three separate concurring opinions.[81]

Judge Edwards found the reasoning in *Filartiga* controlling; however, the factual distinctions in the present case, specifically the fact that the law of nations does not impose the same liability on nonstate actors like the PLO, required dismissal for lack of subject matter jurisdiction.[82] Judge Edwards continued, however, articulating his understanding of the ATS. He disagreed with Judge Bork's belief that the ATS requires a victim to assert an actionable claim granted by the law of nations, because "the law of nations never has been perceived to create or define civil actions."[83] Judge Edwards further observed that the violations of the law of nations are not limited to those articulated in the 18th century; instead, he used a more liberal approach, allowing for new violations to be actionable.[84]

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74. *Id.* at 880-85.
75. *Id.* at 885.
76. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775-76 (D.C. Cir. 1984).
77. *Id.* at 776.
78. *Id.*
79. *Id.*
80. *Id.* at 775.
81. *Id.*
82. *Id.*
83. *Id.* at 777.
84. *Id.* at 789.

Judge Bork's concurrence, while reaching the same conclusion that the complaint must be dismissed,[85] differs vastly in its reasoning. Bork's principal argument rests on separation of powers, whereby the concerns of foreign relations are best left to the political branches.[86] In addition, Judge Bork also discussed his disagreement with the argument advanced by the victims that international law is part of the common law of the United States.[87] He did not distinguish between the pre- and post-*Erie* differences in common law. Rather, Judge Bork merely refuted the appellant's assertion that because international law is part of the common law, it creates a cause of action.[88] He also felt that Judge Edwards and the Second Circuit's construction of the ATS is overly broad, as it would effectively make all treaties self-executing and it would authorize vindication for any international violation.[89] Judge Robb's concurrence rested solely on his belief that the issue was a nonjusticiable political question.[90]

As evident by this final decision, it is clear that the matter remained unsolved and was in need of explanation. Indeed, as judge Edwards exclaimed in 1984, this area of law "cries out for clarification by the Supreme Court."[91] Judge Edwards received that elucidation twenty years later, though a fierce debate raged in the meantime.

III. THE DEBATE BEFORE *SOSA*

There are two schools of thought regarding the proper role of customary international law in the constitutional scheme: one dubbed the modern view and other the revisionist view. That customary international law has the status of federal common law is the crux of the modern position. Two important implications of this view are (1) that a case arising under customary international law arises under federal law for purposes of Article III jurisdiction and (2) that customary international law preempts inconsistent state law according to the Supremacy Clause.[92] A recent challenge to this paradigm has come from Curtis A. Bradley and Jack L. Goldsmith, who argue that customary international law should not be treated

85. *Id.* at 799.
86. *Id.* at 801-08.
87. *Id.* at 811.
88. *Id.*
89. *Id.* at 811-12.
90. *Id.* at 823.
91. *Id.* at 775.
92. BRADLEY & GOLDSMITH, *supra* note 36, at 439-41. A third implication is that customary international law would bind the President under Article II, Section 3, the Take Care Clause. *Id.*

as federal common law.[93] There is a consensus among most participants in this debate that prior to *Erie*, customary international law held the status of general law.[94] As such, it was neither state nor federal; thus, it did not create federal question jurisdiction or preempt state law.[95] With this as their only agreement, however, the two camps divide. And even among those who espouse the modern position, opinion is divided on the basis for that position.[96]

1. *The Modern Position*

The modern position holds that customary international law is federal common law. Of course, prior to *Erie*, all agreed that CIL was general law.[97] The post-*Erie* status of CIL is the cause for debate. Some have stressed the intent of the Framers to support their position. Using *Sabbatino*'s announcement that foreign affairs was an enclave of federal common law, others argue that the modern position received implicit support from this reasoning.[98] Finally, Professor Henkin argues that while like federal common law in some respects, it is not identical; it is not made by judges, instead it is interpreted from state action.[99]

In Beth Stevens' defense of the modern position, she particularly highlights the intent of the Framers that the United States respect international law.[100] Stevens asserts that "the framers drafted a Constitution that empowered the national government to enforce [the law of nations], by assigning to the federal government

93. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique*]; Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*]; Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*].

94. Ernest A. Young, *Sorting Out the Debate over Customary International Law*, VA. J. INT'L L. 365, 374 (2002).

95. *Id.* at 374-75.

96. There are several authors who support this position. For the purposes of this paper, I will focus on Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); and Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997). For a more complete list of articles endorsing the modern position, see Goodman & Jinks, *supra*, 474 n.55.

97. *See supra* note 94 and accompanying text.

98. Goodman & Jinks, *supra* note 96, at 472-73.

99. *See generally* Henkin, *supra* note 96.

100. Beth Stevens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997). She also discusses the enclaves left open by *Erie* and how customary international law is but one of them, but her discussion on this point adds little to what is discussed *supra*, so I focus solely on the historical argument.

control over issues touching upon foreign affairs."[101] Others have echoed that same sentiment, saying the Founders "clearly expected" that the law of nations was "the supreme law of the land" and would be used in federal court.[102] Although the Framers accepted aspects of the law of nations as part of the constitutional structure, its precise role would not be fully understood until the judicial power evolved.[103] Yet, while the Constitution clearly delineates certain foreign affairs responsibilities, obviously it does not charge one branch with ensuring that international law, in general, is respected. It is evident, though, that this was a concern. For example, Attorney General Edmund Randolph recognized that "although not specially adopted by the constitution," the law of nations is "essentially part of the law of the land [whose] obligation commences and runs with the existence of a nation."[104] John Jay, writing in support of the Constitution's ratification, felt that "[i]t is of high importance to the peace of America that she observe the laws of nations . . . and to me it appears evident that this will be more perfectly and punctually done by one national government" than by separate states.[105] Unfortunately, the Framers' silence on the role of international law within the constitutional framework speaks loudly, so despite the obviousness it was assumed that the United States would be bound by the law of nations, the failure to specifically incorporate it into the final draft of the Constitution does not help to settle the debate.

According to Goodman & Jinks, *Sabbatino* provides "a sound conceptual basis" for the modern position.[106] The two features of federal common law discussed in *Sabbatino* — "unique federal interests and the need for national uniformity" — are certainly found in CIL. And the "sliding scale" regarding how federal courts can find actionable claims arising from customary international law allows for only a limited number of norms to be incorporated.[107] This might seem odd, at first glance, since the holding in *Sabbatino* appears to preclude judicial judgment regarding the validity of an act of a foreign sovereign. However, the more nuanced position is not that the act of state doctrine precludes all judgment on an act of a sovereign; rather, it is only where an issue is disputed (like the validity of a government's ability to seize an alien's private property)

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101. *Id.* at 399-400.

102. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7 (2d ed. 2003); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952-1953).

103. Dickinson, *supra* note 102, at 55-56

104. *Id.* at 400 (quoting 1 Op. Att'y Gen. 26, 27 (1792) (Edmund Randolph)).

105. *Id.* at 404 (quoting THE FEDERALIST NO. 3 (John Jay)).

106. *Id.* at 484.

107. *Id.* at 480-84.

that courts should defer to the sovereign.[108] However, if the law is settled, courts may and should apply it.[109] Thus, courts are to distinguish between areas of international law around which an agreement has been built and areas about which there is still division; "the greater the degree of codification and consensus supporting a CIL norm, the more allowance courts have in finding attendant claims actionable."[110] They conclude that federal law includes "universally recognized human rights norms."

A slightly different view is offered by Professor Louis Henkin. He asserts that "to call international law federal common law is misleading."[111] He notes that neither the Constitution nor an act of Congress explicitly said or even implied that the law of nations was incorporated as domestic law.[112] Even so, both state and federal courts at the inception of the United States applied customary international law, not as sate or federal law, but rather as common law.[113] Henkin then reads *Sabbatino* as "rejecting the applicability of *Erie* to international law," which allows for cases arising under international law to be within Article III.[114] However, international law is only *like* federal common law in that it is supreme to state law, but dissimilar in that "it is not made and developed by federal courts independently and in the exercise of their own lawmaking judgment."[115] Instead, judges applying that law are merely interpreting law that exists as a result of the political actions of nation states.[116] Henkin is not disturbed by the fact that the Supremacy Clause fails to mention customary international law expressly because he asserts that the Clause was for the states, "designed to assure federal supremacy."[117] In concluding, Henkin feels that courts should continue to apply well-established norms of international law to which the United States has agreed, unless Congress decides to reject them as domestic law.[118]

2. *Challenging the Modern Position*

The modern position was widely held until recently, when Curtis Bradley and Jack Goldsmith challenged it with *Customary In-*

108. *Id.* at 482-83.
109. *Id.* at 484.
110. *Id.* at 482.
111. Henkin, *supra* note 96, at 1561.
112. *Id.* at 1557.
113. *Id.*
114. *Id.* at 1559-60.
115. *Id.* at 1561.
116. *Id.* at 1562.
117. *Id.* at 1565-66.
118. *Id.* at 1569.

ternational Law as Federal Common Law: A Critique of the Modern Position. According to the authors, the modern view that customary international law holds the status of federal common law is based on flawed arguments and creates untenable implications.[119]

Bradley and Goldsmith first trace the rise of the modern position. They start by noting that pre-*Erie* courts applied customary international law in a various contexts, usually without statutory or constitutional authorization.[120] As general common law, such law "was not part of the 'Laws of the United States' within the meaning of Articles III and VI of the Constitution," meaning states were not bound by federal court interpretation and federal question jurisdiction was not established.[121] These two conclusions form the crux of the authors' critiques of the modern position and their own view.

As described above, *Erie* essentially ended federal court creation of general common law. However, for almost twenty-five years, the issue of *Erie*'s effect on customary international law remained unexplored, save an essay by Philip Jessup and the Second Circuit decision, *Bergman v. De Sieyes*.[122] However, following the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*,[123] where the Court, in Bradley & Goldsmith's view, "*stated*" rather than "*held*" that the act of state doctrine was a rule of federal common law, attention soon shifted.[124] Bradley and Goldsmith label this decision as the "catalyst for the scholarly argument that customary international law should be treated as federal common law."[125] That case spawned "isolated academic support" for the modern position, which was further bolstered by two events in 1980.

The first event has been described as "the *Brown v. Board of Education* for customary international law."[126] The Second Circuit in *Filartiga v. Pena-Irala* first upheld federal jurisdiction in "an action by an alien, for a tort . . . in violation of the law of nations," then it claimed that the law of nations has always been part of the

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119. Bradley & Goldsmith, *Critique*, *supra* note 93, at 820.

120. *Id.* at 822. Courts applied customary international law as natural law, part of the English-inherited common law, or simply part of the "law of the land" without explaining the source. *Id.*

121. *Id.* at 823.

122. *Id.* at 827-28. Jessup first posited that were *Erie* applied to customary international law, a state's ruling about the law would be final. *Id.* Jessup found it "unsound" and "unwise" that *Erie* not be interpreted this way. *Id.* (quoting Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939). The *Bergman* court followed Jessup's advice, as described in text accompanying notes 62-66, *supra*.

123. 376 U.S. 398 (1964).

124. Bradley & Goldsmith, *Critique*, *supra* note 93, at 829 (emphasis added).

125. *Id.* at 830.

126. *Id.* at 832 (citing Harold Hongjo Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991)).

federal common law, thus under Article III.[127] In doing so, the authors complain that the court mistakenly relied on pre-*Erie* precedents, ignored *Bergman*, and failed to understand *Erie*'s implications.[128] The two authors then credit the *Restatement (Third) of Foreign Relations* with furthering the modern position. Although the *Restatement (Second)* merely mentioned it in a reporter's note,[129] the newer version, "without citing any authority . . . [explained] that '*courts have declared* that . . . interpretations of customary international law are . . . supreme over state law.'"[130] In other words, customary international law, "while not mentioned explicitly in the Supremacy Clause, [is] also federal law [in addition to treaties] and as such is binding on the States."[131] Bradley and Goldsmith credit these two events for allowing the prevailing, modern position to take root.

Bradley and Goldsmith then discuss the implications of the modern position and next offer their critiques. As already mentioned, the modern position's reliance on pre-*Erie* assertions that customary international law is "part of our law" and thus federal law is misplaced, as it was merely *general* common law.[132] Related are *Erie*'s theoretical underpinnings, which require that future federal common law be grounded in positive law, with some authority behind it.[133] In essence, *Erie* requires that the authority come from a domestic source.[134] Applying laws that were created outside the American political process violates this fundamental *Erie* requirement.[135] Bradley and Goldsmith dismiss *Sabbatino* as irrelevant, distinguishing the act of state doctrine with its constitutional underpinnings related to the separations of powers.[136] Finally, Bradley and Goldsmith dismiss the argument that the foreign relations enclave suggested by *Sabbatino* can allow courts to bind the political branches to interpretations of customary international law.[137] The two professors dismiss with less conviction the federalism argument, which they dub the dormant foreign relations preemption, as unnecessary because most state law competencies do not conflict with customary international law; when they do, it is usually the

127. *Id.* at 833 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)).
128. *Id.* at 834.
129. *Id.* at 830.
130. *Id.* at 835 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS § 111 note 2).
131. RESTATEMENT (THIRD) FOREIGN RELATIONS § 111 cmt. d.
132. Bradley & Goldsmith, *Critique*, *supra* note 93, at 849-52.
133. *Id.* at 853-55.
134. *Id.* at 856.
135. *Id.* at 857-58.
136. *Id.* at 859.
137. *Id.* at 861.

result of a democratic process.[138] In any event, the value of preemption is not seen as strong by the authors.

IV. *SOSA*'S ANSWERS

In a recent decision, the Supreme Court somewhat clarified the murky jurisprudence regarding the role of customary international law within the constitutional structure. In analyzing a claim using the Alien Tort Statute (ATS) as a jurisdictional grant and customary international law as substantive law, the Court answered three fundamental questions: What is the nature of the Alien Tort Statute? Deciding that the ATS was jurisdictional in nature, how are causes of action to be defined? Finally, given the present state of federal common law, how are new norms of international law incorporated into U.S. law?

A. Facts of Sosa

While on assignment in Mexico in 1985, Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar was captured and tortured during a two-day interrogation.[139] He was eventually murdered.[140] According to eyewitness testimony, DEA officials learned that Humberto Alvarez-Machain ("Alvarez"), a Mexican physician and the respondent in the present case, helped to keep the agent alive in an attempt to extend questioning.[141] Alvarez was indicted, and a warrant was issued for his arrest in the United States. After failing to persuade the Mexican government to aid in bringing Alvarez to the United States to answer the charges, the DEA hired Mexican nationals to capture him and bring him to the United States.[142]

The plan was executed by a group of Mexicans, including petitioner Jose Francisco Sosa, who abducted the physician from his house, held him in a hotel, and brought him to El Paso, Texas, where he was arrested.[143] Alvarez sought to dismiss the indictment because his seizure had violated the extradition treaty between the United States and Mexico.[144] The district court agreed with Alvarez, as did the Ninth Circuit which affirmed the lower court's decision, but the Supreme Court reversed, holding that the nature of Alva-

138. *Id.* at 861-66.
139. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* (citations omitted).

rez's seizure had no bearing on the jurisdiction of the federal court. The case was subsequently tried, and Alvarez moved for a judgment of acquittal following the close of the government's case.[145] The district court granted the motion.[146]

After returning to Mexico, Alvarez began a civil suit. He sued several individuals involved in his abduction, as well the United States.[147] Sosa sought damages from the United States under the Federal Tort Claims Act (FTCA) for false arrest and from Sosa under the ATS for a violation of the law of nations.[148] The district court dismissed the FTCA claim following the government's motion, but it awarded Alvarez $25,000 in damages on the ATS claim. The Ninth Circuit affirmed the ATS judgment but reversed the dismissal of the FTCA claim.[149] In an en banc decision, the Ninth Circuit held that under the FTCA, because the DEA lacked authority to arrest and detain Alvarez in Mexico, the United States was liable to him for the tort of false arrest.[150] The Supreme Court reversed, holding that the foreign country exception of the FTCA bars all claims based on any injury suffered in a foreign country.[151] As to the ATS claim, the Ninth Circuit held that the ATS provide federal courts with subject matter jurisdiction *and* created a cause of action for a violation of the law of nations.[152] The Supreme Court reversed this ruling as well,[153] for the reasons discussed below.

B. Jurisdiction

The Supreme Court wisely did not step into the historical debate about the Founder's intent regarding the law of nations and the federal courts' ability to hear cases based on it. Instead, the Court recognized that the Alien Tort Statute, passed by the first Congress as part of the Judiciary Act of 1789, merely granted jurisdiction. The Supreme Court begins its substantive law analysis by recalling that upon independence, the United States "w[as] bound to receive the law of nations, in its modern state of purity and refinement."[154] The majority distinguishes between two elements of the law of nations: norms governing the behavior of nation states with each other and norms that regulate an individual outside of

145. *Id.*
146. *Id.*
147. *Id.* at 2747.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 2754.
152. *Id.* at 2747.
153. *Id.*
154. *Id.* at 2755 (citing Ware v. Hylton, 3 U.S. 199 (1796)).

his "domestic boundaries."[155] The legislative and executive branches are thought to be constrained by the norms governing the interactions among nation states, while a body of judge-made law regulated those individuals operating outside the domestic "sphere of influence," such as law merchant.[156] The majority noted that in the late eighteenth century, a sphere of overlap existed, whereby some rules that sought to control individual behavior for the benefit of other individuals coincided with the norms that governed nation state interaction.[157] Violation of safe conducts,[158] infringement on the rights of ambassadors,[159] and piracy[160] are the noted examples.[161]

The Souter-led majority then described the history of the "distinctly American preoccupation" with the overlapping norms.[162] Similar to Beth Stevens' historical analysis, the Court noted that the early years of the American experience were fraught with a weak central government. In fact, it was the inability of the Continental Congress to compel the individual states to vindicate violations of the law of nations, exemplified by the Maribos Incident, which led to the Framers' vesting the Supreme Court with original jurisdiction over certain matters and to the first Congress' enacting the ATS.[163] Specifically, the Constitution gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Counsels," and the Judiciary Act grants the federal judiciary the power to hear claims brought by aliens for violations of international law.[164] After providing this brief historical

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155. *Id.* at 2756.

156. *Id.* The law merchant, or lex mercatoria, was originally a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. *Law Merchant*, WIKIPEDIA, http://en.wikipedia.org/wiki/Law_Merchant (last visited Dec. 9, 2005).

157. *Id.*

158. "A 'safe-conduct' is a written permit given by a belligerent in an armed conflict to a person (of enemy character or not) allowing him or her to proceed to a given place for a certain purpose." Rolf Stödter, *Safe-Conduct and Safe Passage*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 277, 277 (2000).

159. "The duty to give special protection to the envoy who bore messages [has been] observed and enforced by sanctions" for over three thousand years. *Diplomatic Agents and Missions, Privileges and Immunities*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1040, 1040 (1990). This grew into immunity from civil jurisdiction for ambassadors. *Id.* This was eventually codified into a complete listing of privileges and immunities in the Vienna Convention. *Id.*

160. "A pirate is one who roves the sea in an armed vessel without any commission or passport from any government, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, whatever ships or vessels he may choose to plunder." 61 AM. JUR. 2D *Piracy* § 1 (2002).

161. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).

162. *Id.*

163. Sosa, 124 S. Ct. at 2756-57.

164. *Id.* at 2756 (citing U.S. CONST. art. III,§ 2 and 1 Stat. 80, ch. 20, § 9).

background in attempting to explain the impetus for the ATS, the Supreme Court resigns itself to acknowledging that there is no consensus as to the original intent of the first Congress creating the ATS.[165]

Nonetheless, the majority was able to draw two conclusions upon which it continued its analysis, both of which seem plausible. Souter wrote that first, Congress could not have enacted the ATS "only to leave it lying fallow indefinitely."[166] In other words, it seems reasonable that the first Congress enacted the Alien Tort Statute to address specific violations of international law. Second, the number of specific violations envisioned by the drafters of the Statute was likely confined to the three hybrid causes of action discussed above. Thus, the Supreme Court unanimously agrees that:

Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[167]

The agreement between the majority and the Scalia-led concurrence ends here. Because nothing precludes the federal courts from recognizing new claims arising from the law of nations based on common law, the majority reasoned that such power rests with the federal judiciary. It then discussed reasons why creating new causes of action must be done with caution. Scalia, on the other hand, took umbrage with the majority's willingness to exercise its discretion in creating new causes of action. He argued that by framing the issue in terms of *discretion*, the majority neglects to determine the prerequisite question of *authority*.[168]

C. Closed, Ajar, or Wide Open?

The difference between the majority and Scalia concurrence mirrors the debate between those advocating the modern position and those challenging it, as it centers on the difference between general common law and federal common law.

The majority simply "assume[s] . . . that no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases beginning with *Filartiga* . . . has categorically

165. *Id.* at 2758.
166. *Id.* at 2758-59.
167. *Id.* at 2761.
168. *Id.* at 2772.

precluded the federal courts from recognizing a claim under the law of nations as an element of common law."[169] The majority sees the few remaining judicial "enclaves in which federal courts may derive some substantive law in a *common law way*" as evidence that not all judicial creation of actionable international norms is forbidden.[170] It stresses that for two hundred years the Court has accepted the law of nations, and it finds comfort in the Torture Victim Protection Act, enacted by Congress to supplement judicial decisions.[171] Using this assumption, the majority calls for "judicial caution" when deciding what new claims should be recognized.[172]

The first two reasons cited by the majority draw the most criticism from Scalia. The majority was first concerned with the "substantial element of discretionary judgment" utilized when a judge creates a new common law doctrine.[173] This is because of the way the common law has changed, such that when a new common law principle is espoused, "there is a general understanding that the law is not so much found or discovered as it is either made or created."[174] In other words, new laws cannot be based merely on reason; instead, they require a positive choice. Related to this theoretical development of common law and, in fact, a manifestation of this development, the *Erie* decision "was the watershed in which [the Supreme Court] denied existence of federal 'general' common law."[175] Though it noted that some enclaves of judicially created common law principles like the act of state doctrine created in *Sabbatino* are acceptable, the Court preferred legislative guidance before "exercising innovative authority over substantive law."[176]

The remaining three issues relate to the judiciary's ability to create a new cause of action absent legislative approval. First, the majority reiterated its reliance on the legislature to create a private right of action.[177] Second, the matter is compounded with a cause of action for an international law violation, as the repercussions on the political branches with respect to foreign relations could be harmful.[178] Finally, the majority notes that the legislature has not

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169. *Id.* at 2761.
170. *Id.* at 2764 (emphasis added).
171. *Id.* at 2765.
172. *Id.* at 2762.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 2763. In a somewhat related topic that deserves brief mention, Justice Breyer in his concurring opinion asks courts considering a claim like Alvarez's to take into account the principle of comity. *Id.* at 2782 (Breyer, J., concurring). "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching on the

enthusiastically encouraged the judiciary to be creative in defining questionable violations of the law of nations; in fact, the Senate, when ratifying human rights-related treaties, has expressly withheld the ability of injured parties to pursue a claim based on a violation of such treaties.[179] The aforementioned reasons mandate judicial caution if a new private right is to be created from the law of nations.

Whereas the majority views *Erie* as leaving the door to federal common law creation slightly ajar, the Scalia-led concurrence sees it as slamming the door shut.[180] The majority bases this view on additional factors. It recognizes that *Erie* was not absolute in barring judicial creation of rules, that "the domestic law of the United States recognizes the law of nations," and that since the *Filartiga*, Congress has not expressed displeasure at the federal judiciary's exercise of power.[181]

According to Scalia, the majority errs by simply assuming it has discretion to create a cause of action because nothing has precluded it, rather than relying on explicit authorization, as required by *Erie*.[182] Citing Young and Bradley & Goldsmith, Scalia states that the law of nations envisioned to be applied in the forum created by the ATS would have been known as general common law.[183] He then recalls the *Erie* decision that repudiated the holding of *Swift*, essentially declaring the "death" of general common law.[184] From its ashes rose "a new and different common law pronounced by federal courts." By citing Holmes, Scalia stresses the theoretical difference between the two, noting that the new common law is "made" and requires a positivistic source, whereas the old was merely "discovered."[185] He too notes admiralty as an exception.[186] But Scalia finds no exception to the general post-*Erie* rule that this situation calls for judicial lawmaking power.[187] (It should be noted that Scalia fails to mention *Sabbatino*, arguably the closest exception available.) He then lampoons the majority's creation of a federal common law command out of international norms and con-

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laws and interests of other sovereign states." Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 543 n.27 (1987).

179. *Id.*

180. *Id.* at 2764.

181. *Id.* at 2764-75.

182. *Id.* at 2772-73.

183. *Id.* at 2769-70 (Scalia, J., concurring) (citing Young, *supra* note 94 and Bradley & Goldsmith, *Critique*, *supra* note 96).

184. *Id.* at 2770.

185. *Id.*

186. *Id.*

187. *Id.*

structing a cause of action to enforce it based on the ATS' jurisdictional grant as "nonsense upon stilts."[188]

Scalia then considers the consequences of the Court's decision. Whereas the majority "welcomes congressional guidance" in its exercise of this power, Scalia sees the judiciary's actions as an invasion of the legislature's domain.[189] That misfortune is compounded in Scalia's eyes, and in other's as will be discussed below, by the fact that the laws created come not from the American constitutional process, but instead are an "invention of internationalist law professors and human-rights advocates."

D. Standard for New International Law Norms

With the caution discussed above in mind, the majority articulated a standard for recognizing new private claims under federal common law for violations of international law norms. Any new causes of action should be of "definite character and acceptance among civilized nations than the historical paradigms familiar" when the ATS was enacted.[190] Citing *The Paquete Habana*, the Court offered as possible sources of evidence of a new norm the works of jurists and commentators.[191] The Supreme Court also recognized several limitations on the power of courts even if such a norm were found to exist: remedies in a domestic legal system and perhaps international forum must be exhausted and in some circumstances deference to the political branches must be exercised.[192]

With this framework in mind, the majority then analyzes the alleged law of nations violation claimed by Alvarez. He couches his claim in terms arbitrary arrest.[193] The Court finds Alvarez's citation to the Declaration of Human Rights and the International Covenant on Civil and Political Rights is inconsequential, as the former is merely a statement of principles and the latter was ratified with the understanding that it was not self-executing.[194] The Court then reclassifies his claim as arbitrary detention but again finds no support that the claim is a "binding customary rule having the specificity we require."[195] Thus, Alvarez had not suffered a violation of a customary international norm.[196]

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188. *Id.* at 2772.
189. *Id.* at 2774.
190. *Id.* at 2765.
191. *Id.* at 2766-67.
192. *Id.* at 2766.
193. *Id.* at 2767-68.
194. *Id.* at 2767.
195. *Id.* at 2769-69.
196. *Id.* at 2769.

V. U.S. POLICY GOING FORWARD

Some lament that the *Sosa* decision went too far, while others fear it did not go far enough. Many who are hostile to international law in general see the incorporation of customary international law into federal law, by the judiciary no less, as only one symptom in a growing problem in the attempt to restrict American sovereignty. Writing before *Sosa* but commenting on and criticizing *Filartiga*, Robert Bork derides the "campaign" to impose international standards on "an entirely different battlefront where there is even less democratic involvement."[197] This next part will address the concerns of those who fear the *Sosa* decision will unnecessarily open the United States to an erosion of sovereignty and eventually a weakening of the country's dominance or hegemony. I am sympathetic to the questioning of the way in which international norms are incorporated into U.S. law, but I disagree with critics who argue shortsightedly that the sovereignty of the United States is unreasonably threatened and its hegemonic position vulnerable if the U.S. accedes to international norms.

A. The Inarguable Foreign Policy Goal

To Fukuyama's credit, he does imagine the Kantian perpetual peace; he just assumes incorrectly that it has been achieved. Although Kant first envisioned this path over two centuries ago, the vision is shared by many today, including the current President of the United States. Kant begins with the premise that the fundamental purpose of international law is peace.[198] He asserts that international law — and eventual perpetual peace — requires an alliance of republican states, by which he means a liberal democracy, or "a form of political organization that provides for full respect for human rights."[199] Kantian theory provides two arguments for the thesis: one empirical and one normative. The empirical argument relies on the tendency of liberal states to maintain peace among themselves, whereas nonliberal states have a propensity to go to war.[200] In his second inaugural address, President George W. Bush implicitly acknowledged this Kantian concept: "The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of

197. Robert H. Bork, *The Limits of 'International Law,'* NAT'L INT., 1, 6 (Winter 1989-1990).
198. FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 9 (1998).
199. *Id.* at 3.
200. *Id.*

freedom in all the world."[201] The normative argument rests on Kant's categorical imperative, that human beings have inherent worth.[202] Again, President Bush acknowledges this as well: "[E]very man and woman on this earth has rights, and dignity, and matchless value."[203] Kant bases his belief on their rationality, while Bush does so because of their creation by God is his image.

Surely no one argues that the U.S. policy should not ultimately result in the spread of peace and democracy throughout the world. It is our current Administration's stated goal. Of course, there are differing opinions on how best this is achieved. Two competing rationales are often simplistically divided into two camps: idealists and realists. Idealists are portrayed as advocating human rights and global governance while realists are depicted as stressing *realpolitik* and state sovereignty.[204] This remaining Part attempts to offer a middle road, whereby both camps' concerns can be incorporated into a sound policy.

VI. WHERE WE ARE NOW

The United States' international law record, particularly in the human rights realm, is inconsistent at best, hypocritical at worst, but clearly incoherent. The row over the United States' detention policy and its possible torture of detainees is clearly a stain on the U.S. record. The United States struggles with this. For example, John McCain recently introduced amendments to the Defense appropriations bill which would "prohibit cruel, inhuman, and degrading treatment of persons in the detention of the U.S. government."[205] But the Bush Administration has threatened to veto the bill, arguing it would be "unnecessary and duplicative and it would limit the President's ability as Commander in Chief to effectively carry out the war on terrorism."[206] This dispute represents just one issue in the recent spate of picking and choosing which international standards to abide by and enforce, and which to ignore.

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201. President George W. Bush, Second Inaugural Address (Jan. 20, 2005).

202. TESÓN, *supra* note 1988, at 14-15.

203. President George W. Bush, Second Inaugural Address, *supra* note 2011.

204. *See* Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1259-66 (2005) (book review).

205. Press Release, John McCain, McCain Statement on Detainee Amendments (Oct. 5, 2005), *available at* http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPress Release &Content_id=1611.

206. *The World Today: U.S. Senate Rebuffs Bush* (ABC radio broadcast Oct. 7, 2005), *available at* http://www.abc.net.au/worldtoday/content/2005/s1476966.htm. McClellan's argument is unbelievable. If the language were duplicative, thus the President is bound already, how would the addition of the words limit the President?

Other examples of inconsistency are offered below, as is one author's plausible explanation for this incoherence.

The most recent National Security Strategy and National Defense Strategy offer further examples. The National Security Strategy defines one characteristic of a rouge state as "display[ing] no regard for international law" and "callously violat[ing] international treaties to which they are a party."[207] Yet the National Defense Strategy cites as one U.S. vulnerability challenges "by those who employ a strategy of the weak using international fora, judicial process, and terrorism."[208] By definition, the nonrouge state has respect for international law and the treaties to which it has agreed to. But then how does that non-rouge state's presumable use of an international forum or judicial process to solve a dispute challenge the United States? And how does the United States explain its use of the International Atomic Energy Agency and threat of referral to the Security Council to deal with Iran's nuclear ambitions? Even more amazing is the likening of those who use terrorism to those who use an available judicial remedy. The comparison is outrageous.

Yet, while dismissing the use of international institutions and international law as a tool of the weak, the United States has increasingly used humanitarian concerns in its foreign interventions;[209] for example, the no-fly zones trifurcating Iraq were rationalized by the need to protect the civilian population[210] and the Kosovo intervention in 1999 was validated by referencing the "humanitarian catastrophe."[211] Surprisingly, the United States even relied on legal scholars and international jurists to justify its newest foreign policy — preemption.[212] And once the primary reason justifying preemption (threat of weapons of mass destruction) failed to mate-

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207. NAT'L SEC. COUNCIL, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17-18 (2002) [hereinafter NATIONAL SECURITY STRATEGY]. Of course, there are several other distinguishing characteristics, like threatening neighbors, brutalizing its own people, using natural resources for the personal gain of rulers, sponsoring terrorism, etc. *Id.* at 18.

208. *Id*. at 5.

209. Nico Krisch, *Imperial International Law* 24-25, 41 (Global Law, Working Paper No. 04/01), *available at* http://www.nyulawglobal.org/workingpapers/papersKrisch_appd_0904.pdf.

210. *See Iraq No-Fly Zones*, WIKIPEDIA, http://en.wikipedia.org/wiki/Iraqi_no-fly_zones (last visited Dec. 9, 2005) (noting that no U.N. resolution specifically authorized the no-fly zones but that they were established on a basis of Security Council Resolution 688, which condemned "the repression of the Iraqi civilian population").

211. President Bill Clinton, Speech by the President to the Nation on Kosovo (Mar. 24, 1999), *available at* http://www.clintonfoundation.org/legacy/032499-speech-by-pres*Id*ent-to-the-nation-on-kosovo.htm ("We act to protect thousands of innocent people in Kosovo from a mounting military offensive."); *see also* John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 38 (2000).

212. NATIONAL SECURITY STRATEGY, *supra* note 2077, at 19.

rialize,[213] the United States turned to humanitarian grounds to justify its actions.[214]

The most often-cited contradiction though rests with the U.S. refusal to directly incorporate international human rights instruments.[215] This is accomplished by attaching reservations, understandings and declarations to most treaties and by making most non-self-executing.[216] Despite its checkered record on acceding to human rights treaties and norms, the United States has actively pursued norm internalization, whereby it "incorporates international law concepts into [its] domestic practice."[217] Harold Koh has argued that this process is a critical in convincing nations to obey international law.[218] The most widely used tool of internalization, especially by the United States, is employing economic sanctions.[219] Sanctions contribute to norm solidification in two ways: they attract attention both in the domestic political process and in the international community to the human rights-violating country.[220] The formal incorporation of the promotion of human rights into U.S. foreign policy is the Foreign Assistance Act of 1961, which in relevant part provides, "The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principle goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all coun-

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213. President George W. Bush, Remarks by the President in Address to United States General Assembly (Sept. 12, 2002), *available at* http://www.un.int/usa/02_131.htm (noting in one substantive paragraph the humanitarian violations in Iraq but in ten others either U.N. resolution violations or possession of weapons of mass destruction).

214. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Feb. 2, 2005), *available at* http://www.c-span.org/executive/ transcript.asp?cat=current_event&code=bush_admin&year=2005 (praising Iraqi freedom, democracy, human rights and liberty while failing to mention any failure to find weapons).

215. M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMP. L 27, 29 (2004); *see also* Michael Ignatieff, *No Exceptions?*, LEGAL AFF., May-June 2002 at 59 (arguing the hypocritical approach may not deserve the criticism it receives).

216. Alam, *supra* note 2155, at 29; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 93, at 328.

217. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 6 (2001).

218. *Id.* (citing Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

219. Repeal of foreign sovereign immunity for state sponsors of terrorism is another example. *Id.* at 4. Economic sanctions have been credited with prompting change in places like Brazil, Uganda, Nicaragua, South Africa and Burma. *Id.* at 5. In addition to promoting democracy and human rights, the U.S. has used sanctions to slow nuclear proliferation and drugs and weapons trafficking, to combat terrorism, to destabilize hostile regimes, and to punish territorial aggression. *Id.* at 31.

220. *Id.* at 7.

tries."[221] Critics argue America has imposed these sanctions inconsistently[222] and that unilateral imposition of sanctions undermines multilateral regimes.[223] However, they are still an active attempt to spread respect for human rights.

One persuasive explanation of the United States' behavior, characterized by a reluctance to join treaties and readiness to disregard inconvenient legal rules is that "international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia."[224] To that end, it is loath to adopt new international human rights obligations and subject itself to international supervision, but it is proactive in using domestic means to enforce human rights abroad.[225] Perhaps criticisms would remain mild were the United States only failing to accede to international treaties but following norms nonetheless and otherwise participating in international institutions. Yet the United States is perceived as running roughshod over those norms it finds inconvenient and as engaging international fora only as a charade. To some, these criticisms are inconsequential, as international law is only an attempt to impede U.S. foreign policy.

VII. REALIST CRITIQUES

Several prominent scholars,[226] a former judge,[227] and politicians[228] have vehemently argued that international law is currently

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221. *Id.* at 32 (quoting Foreign Assistance Act § 502(b), 22 U.S.C. § 2304(a)(1) (1994)). There are several implementing statutes with authorize the various economic sanctions. *Id.*

222. *See, e.g.*, LOUIS HENKIN, THE AGE OF RIGHTS 66-73 (1990).

223. Cleveland, *supra* note 2177, at 69. Four criticisms are that U.S. sanctions "(1) enforce against other states rights that are not binding on the United States; (2) fail to apply international standards regarding human and labor rights; (3) neglect available multilateral mechanisms; and (4) selectively and hypocritically enforce human and labor rights." *Id.* While these arguments may have merit, they are will not be discussed further in this paper. Nevertheless, Professor Cleveland concludes that "unilateralism is not inherently hegemonic, and unilateral measures which are crafted with proper respect for international law principles can complement, rather than compete with, with development of a multilateral system." *Id.*

224. Krisch, *supra* note 2099, at 1-2.

225. *Id.* at 49-50.

226. JEREMY RABKIN, IN DEFENSE OF SOVEREIGNTY (2004).

227. Robert H. Bork, *The Soul of the Law: Judicial Hubris Wreaks Havoc, Both Here and Abroad*, WSJ.com. (lamenting the dominance of liberalism in the law and the new international law that threatens our sovereignty); *see also* Bork, *supra*, note 196.

228. *See, e.g.*, *Hearing on the International Criminal Court Before H. Comm. on International Relations* 105th Cong. 37-38 (2000), *available at* 2000 WL 1130039 (statement of Rep. Christopher Smith, Member, House Comm. on International Relations) (saying that by acceding to the ICC, the U.S. would be ceding sovereignty); *Hearing on the United Nations Convention on the Law of the Sea Before the S. Armed Servs. Committee* (2004), *available at* 2004 WL 766860 (statement of Sen. James Inhofe, Member, Sen. Armed Servs. Comm.) (acknowledging that by agreeing to UNCLOS, the United States is giving up sovereignty); Representative Bob Barr, *Protecting National Sovereignty in an Era of International Med-*

hampering the United States. Those holding this view have been labeled "new sovereigntists."[229] Former Assistant Secretary of State for International Organization Affairs and current U.S. Ambassador to the United Nations has stated that "'[i]nternational law' today is very much about binding, restricting and limiting the United States."[230] He adds, "The 'agenda' of constraining the United States through international law is neither carefully planned nor entirely coherent, but it an unmistakably discernible tendency."[231] Judge Bork asserts that "[t]he new international law threatens our sovereignty and domestic law as well." The United States seems to have adopted this attitude somewhat, as the National Defense Strategy proclaims that the U.S. has "a strong interest in protecting the sovereignty of nation states." Encouragingly, however, it also warns that nations have a responsibility to exercise sovereignty "in conformity with the customary principles of international law, as well as with any additional obligations that they have freely accepted."[232]

Just as both international and constitutional common law have evolved, one must understand the notion of sovereignty has evolved over the centuries as well. Once seen as absolute, where all political power was centered in one authority figure, sovereignty now incorporates democratic precepts, such as suffrage and representative governance.[233] As will be discussed below, many who are weary of the current trends in international law use the concept of sovereignty as "an emotional flag"[234] to counterbalance the internationalist movement. In any event, the notion of sovereignty has been belittled by some,[235] and its permanence has been questioned of late.[236]

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dling: An Increasingly Difficult Task, 39 HARV. J. ON LEGIS. 299, 299 (2002) (warning that international organizations "are shifting rapidly towards an activist, internationalist agenda that comes at the cost of the United States' traditional freedoms and independence"). Some have even gone so far as to call for the United States' withdrawal from the United Nations. *Id.* at 322 n.142 (discussing Representative Ron Paul's legislation seeking U.S. withdrawal of American participation in the U.N.).

229. See *supra* note 229.

230. Bolton, *supra* note 2111, at 30.

231. *Id.* at 48.

232. DEP'T OF DEFENSE, NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2005).

233. *See* Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195, 195-99 (2004). *See generally* John D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321 (1991) (tracing the meaning of sovereignty in both constitutional and international law).

234. Radon, *supra* note 2333, at 202.

235. *See, e.g.*, Louis Henkin, *That "S." Word: Sovereignty, and Globalization, and Human Rights*, 68 FORDHAM L. REV. 1, 1 (1999) ("I don't like the 'S word.' Its birth is illegitimate, and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values.").

236. STEPHEN D. KRASNER, SOVEREIGNTY: DISORGANIZED HYPOCRISY (1999).

It is important to question the arguments offered by the new sovereigntists why the United States should not be bound by international law.[237] The first problem is that the international lawmaking process is unaccountable and unreasonably intrusive on domestic affairs, and international norms are sometimes even unconstitutionally grafted into domestic law. The other concern is with international law itself: international law norms, especially in the human rights arena, are vague, malleable, and imprecise, and because it is unenforceable, the United States has the duty to opt out of many international regimes, as a matter of power and legal right. The first concern is valid but is overcome if the appropriate constitutional actors are the ones actually binding the United States. This is exactly what the Supreme Court in *Sosa* required. The other two concerns can also be minimized with a careful, measured approach.

Borrowing the emotion flag analogy, it is perfectly respectable, in fact ideal, to invoke the patriotism of America's constitutional, democratic process — a system of checks and balances coupled with political accountability.[238] This has been identified a core American value: "deep attachment to popular sovereignty."[239] It has best been summed up best by Ambassador Bolton when he said that "democratic theory and sound constitutional principles, from our perspective, require that laws that bind American citizens be decided upon by our constitutional officials — the Congress and the president — not derived by abstract discussions in academic circles and international bodies."[240] This contrasts the view of those who are pessimistic about U.S. failure to adopt international standards using formal means, such as treaties, and who are much more hopeful about the potential of customary international law, which "ipso facto becomes supreme federal law and hence may regulate activities, relations or interests within the United State."[241]

Most modern critics who detest international law echo the concerns of nineteenth century critic John Austin, who argued that because there was no international sovereign to ensure rules were followed, it would never gain the same respect as other areas of positive law.[242] This deep-rooted criticism still rings true today: without

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237. Professor Spiro organizes these complaints somewhat differently, *see* Spiro, *supra* note 10, at 10; however, I feel this arrangement is better.

238. Radon, *supra* note 2333, at 202.

239. Ignatieff, *supra* note 2155, at 60.

240. *Hearing on the Nomination of John Bolton to Be U.S. Representative to the United Nations, Part 2 Before the S. Foreign Relations Comm.*, 109th Cong. (2005) (statement of John Bolton, Nominee to be U.S. Rep. to the U.N.), *available at* 2005 WL 827844.

241. Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 856 (1989).

242. JANIS, *supra* note 11, at 2-3.

an international legislature to codify international norms, an international judiciary[243] to consistently interpret these norms, and an executive to ensure they are enforced, norms remain vague. To solve this problem, further "legalization" must continue.[244] Legalization is characterized by "(1) increasingly obligatory norms; (2) increasingly precise norms; and (3) the delegation of authority to supranational bodies to interpret, implement, and apply these norms."[245] This strengthens human rights norms by increasing credibility of and compliance with international norms.[246] As legalization is an obvious trend (otherwise the new sovereigntists would not be concerned), why would the United States resign itself to the sidelines as norms are crystallized? Would it not be better to take an active role — even the lead — in ensuring that its valued norms are furthered? Stronger international institutions enforcing increasingly transparent rules could help spawn religious freedom in China and women's rights in the Middle East, diminish or even prevent genocide or ethnic cleansing in Africa, and slow or halt the proliferation of nuclear weapons to rouge states, all goals currently pursued by the United States. Realists often contend that these outcomes materialize only in an idealist's world, but as norms become universal, effective pressure can be put on rights abusers to conform, credible threat of punishment will dissuade those who might commit crimes against humanity, and promise of a more peaceful world will reduce need to acquire deadly weapons.

In addition and related to international law's feeble and ineffective nature, new sovereigntists argue that the United States has the legal right and power avoid international restrictions. The legal right is based on the constitutional concerns discussed above, especially concerning customary international law. Arguably, however, they would not contend that the United States *can* legally breach a treaty properly entered into by the President with the advice and consent of the Senate, as required by the Constitution. Of course, it is assumed that United States *could* do so without consequence, as few have the power to challenge its ability to do that. Ironically though, the United States has used international legal principles to its seeming advantage when making reservations, understandings and declarations, much to the internationalists' chagrin.[247] And as

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243. Though the International Court of Justice is arguably an international judiciary body, as is the International Criminal Court, both courts do not have world-wide acceptance.

244. Derek P. Jinks, *The Legalization of World Politics and the Future of U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J., 357, 360 (2002).

245. *Id.*

246. *Id.*

247. *See supra* note 216 and accompanying text.

the "sole superpower," the United States clearly has the power to avoid and even break international law without fear of direct reprisal. But, as the Untied States has undoubtedly learned, there are limits to its power, both in its ability to prevent international terrorist attack and to project its will abroad. Policies, like ignoring international obligations, that breed isolation and resentment will only further limit America's power, whereas those that foster international cooperation will strengthen America's hand.

Advocating resistance to and avoidance of the international rule of law is short cited. New sovereigntists recognize the trend of increasing legalization of international norms, yet by advocating laissez-faire approach to stifle the progress, they limit United States ability shape norms at this early stage of development.[248] In addition, this policy betrays our history as a human rights leader. "Not only have American concepts of freedom shaped the rise of constitutionalism in Europe and elsewhere,"[249] Americans have also been pivotal in shaping recent developments in international law, including the United Nations and international financial institutions, as well as human rights, as illustrated by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[250]

American hegemony is unquestionably something to preserve. It hinges on the spread of Kantian principles, which in turn depends on the spread of the international rule of law. Supremacy also requires an embrace and unrelenting defense of American democratic principles. Furthermore, American sovereignty needs to be defended, but it need not remain absolute. A careful and measured sacrifice of sovereignty by acceding to reasonable agreements and norms, reciprocated by other nations, will strength the international legal system and the United States. This policy requires political leaders to recognize the promise of peace, to persuade Americans that it is one worth pursuing, and to carefully safeguard constitutional values while pursuing these norms. The result could be the ultimate manifestation of American exceptionalism — the notion that the United States is destined for greatness — to be the superpower that benevolently accedes its own sovereignty for the good of the world.

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248. Spiro, *supra* note 10, at 15.

249. Lillich, *supra* note 240, at 852 (quoting Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537 (1988).

250. HENKIN, *supra* note 2222, at 65; Cleveland, *supra* note 2177, at 30; Krisch, *supra* note 208, at 16; Lillich, *supra* note 240, at 852.

VIII. Conclusion

The rise of international law, particularly human rights, and the weakening of absolute state sovereignty are undeniable historic trends. Recognizing these trends, the United States must decide either to actively resist, sit idly by, or shape the way in which they continue. The Supreme Court has recently held that the United States is bound by only the most concrete of customary international norms, but further incorporation requires action by the political branches. The current Administration has a checkered record, and though the President speaks in idealistic, internationalist terms, he seems to ignore the international community in practice and policy. Though the United States might be restrained in the short term, such restraints will occur less often and with less detrimental affects as the number of liberal democracies grows. Those democracies, also committed to the international rule of law, will ensure their values are advanced using international law and institutions to mandate that all nations offer some minimal respect to human rights. As human rights abuses lessen and liberal and economic democracy continue to spread, the Kantian hope of perpetual peace will be achieved, and Fukuyama's prediction of the end of history will be realized.

RECENT DEVELOPMENTS

JOHN MERRITT LOCKWOOD

I. AFRICAN DEBT RELIEF

Debt has been the focus of many activists campaigning against governments; the theory is that sovereign governments use debt as a tool for curbing public programs that could otherwise be used to provide healthcare for residents of developing countries. The current ratio is that for every pound that flows into these impoverished countries in the form of aid there is thirteen pounds being used to as payment for debt services. This is nothing more than a vicious cycle that has been ongoing for more than twenty years; each time the government takes out new loans to pay for old loans they simply adopt a new set of economic policies that practically spin the country deeper and deeper into debt without resolving the problem. The reality of this problem can be quite startling and the actual statistics are unsettling. In Niger, 86 percent of the population is unable to either read or write and 25 percent of the children born do not live to see their fifth birthday.[1] In Zambia, the drastic impact of the HIV/AIDS epidemic has reduced life expectancy to just 40 years.[2]

These countries are in need of significant help. Everyday more and more children die while their governments spend more on debt relief payments than on healthcare and education combined.[3] The concept of human rights is the understanding that all human beings are born equal. This is grounded in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which guarantees the right to sufficient food, education, shelter, clothing and the right to special care for children.[4] Within the ICESCR the "equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and is "derive[d] from the inherent dignity of the human person."[5] Parties to this agreement recognized that upon signing they were le-

1. OXFAM INTERNATIONAL, DEBT RELIEF: STILL FAILING THE POOR (2001), http://www.oxfam.org/en/files/pp0104_Debt_relief_still_failing_the_poor.pdf/download.
2. *Id.*
3. *Id.*
4. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3. [hereinafter ICESCR].
5. *Id.*

gally obligated to provide these bare minimum essentials regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[6]

The 2002 G8 Summit in Kananaskis resulted in the adoption of the Africa Action Plan ("AAP").[7] The AAP contains commitments on promoting peace and security; strengthening institutions and governance; fostering trade, economic growth and sustainable development; implementing debt relief; expanding knowledge; improving health and confronting HIV/AIDS; increasing agricultural productivity; and improving water resource management.[8] The AAP was drafted in response to the New Partnership for Africa's Development ("NEPAD") and was intended to serve as a plan for how the G8 partners would enhance their engagement with African countries.[9] NEPAD arises from a mandate given by the Organisation of African Unity ("OAU") to the five initiating Heads of State; Algeria, Egypt, Nigeria, Senegal, and South Africa.[10] This mandate was to establish an integrated socio-economic development framework in Africa by focusing on simple primary objectives.[11] The AAP states that the case for action within Africa is compelling and recognizes, along with NEPAD, that Africa maintains the prime responsibility for their future.[12]

The AAP consists of eight engagements that are designed in order to support NEPAD in obtaining the primary objectives.[13] Within each engagement, the AAP outlines various commitments that will provide a roadmap as to how the engagements are to be completed. While there are eight engagements, the most publicized areas include those of growth development and debt relief, respectively engagements III and IV of the AAP.[14] To generate growth, the AAP contains commitments to helping Africa attract

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6. *Id.*

7. Gov't of Canada: Canada's G8 Website, Statement by G8 Leaders: G8 African Action Plan, http://www.g8.gc.ca/2002Kananaskis/afraction-en.asp. [hereinafter AAP].

8. *Id.*

9. *Id.*; *see also* Victor Mosoti, *The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion*, 5 SAN DIEGO INT'L L. J. 145 (2004).

10. *See* Corinne A. A. Packer & Donald Rukare, *The New African Union and it's Constitutive Act*, 96 AM. J. INTL L. 365 (2002); *see also* Vincent O. Nmehielle, *The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?*, 7 SING. J. INT'L COMP. L. 412 (2003).

11. *See supra* note 10. The primary objectives are as follows: a) to eradicate poverty; b) to place African countries, both individually and collectively, on a path of sustainable growth and development; c) to halt the marginalization of Africa in the globalization process and enhance its full and beneficial integration into the global economy; d) to accelerate the empowerment of women.

12. *See* AAP, *supra* note 7.

13. *Id.*

14. *Id.*

investment,[15] provide market access for African products,[16] increase funding and trade-related assistance,[17] support Africa in advancing regional economic integration and intra-African trade,[18] and improve and strengthen commitments by the Official Development Assistance ("ODA") for enhanced-partnership countries.[19] The ODA is designed to spur growth within low-income countries by providing humanitarian assistance. Commitment 3.6 of the AAP ensures that this humanitarian assistance is effectively used and not wasted on unproductive purposes.[20]

The Group of Eight consists of an informal but exclusive body of the world's leading industrial nations. Their purpose is to tackle global issues through discussion and action. On June 11, 2005, this group of the world's wealthiest nations agreed to immediately cancel up to $55 million worth of debt owed by the world's poorest nations.[21] The United Kingdom, which holds the G8 presidency this year, hopes that in addition to the debt cancellation they will be able to secure a large increase in developmental aid for the poorest countries.[22] It is widely believed that these countries will need more than just debt relief. They are already underdogs when it comes to international trade and without capital investments they will eventually drag themselves back into debt due to their inability to generate sufficient income flows.

The initial plan calls for an immediate cancellation of 100 percent of all debt owed by 18 countries.[23] There are an additional 20 countries under consideration, which could bring the grand total to $55 billion if they meet specific requirements deemed necessary by the G8 ministers.[24] While there was a great deal of praise initially, skeptical doubts were simultaneously being raised as to how great of an impact this relief would truly be.[25] Nsaba Buturo, the Ugandan Information Minister, was quoted as saying that the debt program was "commendable" but that it is "something that should

15. *Id.* at Commitment 3.1
16. *Id.* at Commitment 3.3
17. *Id.* at Commitment 3.4
18. *Id.* at Commitment 3.5
19. *Id.* at Commitment 3.6
20. *Id.*
21. *G8 Ministers Back African Debt Deal*, CNN.com, June 11, 2005, *available at* http://www.cnn.com/2005/WORLD/europe/06/11/uk.g8.africa/index.html.
22. *Cautious Welcome for G8 Debt Deal,* BBC NEWS, June 12, 2005, *available at* http://news.bbc.co.uk/2/hi/business/4084574.stm. The agreement with the World Bank calls for an immediate write-off of 100% of the money owed by an initial 18 countries. There are nine other countries that could potentially qualify for the debt write-off within the next 18 months. These nine countries could bring the total debt cancellation up to $55 billion. *Id.*
23. *G8 Ministers Back African Debt Deal*, *supra* note 21.
24. *Id.*
25. *Cautious Welcome for G8 Debt Deal, supra* note 22.

have been done yesterday."[26] These statements echoed by Sofian Ahmed, Ethiopia's Finance Minister, who felt that the debt cancellation was a good start assuming that it would not create any additional obligations of his country.

These reservations are built upon well-founded concerns. There has been minimal public discussion following the initial announcement of the debt cancellation. However, there have been reports that these countries would not necessarily receive a clean slate with their debtors. BBC News has reported that instead of receiving irrevocable and unconditional debt relief, the countries would instead receive grants that would have conditions attached.[27] These rumors have created concern among many sub-Saharan countries because they would be in direct contradiction to the proposed debt cancellation.[28]

One of the documents submitted at the G8 Conference in Gleneagles was the Africa Progress Report ("Report"). The Report is in response to the 2002 African Action Plan and NEPAD, both which discuss the challenges in Africa and the compelling case for action. Africa still remains the country most likely to fall short of the Millennium Goals proposed by the UN.[29] The conditions there remain below standard: children are dying at a rate of almost two thousand per day, over 2.3 million died in 2005 from HIV/AIDS, and over 40 million children are still not in school.[30] If progress is not made by 2015 then the world will have seen 40 million children die, more and more people infected with HIV/AIDS, and many will still be forced to live on less than $1 per day.[31] While progress has been made on the African Action Plan, much more is needed in order to face the ever changing challenges that arise. As the Report states, deeper relationships are required in order to support African initiatives and reinforce efforts to counter the effects of HIV/AIDS and crippling debt.

In July 2005, rocker Bob Geldof and many others treated the world to a "Live 8" musical concert which was reminiscent of the 1985 "Live Aid" concert that took place in the wave of the Ethio-

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26. *Id.*

27. Steve Schifferes, *G8 Debt Deal Under Threat at IMF*, BBC NEWS, July 15, 2005, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/4686015.stm. A document leaked to the Jubilee Debt Campaign quotes Willy Kierkens, Belgian IMF representative, as telling the executive board that "rather giving full, irrevocable and unconditional debt relief … countries would receive grants." The document goes on further to explain that these grants could be withdrawn at any time if the countries did not meet the requirements imposed. *Id.*

28. *Id.*

29. Africa Progress Report, http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_AfricaProgressReport,0.pdf.

30. *Id.* at 1.

31. *Id.* at 2.

pian famine.[32] The purpose of the concert was to raise awareness of the poverty and substandard conditions of Africa. The concert was attended by the likes of Nelson Mandela, Bill Gates, and Kofi Annan. The concert was strategically held in the weeks before the G8 Gleneagles Summit in order to attempt to sway some attention toward eradicating the enormous debt of African countries. The chances that the Live 8 concert had any effect on the G8 Gleneagles Summit is speculative at best, but for at least a moment in July millions watched as some of the world's greatest performers expressed their support for relief efforts in Africa.

II. GUANTANAMO BAY

The treatment of detainees held at the infamous Guantanamo Bay prison has littered the world headlines and has become increasingly troublesome for the Bush Administration. The prison, which was established in 1898 following the end of the Spanish-American War, is best known as a detainment camp for prisoners believed to have ties with al-Qaeda. Many of the prisoners held at the camp are not officially charged with any crime nor have they been deemed prisoners of war. Public outcry has grown stronger while still searching for answers to complicated questions. For example, what legal rights do the detainees have to question their confinement? Do the detainees have access to the United States court system?

In addition to the legal questions arising out of Guantanamo, there have been numerous allegations of abusive treatment and interrogations.[33] An article in the New England Journal of Medicine raised questions concerning the participation of U.S. medical personnel that participated in the questioning of detainees at Guantanamo Bay.[34] This article claimed that the medical personnel violated the Geneva Conventions and standards of professional ethics by participating in the abusive interrogations and even pos-

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32. *See, e.g.*, Live 8: Real Serious Music, CBS News Online, July 2, 2005, http://www.cbsnews.com/stories/2005/07/02/world/main705970.shtml ("Musicians were taking to 10 stages from Tokyo to Toronto, Berlin to Johannesburg for a music marathon to raise awareness of African poverty and pressure the world's most powerful leaders to do something about it at the [G8] summit in Scotland next week").

33. David R. Chludzinski, *A Most Certain Tragedy, But Reason Enough to Side-Step the Constitution and Values of the United States?*, 23 PENN ST. INT'L L. REV. 227 (2004); *see* Alan Tauber, *Ninty Miles From Freedom? The Constitutional Rights of the Guantanamo Bay Detainees*, 18 ST. THOMAS L. REV. 77 (2005); *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L. Q. 1 (2004).

34. M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go To War*, 352 NEW ENG. J. MED. 1497 (2005).

sibly torture.[35] These allegations have been fueled in part by documents obtained by U.S. civil liberties and human rights groups during litigation and Freedom of Information Act requests.[36] In addition, outrage followed released photographs that showed prisoners being held in chain-link cells and being forced to wear hoods, goggles, earmuffs, and facemasks.[37] U.S. authorities confirmed that in August 2003, twenty-three detainees staged a mass protest in which they attempted to hang or strangle themselves.[38] Following this negative publicity, the United States government began releasing photographs and press releases that attempted to depict the prisoner treatment in a favorable light.[39] According to the U.S. Defense Department, Guantanamo detainees receive essential dental care, comfort items, and a carbohydrate rich diet that is also "culturally sensitive."[40]

Rasul v. Bush resulted when several aliens brought actions challenging the legality and conditions of their confinement.[41] The Petitioners in *Rasul* were 2 Australian citizens and 12 Kuwaiti citizens who had been captured abroad and held in the custody of the U.S. military since the early part of 2002.[42] All of the petitioners alleged that they had never been a combatant against the United States nor had they ever committed an act of terrorism.[43] In addition, they claimed that charges were never filed against them, counsel was not provided, and that they had no access to the courts or any tribunal for that matter.[44]

The claim sought relief on the basis that the denial of rights constituted a violation of the United States Constitution, interna-

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35. *Id.*

36. *Id.*

37. Rui Wang, Note, *Assessing the Bush Administration's Detention Policy for Taliban and al-Qaeda Combatants at Guantanamo Bay in Light of Developing United States Case Law and International Humanitarian Law, Including the Geneva Conventions,* 22 ARIZ. J. INT'L & COMP. L. 413, 415-416, (2005).

38. *See Mass Suicide Attempts by Suspects Confirmed*, WASH. POST, Jan. 25, 2005, at A5; *See also 23 Detainees Attempted Suicide in Protest at Base, Military Says*, N.Y. TIMES, Jan. 25, 2005, at A14.

39. Wang, *supra* note 36, at 416; *see also* U.S. Department of Defense, *Operation Enduring Freedom,* http://www.defenselink.mil/photos/Operations/OperatiEndurinFreedo/page4.html.

40. Wang, *supra* note 36, at 416-417; *see Inside Camp X-Ray: Meals*, BBC News Online, http://news.bbc.co.uk/hi/english/static/in_depth/americas/2002/inside_camp_ ray/meals.stm.

41. Rasul v. Bush, 542 U.S. 466 (2004).

42. *Id.* at 470. Many of the detainees were captured by villagers who believed that the United States would offer financial rewards to those who turned them over to U.S. custody. *Id.*

43. *Id.* at 471.

44. *Id.* The Australian, David Hicks, was later permitted to speak with counsel after the petition was filed but prior to the Court's ruling. He was allegedly captured in Afghanistan by the Northern Alliance which is a coalition of Afghan groups who oppose the Taliban. *Id.*

tional law, and various treaties of the United States.[45] The case was originally dismissed by the District Court for lack of jurisdiction.[46] On appeal, the Court of Appeals affirmed the lower courts ruling that aliens in military custody with no presence in the United States do not have the privilege of litigation.[47] This ruling was appealed and the Supreme Court chose to grant certiorari on November 10, 2003.[48]

The argument presented by the government was that the Supreme Court's decision should be controlled by a prior decision in *Johnson v. Eisentrager*.[49] In *Eisentrager*, the Court held that a Federal District Court lacked the authority to issue a habeas petition to 21 German citizens captured in China by U.S. Forces.[50] The Court differentiated *Eisentrager* from *Rasul* in many respects. The detainees in *Eisentrager* were at war with the United States whereas the petitioners in *Rasul* were not.[51] Furthermore, they deny that they every engaged in or plotted acts of aggression against the U.S., they were never charged or convicted of any wrongdoing, and they have been imprisoned for over two years in a territory over which the U.S. exercises exclusive jurisdiction and control.[52]

Another important differentiation was that the *Eisentrager* detainees were seeking relief under a constitutional entitlement to a habeas petition while making little mention of any statutory entitlements.[53] The Court has seen over 50 years of subsequent decisions that filled important statutory gaps which the *Eisentrager* court did not have the benefit of utilizing. The Court focused particularly on the holding of *Braden v. 30th Judicial Circuit Court of Ky*, that held a district court would have jurisdiction under a § 2241 claim as long as "the custodian can be reached by service of process."[54] The Court in *Braden* effectively overruled the statutory predicate to *Eisentrager*'s holding that would have prevented peti-

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45. *Id.* Petitioners sought to invoke the Court's jurisdiction under 28 U.S.C. §1331 and 1350. As well, they argued causes of action under the Administrative Procedure Act, the Alien Tort Statute, and the general federal habeas corpus statute. *Id.*

46. *Id.* The court relied on Johnson v. Eisentrager, 339 U.S. 763, (1950), in holding that "aliens detained outside the soverign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." *Id.*

47. Rasul v. Bush, 542 U.S. 466, 471 (2004). The Court of Appeals ruled that the District Court lacked jurisdiction over the claims of habeas corpus, including the claims that were not sounding in habeas. *Id.*

48. Rasul v. Bush, 540 U.S. 1003 (2003).

49. Rasul v. Bush, 542 U.S. 466, 475 (2004).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 476.

54. Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-495, 93 S.Ct. 1123 (1973).

tioner's from prevailing in the exercise of a § 2241 petition.[55] The question was not raised in any briefs filed as to whether the District Court lacked jurisdiction over the petitioners' custodians.[56] As a result, the Court held that the District Court had jurisdiction under § 2241 to entertain the challenges to the legality of petitioners' detention at the Guantanamo Bay Naval Base.[57]

The *Rasul* case is just one among many that have involved Guantanamo detainees in the recent years. One of the more important issues has centered on whether or not it is appropriate to subject the detainees to military tribunals. One such case involved Salim Ahmed Hamdan, a detainee who was captured by Afghani militia forces and turned over to the U.S. military.[58] On June 3, 2003, it was determined that there was a reason to believe that Hamdan was a "member of al Qaeda or was otherwise involved in terrorism directed against the United States."[59] This designation brought Hamdan within the constraints of President Bush's November 13, 2001 Executive Order, which would require an individual with such a classification to appear before a military tribunal.[60]

In April 2004, Hamdan formally filed a petition for habeas corpus to challenge his classification.[61] While this petition was pending before the court, Hamdan was formally charged with "conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism."[62] More specifically, it was alleged that Hamdan was Osama bin Laden's personal driver and bodyguard, delivered weapons to various al Qaeda members, and trained at the al Qaeda sponsored al Farouq camp.[63] Hamdan already admitted that he was the personal driver of bin Laden, but disputed the allegations that he was ever involved in terrorist activities.[64] Pursuant to a recently released opinion, *Hamdi v. Rumsfeld*, Hamdan was granted a Combatant Status Review Tribunal that subsequently affirmed his

55. Rasul v. Bush, 542 U.S. 466, 478-479 (2004).
56. *Id.* at 484.
57. *Id.*
58. Hamdam v. Rumsfeld, 415 F.3d 33, 34 (D.C. Cir. 2005).
59. *Id.*
60. *Id.*
61. *Id.* Hamdan's petition also alleged that the President violated the separation of powers doctrine by establishing the military commissions. The argument was that Article I of the Constitution gave Congress the power to establish military commissions and that the President has no inherent power under Article II. The Appeals Courts held that Congress had in fact authorized such commissions in a joint resolution that was passed in response to September 11, 2001, and in 10 U.S.C. §821 and 10 U.S.C. §836. *Id.*
62. *Id.*
63. *Id.*
64. Hamdam v. Rumsfeld, 415 F.3d 33, 34 (D.C. Cir. 2005).

status as an enemy combatant.[65] On November 8, 2004, the district court granted Hamdan's habeas petition holding that a competent tribunal must determine he was not a prisoner of war under the 1949 Geneva Convention before a military tribunal could be held.[66] This ruling dealt a significant blow to the Bush administration's policy of conducting military tribunals for Guantanamo detainees.

On Friday, July 15, 2005, a three judge panel of the U.S. Circuit Court of Appeals for the District of Columbia ruled that the Bush administration's plan to use military tribunals to try detainees at Guantanamo Bay was constitutional.[67] This overruled the lower court's ruling that protected Hamdan from being subjected to the tribunals. The court paid particular attention to *Johnson v. Eisentrager*[68] and *Holmes v. Laird*.[69] The Supreme Court in *Eisentrager* concluded that an individual has no right to a habeas petition if:

> he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.[70]

The decision in *Eisentrager* was used in *Holmes* to deny the enforcement of the individual rights provisions of the NATO Status of Forces Agreement.[71] *Eisentrager* is still considered good law despite its age and recent negative treatment in *Rasul v. Bush*. The holding in *Rasul* did not elaborate on the power of courts to enforce any of the Geneva Convention's provisions; rather, the holding of *Rasul* only applied to the federal courts ability to entertain a habeas petition of detainees.[72] There was a brief discussion on the issue that *Eisentrager* dealt with the 1929 Geneva Convention whereas the petitioners in *Hamdam* were seeking relief under the

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65. *Id.*
66. *Id.*
67. *Id.* This case became another focal point of the media after it was learned that recent Supreme Court nominee John Roberts was one of the judges that signed onto the opinion.
68. Johnson v. Eisentrager, 339 U.S. 763 (1950). The court lacked authority to issue a writ of habeas corpus to 21 German nationals who were captured by U.S. forces in China. An American military tribunal tried the Germans and convicted them of war crimes. *See id.*
69. Holmes v. Laird, 459 F.2d 1211, (D.C. Cir. 1972).
70. Johnson, 339 U.S. at 781.
71. Hamdam v. Rumsfeld, 415 F.3d 33, 39 (D.C. Cir. 2005).
72. Rasul, 542 U.S. at 483-484.

1949 Convention, but the Court could discern no relevant differences that would render *Eisentrager* inapplicable to the proceedings.[73]

The Court leveraged these differences against Hamdam by holding that a military commission was a competent tribunal for his claims to be asserted.[74] This decision may well be considered a difficult blow to human rights activist across the world, but it does have the capability of bringing some closure to this difficult issue. On August 8, 2005, Hamdan's attorneys filed a petition for certiorari to the United States Supreme Court. The Court in turn granted this petition.[75] This case will allow the Court the opportunity to clarify the threshold legal requirements for the use of military tribunals in detainee cases.

73. Hamdam, 415 F.3d at 40.

74. *Hamdam*, 415 F.3d at 43. The Court made remarks that there were several problems with Hamdam's arguments under the 1949 Geneva Convention such as whether al Qaeda members could seek redress under its provisions. *Id.*

75. Hamdam v. Rumsfeld, 2005 WL 1874691, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).