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Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union

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Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union

By
Natalie Shimmel

I.
INTRODUCTION

On May 1st, 2004, the European Union (EU) welcomed to its fold ten new members: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.[1] Fireworks erupted across the continent at 12:01 a.m. while newly minted EU citizens celebrated to the triumphant strains of Beethoven's "Ode to Joy," the EU anthem. Europeans drank toasts, traveled across newly relaxed borders, and attended concerts and parties.[2] The next morning, representatives from all 25 EU Member States gathered in Dublin for a symbolic ceremony to raise the flags of the new members besides those of the fifteen previous members.[3] EU and national leaders addressed messages of celebration, unification, and welcome to the new countries. "Welcome to the new Europe," declared Romano Prodi, President of the European Commission. "Today Europeans are celebrating the fact that they are no longer kept apart by phony ideological barriers."[4] The Chancellor of Germany, Gerhard Schröder, proclaimed: "Today we have the unique chance to change this Europe into a

1. Denis Staunton, *New Dawn for United Europe as 10 States Join EU*, IRISH TIMES, May 1, 2004, at 1.

2. MONIKA BYRSKA, EUROPEAN CITIZEN ACTION SERVICE, 'THE UNFINISHED ENLARGEMENT': REPORT ON FREE MOVEMENT OF PEOPLE IN EU-25, at 2 (Monika Byrska & Tony Venables eds., 2004), *available at* http://www.ecas.org/file_uploads/498.pdf (*cited in* Euractiv, *Action Group Calls for Early End to Restrictions on Free Movement of Labour*, May 28, 2004, http://www.euractiv.com/Article?tcmuri=tcm:29-118050-16&type=News).

3. Robert MacPherson & Jitendra Joshi, *Europe Reunited as 10 Nations Join the Family*, AGENCE FRANCE-PRESSE, May 1, 2004, *available at* 5/1/04 AGFRP 10:50:00. Prior to the May 2004 expansion, the EU consisted of Belgium, France, Germany, England, the Netherlands, Spain, Portugal, Italy, Austria, Ireland, Sweden, Greece, Finland, Luxemburg, and Denmark. These countries are known as the EU-15.

4. *Welcome to a New Europe, Trumpet World Leaders*, AGENCE FRANCE-PRESSE, May 1, 2004, *available at* 5/1/04 AGFRP 14:13:00 [hereinafter *Welcome to a New Europe*].

place of lasting peace and prosperity."[5]

Indeed, these accolades and congratulatory predictions seemed well-deserved by the European Union and its architects. The EU traces its humble roots to the European Coal and Steel Community (ESCS), created in 1951 by Belgium, France, Germany, Italy, Luxemburg, and the Netherlands to manage Europe's coal and steel supply and prevent Germany from rearming itself after World War II.[6] The ECSC was soon joined in 1957 by the European Atomic Energy Community (Euratom), created to establish a mutual atomic energy policy,[7] and the European Economic Community (EEC),[8] designed to coordinate economic policy and build a common internal market organized around four fundamental freedoms: the free movement of capital, the freedom to provide services, the free movement of goods, and the free movement of people.[9] With the accession of more and more countries, the EEC gradually became a site of political as well as economic coordination. The Maastricht Treaty of 1992 formalized and further advanced this political integration with the creation of the European Union, a political entity composed of three pillars.[10] The first pillar contains the European Community, as embodied in its three basic treaties, the EC Treaty (formally the EEC Treaty), the ESCS Treaty, and the Euratom Treaty. The second pillar consists of the EU's "Common Foreign and Security Policy," and the third pillar of cooperation in justice and home affairs.[11] By the beginning of the 21st century, the EU had grown into a complex and powerful multinational organization that integrated its members' economic, social, cultural, fiscal, and political policies on an unprecedented scale.

Today, four main institutional actors coordinate the EU: the European Council, the European Commission, the European Parliament, and the European Court of Justice (ECJ). The Council consists of one minister from each Member State[12] and has policymaking and legislative authority.[13] The Council also has

5. Christopher Adams & George Parker, *European Union Hails its Biggest Expansion Yet*, FIN. TIMES UK, May 1, 2004, *available at* 2004 WLNR 9732934.

6. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; GEORGE A. BERMANN ET AL., EUROPEAN UNION LAW 9 (2d ed. 2002). For a general history of the development of the EU, see *id.* at 3-27; Hon. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923 (1996).

7. Treaty Implementing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167, 5 EUR. Y.B. 454 [hereinafter Euratom Treaty].

8. Treaty Establishing the European Economic Community, Mar.. 25, 1957, 261 U.N.T.S. 11, 4 EUR. Y.B. 412 [hereinafter EEC Treaty].

9. Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C325) (as amended) art. 3(c) [hereinafter EC Treaty]; Andrew L. Lee, *The Bosman Case: Protecting Freedom of Movement in European Football*, 19 FORDHAM INT'L. L.J. 1255, 1264 (1996).

10. Treaty on European Union, Dec. 24, 2002, O.J. (C325) (as amended) [hereinafter Maastricht Treaty]; Flaherty & Lally-Green, *supra* note 6, at 944-45.

11. BERMANN ET AL., *supra* note 6, at 17; *see* Markus G. Puder, *Salade Niçoise from Amsterdam Left-overs—Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?*, 8 COLUM. J. EUR. L. 53, 55 (2002); Flaherty & Lally-Green, *supra* note 6, at 944-45.

12. EC Treaty, *supra* note 9, art. 203.

the exclusive power to initiate all EU legislation. For extremely important issues (for example, the accession of new Member States), unanimity among Council members is required; for most matters, voting proceeds by "qualified majority," meaning that the votes of larger states receive more weight than those of smaller states.[14] The Presidency of the Council rotates among Member States every six months,[15] and some commentators have suggested that the President's role has grown more important since the Council's founding as Presidents increasingly use their terms of office to advance their own political agenda.[16]

The Commission is a quasi-executive branch that drafts legislation for the Council, undertakes studies at the request of the Council, and enforces compliance with EU law.[17] The Commission has 20 members; originally each small Member State generally nominated one member, while each large Member States could nominate two.[18] However, in light of the May 2004 accession, the Treaty of Nice changed the composition of the Commission so that as of January 1, 2005, each Member State has the right to nominate one Commissioner, bringing the total number of Commissioners to 25.[19] Unlike members of the Council who primarily advance the interests of their respective Member States, members of the Commission act independently to promote the development and integration of the EU itself.[20]

The Parliament is the EU legislature, but it enjoys relatively little power in comparison with national parliaments. At first, Parliament's authority was exclusively advisory, with no authority over proposed legislation or budgets. However, each successive EU treaty added powers to Parliament's repertoire and today the Parliament can review proposed Council legislation with a limited veto power, request that the Council initiate legislation on a particular topic, and conduct confirmation hearings on proposed Commissioners.[21] It is also the only major EU institution whose members are elected directly by the EU populace. The 732 Members of Parliament (MEPs) serve for five-year terms and "represent the European people rather than a Member State government."[22]

The Court of Justice (ECJ) enforces compliance with "the interpretation and application" of the EC Treaty.[23] It consists of 15 independent judges with six-year terms whom Member States do not have the power to dismiss.[24] The

13. *Id.* art. 202.
14. *Id.* art. 205; BERMANN ET AL., *supra* note 6, at 36-37.
15. EC Treaty, *supra* note 9, art. 203.
16. BERMANN ET AL., *supra* note 6, at 35.
17. EC Treaty, *supra* note 9, art. 207(3); BERMANN ET AL., *supra* note 6, at 42-43.
18. EC Treaty, *supra* note 9, art. 213; BERMANN ET AL., *supra* note 6, at 43.
19. Protocol on the Enlargement of the European Union, Treaty of Nice, art. 4(1). The Treaty of Nice also reweighted votes for qualified majority voting in the Council. *Id.* art. 3(1)(a).
20. EC Treaty, *supra* note 9, art. 213; BERMANN ET AL., *supra* note 6, at 44.
21. BERMANN ET AL., *supra* note 6, at 51-55.
22. *Id.* at 53. The Treaty of Nice increased the total number of MEPs from 535 to 732. *Id.* at 52.
23. EC Treaty, *supra* note 9, art. 220.
24. *Id.* art. 221; BERMANN ET AL., *supra* note 6, at 59.

ECJ reviews the legality of EU legislation and hears suits against other EU institutions and Member States for alleged noncompliance with EU law.[25] Such suits can be brought by the Commission, other Member States, and EU nationals.[26] National courts can also certify questions about EU law directly to the ECJ.[27] With the ECJ's docket increasingly burdened, a Court of First Instance (CFI) was added in 1987.[28] Most cases now must first pass through the CFI to reach the ECJ; while CFI decisions are appealable as a matter of right, defeated parties may only appeal points of law.[29]

The complexity of EU governance represents to many a remarkable achievement in international cooperation in which the ten new Member States would finally be able to participate.[30] Furthermore, most of the new Member States are Central and Eastern European countries (CEECs)[31] that had only recently shaken off the yoke of Communism and Soviet domination. For many people in these nations, joining the EU was a proud moment, symbolic of their democratic and economic accomplishments and their reentry into the community of their free European siblings.[32] There were also important practical benefits that the CEECs would receive from membership, including access to the EU's Single Market, the implementation of the Common Agricultural Policy (CAP) in the new Member States, increased transfers of CAP and structural funds, and the eventual introduction of the euro.[33]

In reality, however, the May 2004 expansion did not fully live up to the promises of the triumphant rhetoric and joyful celebrations. Many old Member States were fearful that the inclusion of their poor, newly democratic neighbors

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25. EC Treaty, *supra* note 9, arts. 226-27, 230; BERMANN ET AL., *supra* note 6, at 59.

26. EC Treaty, *supra* note 9, arts. 226-27; Case 26/62, NV Algemene Transport v. Nederlandse Administratie Der Belastingen, 1963 E.C.R. 1 (holding that a Dutch importer could bring suit in national court challenging Dutch law as violative of provisions of the EC Treaty). This case clarified the doctrine of "direct effect": the EC Treaty and certain types of EU legislation are self-executing and EU nationals can claim the rights they confer even if Member States do not pass implementing legislation.

27. BERMANN ET AL., *supra* note 6, at 59.

28. EC Treaty, *supra* note 9, art. 225; BERMANN ET AL., *supra* note 6, at 65.

29. BERMANN ET AL., *supra* note 6, at 66-69. For a more thorough explanation of the roles of each EU governing body, see generally *id.* at 33-74.

30. Flaherty & Lally-Green, *supra* note 6, at 926.

31. Cyprus and Malta represent the exception to this rule. Both are small islands whose accession concerns are for the most part quite different from those of the CEECs. This paper will focus almost exclusively on the highly contested issues surrounding the accession of the CEECs which are largely absent from the accessions of Cyprus and Malta.

32. *See generally* Catherine Phuong, *Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries*, 52 INT'L & COMP. L.Q. 641 (2003). Not all segments of the population of acceding countries were pleased about joining the EU. In Poland, for example, despite an overwhelming "yes" vote to join the EU at the polls, portions of the population remained wary of the effects of accession and further integration. *See* Peter S. Green, *Poles Vote Yes to Joining European Union*, N.Y. TIMES, June 9, 2003, *available at* 2003 WLNR 5182584; Joanna Mizgala, *A Fresh Face to Head Europe*, FIN. TIMES USA, June 25, 2004, *available at* 2004 WLNR 9783662; Jan Cienski & Stefan Wagstyl, *The Papal Legacy: Kwasniewski Warns Nationalists Might Use Death to Push Agenda*, FIN. TIMES USA, Apr. 6, 2005, *available at* 2005 WLNR 5321098.

33. European Union, *The Economic Impact of Enlargement*, at 6, http://europa.eu.int/comm/economy_finance/publications/enlargement_papers/2001/elp04en.pdf.

to the East would destabilize the EU and cause its economic growth to stagnate. In particular, citizens of the old Member States worried that their labor markets would be flooded with poor migrants from the East, who would take already scarce jobs away from current EU citizens by their willingness to work for low wages.[34] Therefore, to prevent a flood of unwanted migrants, during accession negotiations the old Member States demanded and won the right to impose transitional measures that would temporarily deny the citizens of the new Member States their right to complete freedom of movement as enjoyed by citizens of old Member States.

This paper was conceived as an argument against the imposition of these transitional measures. In Part I, this paper will provide a brief overview of the right to freedom of movement as embodied in EU treaties, legislation, and jurisprudence and its symbolic importance to the EU integration project. Part II of this paper will examine both the accession process and the transitional measures adopted by the old Member States in conjunction with the May 2004 expansion. Part III of this paper will argue that these transitional measures are discriminatory, unnecessary, and without any legitimate economic purpose. They are incompatible with the emphasis the EU places on freedom of movement as part of the integration process, and serve only to legitimize Western European fears and biases while symbolically and actually preventing the true integration of the Central and Eastern European states into the European Union.

II.
THE RIGHT TO FREE MOVEMENT OF PERSONS IN THE EU

A. Freedom of Movement for Workers

Freedom of movement for workers is essential to European integration in both the political and economic spheres. As one of the four freedoms that serve as the building blocks of the common market, freedom of movement for workers represents a key piece of European economic integration. In keeping with the original conception of the European Union as an economic entity, workers were the first group to receive to right to move freely throughout all Member States. With the development of greater political integration came the goal of extending freedom of movement to all EU citizens. The right of free movement for workers remains a crucial component of achieving this objective, for without the means with which to support themselves, most EU citizens would be unable to take advantage of the opportunity to live in another Member State. Thus, freedom of movement for workers is an indispensable tool for furthering both politi-

34. European Union, *Freedom of Movement for Workers After Enlargement*, June 18, 2004, http://europa.eu.int/scadplus/printversion/en/cha/c10524.htm (last visited 4/24/05) [hereinafter EU website]; DIRECTORATE-GENERAL FOR PRESS AND COMMUNICATION, EUROPEAN COMMISSION, MORE UNITY AND MORE DIVERSITY: THE EUROPEAN UNION'S BIGGEST ENLARGEMENT (2003), *available at* http://europa.eu.int/comm/publications/booklets/move/41/en.doc [hereinafter MORE UNITY AND MORE DIVERSITY].

cal and economic integration.

Article 39 of the EC Treaty represents the core of freedom of movement in the EU and guarantees the right to freedom of movement for workers.[35] This provision allows EU citizens to enter and move freely about other Member States in order to accept offers of employment or while looking for employment during a reasonable amount of time.[36] Member States cannot discriminate on the basis of nationality between their own nationals and the nationals of other Member States,[37] and must grant the right to residency in their territory to qualifying EU citizens. The benefits conferred by Article 39 are implicitly limited to nationals of EU Member States.[38] Article 40 of the EC Treaty further gives the European Council the power to issue directives and regulations in order to effectuate freedom of movement for workers; such legislation has both vertical and horizontal direct effect.[39] The correlative right to establishment in another

35. EC Treaty, *supra* note 9, art. 39. The European Union's basic structure is established through a series of foundational treaties. The three core treaties are the ECSC Treaty, the Euratom Treaty, and the EEC. Each subsequent treaty is then incorporated into the text of the original establishing treaty in the form of amendments. The Single European Act amended the EEC Treaty in 1985. Single European Act, 1987 O.J. (L169). In 1993, the Treaty of Maastricht changed the name of the EEC to the European Community (EC), and included a separate Treaty on European Union, which represented political, rather than economic, integration. In 1999, the Treaty of Amsterdam renumbered most of the provisions of the EC Treaty and the TEU. Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C340) 1 [hereinafter Treaty of Amsterdam]. The Treaty of Nice is the latest treaty, ratified in 2003. Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, 2001 O.J. (C80) 1 [hereinafter Treaty of Nice]. All references to the EC Treaty in this paper are to the most current version of the EC, which includes the new Article numbers assigned by the Treaty of Amsterdam. *See generally* BERMANN ET AL., *supra* note 6, at 3-27; *Treaty of Nice*, EU Commission website, *available at* http://europa.eu.int/comm/nice_treaty/index_en.htm#.

36. EC Treaty, *supra* note 9, art. 39(3); FRIEDL WEISS & FRANK WOOLDRIDGE, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY 49 (2002).

37. EC Treaty, *supra* note 9, art. 39(2).

38. Though the EC Treaty makes no specific mention made of nationals of non-Member States, later legislation has clarified that nationals of non-Member States are excluded. WEISS & WOOLDRIDGE, *supra* note 36, at 41, 169. However, some specific agreements have been concluded between the EU and other countries which may grant some free movement rights to nationals of those states. *See* Melchior Wathelet, *The Case Law of the European Court of Justice and Nationals of Non-European Community Member States*, 20 FORDHAM INT'L. L.J. 603 (1997). For example, treaties of this sort have been passed with Icëland, Norway, Liechtenstein, Switzerland, Turkey, Morocco, Tunisia, and Russia. WEISS & WOOLDRIDGE, *supra* note 36, at 219; BERMANN ET AL., *supra* note 6, at 577.

39. WEISS & WOOLDRIDGE, *supra* note 36, at 43. Regulations are equivalent to national legislation and take effect immediately, while directives are non-self-executing and require individual Member States to pass implementing legislation. EC Treaty, *supra* note 9, art. 249. Vertical direct effect allows workers to challenge in court actions of Member State governments alleged to restrict freedom of movement or violate the non-discrimination principle. BERMANN ET AL., *supra* note 6, at 589; *see, e.g.*, Case C-379/87, Groener v. Minister for Education, 1989 E.C.R. 3967 (*reprinted in* BERMANN ET AL., *supra* note 6, at 586) (Dutch national unsuccessfully challenged Irish law requiring all teachers in Ireland to be proficient Irish). Horizontal direct effect allows workers to challenge private companies in the same manner. BERMANN ET AL., *supra* note 6, at 589; *see, e.g.*, Case C-281/98, Angonese v. Cassa di Risparmio di Bolzano, 2000 E.C.R. I-4139 (*reprinted in* BERMANN ET AL., *supra* note 6, at 589) (holding that an Italian bank had to accept a diploma from a German university certifying proficiency in Italian on the same basis that it would accept a diploma from an Ital-

Member State as a "self-employed" person or to "set up and manage undertakings, in particular companies or firms,"[40] and to provide professional, industrial, and commercial services across internal borders[41] further supplements freedom of movement for workers.

Regulation 1612/68 is the main piece of legislation implementing the rights of Article 39.[42] Part I, Title I grants to Member State nationals "the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State."[43] Unfortunately, neither instrument attempts to specify what types of activity an EU national must perform to be considered a worker. The definition of a worker has instead largely been elaborated through the jurisprudence of the ECJ. Thus in *Lawrie-Blum v. Land Baden-Wurtetemberg*, the ECJ noted that "worker" must have a community meaning; national courts cannot decide for themselves what a worker is.[44] The Court further held that the "term 'worker' covers any person performing for remuneration work the nature of which is not determined by himself for and under the control of another," which effectively excludes anyone who is self-employed from the scope of Article 39 or Regulation 1612/68.[45] In *Levin v. Staatssecretaris van Justitie*, the ECJ held that the right to freedom of movement also applied to part-time workers as long as their employment involved "the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary."[46]

Regulation 1612/68 provides additional guarantees that complement and facilitate the exercise of free movement by workers. Part I, Title II reinforces the EC Treaty's prohibition on national discrimination by providing that a worker from another Member State may not be "treated differently from national workers. . .in respect of any conditions of employment and work."[47] Subsequent decisions by the ECJ have elaborated upon the right to non-discrimination[48] and held that Member States cannot accomplish by indirect or covert discrimination that which would be impermissible through direct discrimination.[49] Member

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ian university certifying proficiency in Italian).

40. EC Treaty, *supra* note 9, art. 43.

41. *Id.* arts. 49-50.

42. Council Regulation 1612/68 of 15 October 1968 on Freedom of Movement for Workers Within the Community, 1968(II) O.J. SPEC. ED. 475.

43. Regulation 1612/18 art. I; *see also* WEISS & WOOLDRIDGE, *supra* note 36, at 46.

44. Case 66/85, Lawrie-Blum v. Land Baden-Würtetemberg, 1969 E.C.R. 363, ¶ 16.

45. *Id.* ¶ 12; *see also* WEISS & WOOLDRIDGE, *supra* note 36, at 47.

46. Case 53/81, Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 1035, ¶ 17.

47. Regulation 1612/68 art. 7(1).

48. *See, e.g.*, Case 15/69, Wurttembergische Milchverwertung-Sudmilch AG v. Salvatore Ugliola, [1969] ECR 363 (holding that an EU national employed in another Member State is entitled to have his military service in his home state taken into account by his employer in calculating his seniority on the same basis as if he had performed the military service in the state where he was employed).

49. *See, e.g.*, Case C-350/96, Clean Car Auto Service v. Landeshauptmann Von Wien, 1998 E.C.R. I-2521, ¶ 27 (*reprinted in* BERMANN ET AL., *supra* note 6, at 584) ("The court has consistently held that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria,

States are also forbidden from discriminating against nationals of other EU states in terms of "social and tax advantages,"[50] "access to training in vocational schools,"[51] "membership of trade unions,"[52] and housing.[53]

Finally, Part I, Title III grants to the family members of migrant workers the right to move and live with the worker in another Member State.[54] The worker's spouse and children under the age of 21 also have the right to work in that Member State, even if they are not EU-nationals.[55] Additionally, the worker's children have the right to be admitted to the Member State's "general education, apprenticeship, and vocational training courses under the same conditions as nationals of that State."[56] The ECJ has also held that family members' dependence on social assistance cannot impinge on their right to reside in another Member State.[57] Title III sprang from the realization of the regulation's drafters that few workers would be willing to leave their families behind, and thus the absence of the right to free movement of family members would become a significant obstacle to attaining true freedom of movement.[58] The Council further strengthened Title III with the passage of Directive 68/360, which officially abolished all restrictions on the freedom of movement and residence for workers and their families, provided standardized rules for all Member States for the issuance of residence permits, and limited to passports and identity cards the documents Member States could demand workers and their families produce to

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achieve in practice the same result."). Any national measure which uses residence as the grounds for distinguishing amongst EU nationals is "inherently suspect." John Handoll, *The Equal Treatment of Migrant Workers, in* THE FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION 27, 32 (Niamh Hyland ed., 1999). National rules may only derogate from the principle of nondiscrimination if they satisfy the requirements of "necessity, proportionality and non-discrimination." *Id.* at 35. Note however that though both direct and indirect discrimination are prohibited, indirect discrimination may be permissible if it is justified on objective grounds (e.g. where national and migrant workers are simply not similarly situated). WEISS & WOOLDRIDGE, *supra* note 36, at 59.

50. Regulation 1612/68 art. 7(2). The term "social and tax advantages" has been interpreted extremely broadly by the ECJ to include all grants which would facilitate mobility in society for the recipients. Social advantages have been held to include state assistance in paying for funerals and a transportation fare reduction for large families. Handoll, *supra* note 29, at 41-42; BERMANN ET AL., *supra* note 6, at 599 (citing Case 32/75, Cristini v. SNCF Francais, 1975 E.C.R. 1085).

51. Regulation 1612/68 art. 7(3); *see also* Case 293/83, Gravier v. City of Liège, 1985 E.C.R. 593. The *Gravier* Court held that the Academie Royale des Beaux-Arts in Belgium could not require a French student to pay an enrollment that was not assessed upon Belgium nationals. The Court noted that "[a]ccess to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired." *Id.* ¶ 24.

52. Regulation 1612/68 art. 8(1).

53. *Id.* art. 9.

54. *Id.* art. 10(1). This article includes the worker's spouse, children who are under 21 or dependents and other "dependent relatives in the ascending line of the worker and his spouse."

55. *Id.* art. 11.

56. *Id.* art. 12.

57. A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT'L & COMP. L. 803, 838 (2002) (citing Centre Public d'Aide Sociale de Courcelles v. Lebon, 316/85, 1987 E.C.R. 2811).

58. Van der Mei, *supra* note 57, at 836.

enter the territory of the state.[59]

The law in this area is not yet settled and continues to develop. For example, the ECJ has held that the Netherlands cannot deny benefits to the unmarried companion of a migrant worker if such benefits are extended to Dutch nationals[60], but it is still not clear if, in the case of divorce, the worker's former spouse could continue to reside in the Member State in which he had lived with the worker.[61]

There are two significant exceptions to freedom of movement for workers. First, Article 39(c) of the EC Treaty allows Member States to limit freedom of movement on the basis of "public policy, public security or public health." These grounds are codified in Directive 64/221,[62] which places important limitations on when these exceptions can be invoked.[63] For example, limitations placed on freedom of movement for reasons of public policy or public security must "be based exclusively on the personal conduct of the individual concerned."[64] Furthermore, the ECJ has held that the public policy exception must be interpreted narrowly and given a community meaning, although Member States do have some discretion, as circumstances and national policy vary from state to state.[65] On the other hand, Member States are afforded much less deference in invoking the public health exception. Only diseases listed in the Annex to the Directive may permissibly serve as grounds for derogations for public health,[66] which includes diseases listed by the World Health Organization as subject to quarantine.[67] In addition, affected EU nationals receive "a number of procedural safeguards" to ensure no such individual is unlawfully excluded from the territory of another Member State through the incorrect application of one of these exceptions.[68] These include access to information in a manner each individual can understand about grounds for deportation or denial of a residency permit, as well as the right to an appeal.[69] Finally, derogations on these exceptions can only apply to a total ban on residence, as opposed to a restriction on movement to one part of a Member State,[70] and cannot be invoked solely for

59. Council Directive 68/360 of 15 October 1968 on the Abolition of Restrictions on Movement and Residence Within the Community for Workers of Member States and their Families, O.J. (L 257) 13.

60. Case 59/85, Netherlands v. Reed, 1986 E.C.R. 1283.

61. WEISS & WOOLDRIDGE, *supra* note 36, at 52.

62. Council Directive 64/221 of 25 February 1964 on the Co-ordination of Special Measures Concerning the Movement and Residence of Foreign Nationals which are Justified on Grounds of Public Policy, Public Security or Public Health, 1963-1964 O.J. SPEC. ED. 117.

63. BERMANN ET AL., *supra* note 6, at 603.

64. Directive 64/221 art. 3.

65. Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337 (holding that a Dutch national who worked for the Church of Scientology could be excluded from the UK due to the UK's determination that Scientology was contrary to the public good) (discussed in WEISS & WOOLDRIDGE, *supra* note 36, at 146).

66. Directive 64/221 art. 4; Directive 64/221 Annex.

67. WEISS & WOOLDRIDGE, *supra* note 36, at 145.

68. *Id.* at 150-51.

69. Directive 64/221 art. 6-9; WEISS & WOOLDRIDGE, *supra* note 36, at 150.

70. Case 36/75, Rutilli v. Minister for the Interior, 1975 E.C.R. 1219 (France could not al-

economic purposes.[71]

Article 39(4) of the EC Treaty provides the second major exception to freedom of movement for workers, stating that the provisions of Article 39 "shall not apply to employment in the public service."[72] In *Commission v. Belgium*, the ECJ held that this provision exempts:

> posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality.[73]

In other words, Member States are free to refuse to hire EU nationals from another Member State for categories of governmental jobs that require an elevated degree of loyalty from the employee to the state. This exception has been interpreted narrowly, and has been held to turn on the nature of the responsibilities involved, and not on whether national legislation or authorities consider the job to be a public service post.[74] The Commission has determined that jobs in fields like "commercial service, public health services, public educational establishments and civil research" generally will not qualify for this exception, whereas judicial posts, jobs in the upper echelons of civil service, and senior positions in the police, armed services, and the tax authority likely would.[75] Commentators have suggested that the distinction may lie between jobs that are traditionally blue collar and traditionally white collar.[76]

B. Freedom of Movement for Non-Workers

While freedom of movement for workers is undoubtedly one of the most important aspects of freedom of movement, subsequent EU treaties and legislation supply various additional rights that extend freedom of movement to EU nationals who are not workers. The gradual extension of the right to freedom of movement to non-workers mirrors the EU's evolution from an economic entity to a political entity. Rather than existing purely to further the completion of the internal market, freedom of movement for persons now serves both as a tool to encourage support for greater EU integration among the European populace and as an expression of a nascent EU consciousness and identity.

The expansion of freedom of movement to non-workers began in 1970 with

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low an Italian national into France generally but bar him from entering Alsace-Lorraine specifically because he had participated in riots that took place there) (discussed in WEISS & WOOLDRIDGE, *supra* note 36, at 147).

71. WEISS & WOOLDRIDGE, *supra* note 36, at 144.

72. EC Treaty, *supra* note 9, art. 39(4).

73. Case 149/79, Commission v. Belgium, 1980 E.C.R. 3881, ¶ 10.

74. WEISS & WOOLDRIDGE, *supra* note 36, at 47-48.

75. *Id.* at 48; Ricou Heaton, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND. J. TRANSNAT'L L. 643, 651 (1992).

76. *See* BERMANN ET AL., *supra* note 6, at 612-13.

the passage of Regulation 1251/70, which permits EU nationals who work in the territory of another Member State to remain permanently along with their families in that state after retiring, suffering an injury that results in "a permanent incapacity to work," or having worked and resided in the state continuously for three years.[77] In 1990, Directive 90/365 granted rights of residence in other EU Member States to retirees who are covered by health insurance and who have sufficient resources "to avoid becoming a burden on the social security system of the host Member State."[78] Simultaneously, Directive 90/365, also known as "the playboy directive" because it chiefly benefits the rich,[79] extended the right of residence to any Member State national who did not already enjoy it, subject to the same financial limitations as Directive 90/365.[80] A few years later, Directive 93/96 recognized a right of residence for students, their spouses, and their dependent children, provided that the student is "enrolled in a recognized education establishment," and covered by health insurance.[81] When combined, these pieces of legislation theoretically allow all EU nationals to travel freely throughout the EU. In practice, however, only those who are able to find work, enroll in an educational program, or have sufficient resources to support themselves can truly take advantage of the right to live in another Member State as codified in these Regulations and Directives.

Another important component of the right to free movement was supplied by the Schengen Agreements, which established a system coordinating the border policies of signatories that developed alongside but separately from the EU free movement regime. Belgium, France, Germany, Luxembourg, and the Netherlands signed the first Schengen Agreement on June 14, 1985, which was later supplemented by the Schengen Implementation Agreement in 1990.[82] The effect of the Agreements is to abolish all controls at internal frontiers, allowing Europeans to move from Member State to Member State without passing through customs or so much as presenting a passport. Instead, occasional spot checks are the only tool used to enforce the borders.[83] The Schengen Agreements were not formally part of EU law at the time of their signing, but were later incorporated

77. Commission Regulation 1251/70 of 29 June 1970 on the Right of Workers to Remain in the Territory of a Member State after Having Been Employed in that State, O.J. (L 142) 24.

78. Council Directive 90/365 of 28 June 1990 on the Right of Residence for Employees and Self-Employed Persons who have Ceased their Occupational Activity, art. 1, O.J. (L 180) 28.

79. Heaton, *supra* note 75, at 653.

80. Council Directive 90/364 of 28 June 1990 on the Right of Residence, art. 1, O.J. (L 180) 26.

81. Council Directive 93/96 of 29 October 1993 on the Right of Residence for Students, art. 1, O.J. (L 317) 59. Art. 2 restricts the right of residence "to the duration of the course of studies in question."

82. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, June 14, 1985 (Agreement), June 19, 1990 (Convention), 30 I.L.M. 68 (1991) [hereinafter Schengen Agreements]; *see* WEISS & WOOLDRIDGE, *supra* note 36, at 35, CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 437 (2004).

83. BERMANN ET AL., *supra* note 6, at 645-48 (citing Case 321/87, Commission v. Belgium, 1989 E.C.R. 997 (holding that Member States could not conduct systematic border checks except to verify that the individual held a Member State passport or national identity card)).

into the EU treaty system by the Treaty of Amsterdam in 1999.[84] Today all EU states besides the UK and Ireland participate in the Schengen system[85] and all new Member States are bound by its provisions.[86]

In recognition of the security risks of eliminating border checks, the Schengen Agreements counterbalance ease of movement within the Union with stringent external border controls and increased cooperation between police, drug enforcement officials, and judicial officials responsible for extradition.[87] Pursuant to Article 96 of the Schengen Agreements, Schengen states established the Schengen Information System (SIS), a computerized database of persons alleged to pose a threat to security, safety, or public order.[88] Anyone listed in the SIS will be refused entry to all Schengen states.[89] When a new Member State accedes and becomes responsible for controlling the new EU external border, it must therefore intensify the rigorousness of its border checks and upgrade its computer system to one capable of handling SIS.[90]

The Schengen Agreements also provide for a common asylum policy among Member States.[91] Under the safe third country principle, refugees may only apply for asylum in one Member State, generally the one that issued a visa or the country in which the refugee first arrived. Once asylum applicants have submitted an asylum application in one Member State, they are not permitted a second bite at the apple in another Member State if their application is denied.[92]

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84. The Treaty of Amsterdam added a new Title to the EC Treaty. Title IV establishes common policies for asylum, immigration, visas and external border controls. Treaty of Amsterdam arts. 61-69; *see* WEISS & WOOLDRIDGE, *supra* note 36, at 27. Some commentators have suggested that the incorporation of Schengen into the EC treaty system has led to "considerable complexity, and to a partial fragmentation of the legal order of the EU," as not all EU members participate in Schengen. WEISS & WOOLDRIDGE, *supra* note 36, at 38; *see also* BARNARD, *supra* note 82, at 438.

85. The UK and Ireland have also opted out of Title IV of the Treaty of Amsterdam. Treaty of Amsterdam art. 69, Protocols B3 and B4. In practice, however, they have both chosen to take advantage of the Protocol right to opt in and cooperate on police and judicial matters. WEISS & WOOLDRIDGE, *supra* note 36, at 37. Denmark participates in Schengen, but has also received an exemption from Title IV. Treaty of Amsterdam Protocol B5; European Union website, *The Schengen acquis and its Integration into the Union*, June 15, 2005, http://www.europa.eu.int/ scadplus/leg/en/lvb/l33020.htm.

86. *The Schengen acquis and its Integration into the Union*, http://www.europa.eu.int /scadplus/leg/en/lvb/l33020.htm.

87. WEISS & WOOLDRIDGE, *supra* note 36, at 35. For an argument that Schengen is more concerned with legitimating strong external borders than promoting internal freedom of movement, see Heaton, *supra* note 75, at 657.

88. Schengen Agreement art. 96. BARNARD, *supra* note 82, at 444.

89. WEISS & WOOLDRIDGE, *supra* note 36, at 35.

90. Randall Hansen, *Asylum Policy in the European Union,* 14 GEO. IMMIGR. L.J. 779, 788 (2000); Phuong, *supra* note 32, at 646.

91. The Schengen Agreements' provisions on asylum were later supplemented by the Dublin Convention of 1990. *See* Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C254) 1, 30 I.L.M. 425 [Dublin Convention]; *see also* Hansen, *supra* note 86.

92. James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719, 725 (1993). Many commentators have argued that the EU's safe third country policy violates international law. The assumption behind the policy is that the refusal of asylum in one Member States alleviates the responsibility of other Member States to conduct a full-fledged evaluation of an applicant's claim, despite the fact

In theory, then, Schengen is a dual system: while EU nationals can easily travel from Member State to Member States, Europe as a whole is tightly sealed off from the rest of the world, making it more difficult for both legitimate and illegitimate persons and goods to move between the EU and third countries.[93]

The Maastricht Treaty painted the finishing touches on the portrait of freedom of movement in the EU in 1993. Maastricht's most important implication for the right of free movement lay in five articles it contributed to the EC Treaty. Article 17 establishes and confers upon all Member State nationals "Citizenship of the Union," providing that all citizens "shall enjoy the rights conferred by this Treaty."[94] Article 18 provides that all EU citizens "shall have the right to move and reside freely within the territory of the Member States," subject to restrictions that may later be laid down in legislation.[95] Articles 19-21 give EU citizens the right to vote and be candidates in municipal and EU Parliament elections when resident in other Member States;[96] the right to receive diplomatic protection while in a third country by the authorities of any other Member State on the same terms as that state's own nationals;[97] and the right to petition the European Parliament, the Ombudsman, the Council, the Commission, the Court of Justice, and the Court of Auditors in any EU language.[98]

With the establishment of EU citizenship, the compartmentalization of freedom of movement into various categories of persons was abolished and

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that the treatment the asylum applicant receives may not be consistent across other states. Hathaway, *supra* note 92, at 725-26. Nor is there a right to appeal to a centralized court. Heaton, *supra* note 75, at 665. There is thus a significant danger that genuine refugees may be wrongfully denied asylum in one country, only to find the doors to all of EU Member States closed to them in consequence. Sabine Weidlich, *First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?*, 14 GEO. IMMIGR. L.J. 643, 652 (2000). Harmonization of immigration laws is thus used as excuse to deny asylum and staunch refugee flows. Hathaway, *supra* note 92, at 719; *see also* Gabriela I. Coman, *European Union Policy on Asylum and Its Inherent Human Rights Violations*, 64 BROOK. L. REV. 1217, 1229-30 (1998); Gretchen Borchelt, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473 (2002).

93. For this reason, the EU is occasionally referred to as "Fortress Europe." *See, e.g.*, Phuong, *supra* note 32. This is not to suggest that the illegal trafficking of goods or persons into and out of the EU does not exist; its borders are no more airtight than that of any country. In fact, in October of 2005 the Commission officially recognized the seriousness of the problem of human trafficking in setting out an official plan to fight such trafficking within the EU. European Commission, Memo/05/381, *Fighting Trafficking in Human Beings—An Integrated Approach and Proposals for an Action Plan*, Oct. 19 2005, *available at* http://www.euractiv.com/Article?tcmuri=tcm:29-146082-16&type=News.

94. EC Treaty, *supra* note 9, art. 17.

95. *Id.* art. 18.

96. *Id.* art. 19.

97. *Id.* art. 20.

98. *Id.* art. 21. The rights conferred by EU citizenship do not place any corresponding duties on citizens and have not been frequently invoked by the ECJ. WEISS & WOOLDRIDGE, *supra* note 36, at 168. *But see* Case C-184/99, Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193 (holding that Member States cannot withhold social assistance from a lawfully resident EU citizen who is a national of another Member State if nationals of the host Member State would be eligible for social assistance under the same conditions) (cited in van der Mei, *supra* note 57, at 847).

freedom of movement made generally available to all nationals of Member States. The symbolic and psychological importance of the link between freedom of movement and citizenship should not be underestimated. The concept of citizenship reflects a politically or culturally-based bond, often deeply felt, between a political entity and an individual, and between individuals who share common citizenship. It can be a powerful force encouraging loyalty and a sense of belonging among those who enjoy its benefits, while the state itself promises to protect and benefit the citizens.[99] Significantly, free movement is placed at the core of the definition of EU citizenship; part of the essence of being a citizen is therefore the ability to travel amongst Member States.[100] Free movement is reconfigured, not as a convenience, benefit or mere economic advantage, but as a "fundamental right of the Union citizen," as important as the right to vote or to receive diplomatic protection.[101] Like voting, it is conceived as a site of direct individual participation in the process of building Europe and being European. Ordinary Europeans will experience the impact of increased EU political integration in their daily lives through freedom of movement. It allows traveling Europeans to come into extended contact with other Europeans and European cultures, which promotes greater cross-cultural understanding and identification. It gives EU nationals a reason to feel loyal to the Union and invested in the success of greater integration, functioning as a tool to develop and encourage the perception of a collective European consciousness. In this sense, the free movement of persons is perhaps the most important of the four freedoms, symbolically speaking, to the development of the conception of a unified Europe. Freedom of movement has thus become an indispensable part of the rhetoric of EU expansion as well as an essential component in the ongoing project of further political integration through the creation of a common European identity. Transitional measures, with their calculated denial of freedom of movement to CEEC citizens, therefore exist in fundamental tension with the exalted place of free movement in the concept of European identity.

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99. *See* Note, *The Functionality of Citizenship*, 110 HARV. L. R. 1814, 1815 (1997) ("Citizenship in a liberal state embodies two relationships. A vertical relationship runs between citizen and state, connecting the group of humans who can exact the highest protection from the state and who owe it the most onerous duties. A horizontal relationship connects citizens themselves, developing a community of people who share loyalties, civil allegiance, and national character."); *see also* Michael A. Becker, *Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals*, 7 YALE HUM. RTS. & DEV. L.J. 132, 140-45 (arguing that European citizenship consists of three distinct types of citizenships with their own ideological approach: liberal citizenship with a legal-participatory approach, communitarian citizenship with an identity-based approach, and constructive citizenship with a focus on engagement and uncertainty).

100. *See generally* ELLEN BRINCH JØRGENSEN, UNION CITIZENS—FREE MOVEMENT AND NON-DISCRIMINATION (1996).

101. PIERRE GARRONE, LA LIBRE CIRCULATION DES PERSONNES: LIBERTÉ DU MOVEMENT, ÉGALITÉ, LIBERTÉ ECONOMIQUE 44 (1993): "*un droit fondamental du citoyen de l'Union*" (author's translation).

III.
THE MAY 2004 EXPANSION OF THE EU

A. The Process of Accession to the EU

Since its creation, the European Union has grown enormously, not just in terms of expansion from economic to political integration, but in terms of its very size. Other nations eager to reap the benefits of increased European solidarity and integration soon joined the six countries that made up the original European Coal and Steel Community. The expansion of May 2004 was the latest in a series of expansions since the founding of the Union. While the May 2004 expansion occurred through the same process as the expansions that came before it, the unique history of the CEECs made their accession quite different from the previous accessions of Western European nations.

The design of the EU allows it to absorb new members through a process called accession. Formally acceding to the EU is a complicated matter. To become members, candidate states must adopt all previously existing EU rules and regulations, a body of law known as the *acquis communautaire*.[102] The principle that candidates must accept the *acquis* to join the EU was formalized in the Maastricht Treaty as a "stated community objective."[103] In practice, the *acquis* requirement means that the EU will not negotiate with new members over existing legislation to which they may object; joining the EU is a take-it-or-leave-it offer. Thus, acceding countries may not "question or substantially modify the institutional structure, scope, policies or rules of . . . the Union."[104]

The *acquis* consists of the foundational treaties; the "institutional structure" under them; EU legislation and acts; international agreements between the EU and third parties; legislation and acts passed in connection with accession negotiations; the "political objective" of the treaties; certain core principles of EU law including the direct effect of certain treaty provisions and legislation, the superiority of EU law to conflicting laws in individual Member States, and the "uniform interpretation" of EU law; and other miscellaneous principles that have been added to the *acquis* by different EU institutions throughout the years.[105] As of the May 2004 enlargement, the *acquis* contained over 80,000 pages, divided into 31 chapters, which new members must accept.[106] Given the prodigious amount of law covered in this definition, it is no easy task to bring the existing legal framework in a candidate country into accordance with EU requirements, a process known as harmonization. Furthermore, the Council must unanimously approve the steps the candidate countries will make to harmonize

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102. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 5.

103. Flaherty & Lally-Green, *supra* note 6, at 952.

104. *Id.* at 951.

105. Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1143-44 (1995).

106. Peter Katz, *The Treaty of Nice and European Union Enlargement: The Political, Economic, and Social Consequences of Ratifying the Treaty of Nice*, 24 U. PA. J. INT'L ECON. L. 225, 236 (2003); Phuong, *supra* note 32, at 644; MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 9.

their laws chapter by chapter before accession negotiations can be closed.[107] Since the law of the EU remains in constant flux, accession represents a kind of "moving target" that is quite difficult to hit.[108]

In addition to accepting and implementing the *acquis*, candidate countries must meet three foundational criteria, known as the "Copenhagen Criteria,"set out in the Presidency Conclusions at the Copenhagen European Council in June of 1993.[109] In order to be eligible to accede, would-be Member States must have: (1) "stable institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities;" (2) "a functioning market economy that can cope with competitive pressures and market forces within the Union;" and (3) "the ability to take on the obligations of membership, including support to the aims of the Union. The new members must have a public administration capable of applying and managing EU laws in practise."[110] In sum, candidate states must "recreate themselves in the EU's image."[111]

Since its founding, the EU has experienced four successful waves of enlargement.[112] First to accede in 1972 were Denmark, Ireland, and the United Kingdom (UK). Greece came next, acceding to the Union in 1979, and was shortly followed by Portugal and Spain in 1985. Finally, Austria, Finland, and Sweden became official EU Member States in 1994.[113] Each wave of accession brought a significant increase in population to the EU; the first wave augmented its population by 50%, the second and third waves combined contributed an additional 30%, and the fourth wave added another 25%.[114]

There are several things to note in comparing this history to the May 2004 expansion. First, the May 2004 expansion was by no means the EU's first ambitious attempt to significantly add to the EU's population and geographic area. However, no previous wave had attempted to integrate ten countries, with ten different languages and ten different cultures, at one time. Furthermore, historical and economic differences had figured less prominently in previous expansions. While states like Portugal and Greece were also poor countries with different traditions, they still had a great deal in common historically and culturally with other EU Member States. However, the vast majority of the May 2004 acceding countries developed under Communism, and do not have the same tradition of stable democratic institutions and capitalist infrastructure common to certain Western European nations to ease their transition into EU markets and political organizations. Finally, both Eastern and Western Europe have their own shared sense of collective identity and commonality. The Iron Curtain divided

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107. Katz, *supra* note 106, at 236.
108. Helen E. Hartnell, *Subregional Coalescence in European Regional Integration*, 16 WIS. INT'L. L.J. 115, 166 (1997).
109. Katz, *supra* note 106, at 230.
110. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 9.
111. Hartnell, *supra* note 108, at 127.
112. Puder, *supra* note 11, at 59.
113. *Id.*
114. Goebel, *supra* note 105, at 1095.

Europe for decades and reordered the loyalties and bonds between (even bordering) nations. Given that most CEECs shared decades under the domination of the Soviet culture, language, politics, and economics, while Western Europe was free of such influence, it is also possible that Western European nations feel a common bond of history and culture with each other to the exclusion of Eastern European nations, while Eastern European nations feel that same bond with other Eastern European nations, but not with Western Europe. It seems likely that, at the time of accession, a vestige of that ideological and cultural partition could still manifest itself through an intangible sense of difference and mutual exclusion. Thus, the May 2004 expansion differed dramatically from the enlargements that had come before it, and would present special challenges to its architects.

In recognition of the difficulties likely to be confronted with the May 2004 expansion, the EU made extensive preparations to assist the CEECs in implementing the *acquis* and satisfying the Copenhagen Criteria. Since 1989, the EU has spent approximately € 3 billion per year on a series of programs to aid the development of the CEEC candidates.[115] The Phare program funds projects to foster development of and investment in infrastructure, as well as projects ensuring that new Member States have the administrative structures in place to "meet the rights and obligations of membership."[116] Phare's official objectives include "agriculture sector restructuring, improvement of access to Western markets, investment promotion, environmental protection and professional training."[117] Two additional programs were subsequently added to Phare: ISPA, which also supports the development of infrastructure, and Sapard, which aids the modernization of agriculture in candidate countries.[118] Finally, in 1998, the EU began to employ a process called "twinning," in which EU Member States sent their experts to a candidate country to act as an "advisor and mentor to . . . local officials."[119] Twinning's ultimate goal is to enable applicants to successfully develop administrations modeled after those of current EU members.[120]

Between 1991 and 1996, the EU also entered into a series of association agreements, known as "Europe Agreements," with all 8 candidate CEECs, as well as Romania and Bulgaria.[121] The Europe Agreements established bilateral

115. A separate program allocated € 95 million to Cyprus and Malta for the period of 2000-2004. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 8.

116. *Id.*

117. Romana Sadurska, *Reshaping Europe—Or 'How to Keep Poor Cousins in (Their) Home': A Comment on the Transformation of Europe*, 100 YALE L.J. 2501, 2503 (1991).

118. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 8.

119. *Id.* at 9.

120. *Id.*

121. Elspeth Guild, *The Europe Agreements: The Right to Establishment in the Central and Eastern European Agreements*, *in* THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 127 (Elspeth Guild ed., 1999). Romania and Bulgaria applied for EU membership along with the other 8 CEEC countries. However, they were deemed not to have met the requirements for membership in time for the May 2004 enlargement; instead they are slated to join at the target date of 2007. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 5.

relations between the EU and candidate CEECs. They sought to foster political dialogue, expand trade and economic relations, establish a structure through which the EU could provide financial and technical assistance, furnish a framework for the ultimate integration of the CEECs into the European Union, and promote cooperation in cultural matters.[122] Primarily, however, the target of Europe Agreements was to improve and cultivate the CEECs' new market-based economies by establishing "reciprocal rights and obligations, common action and special procedures."[123] For example, a CEEC signatory to a Europe Agreement received favored access to lucrative EU markets and vice versa, with the understanding that eventually relations would move towards complete free trade in industrial goods. Ultimately, these treaties were "designed to lay the foundation for full political and economic integration [of the CEECs] into the EU."[124]

It is important to note, however, that the Europe Agreements did *not* provide for any additional rights of freedom of movement of persons between the CEECs and Member States, largely due to EU fears of a "flood of unemployed workers" that would "augment the problems of chronic high unemployment."[125] That the EU seemed eager to access CEECs' markets without extending the full benefits of EU membership led to criticism of the Europe Agreements before the completion of the May 2004 accession. According to Roger Goebel, Europe Agreements were little more than "junior, somewhat watered-down, version[s] of the European Economic Area arrangements."[126] Romana Sadurska, another commentator, argues the Europe Agreements were substitutes for full membership designed to keep CEECs complacent about their non-member status and "at a safe distance," rather representing a true effort to strengthen both the EU and the CEECs.[127] The achievement of full EU membership for the majority of Europe Agreement signatories has largely mooted such criticisms. However, the underlying suspicion that the EU did not deal fairly with CEEC countries in the years leading up to their accession may have lingered and infected accession negotiations with an element of distrust.

B. Transitional Measures

The concerns EU Member States expressed in the context of the Europe Agreements about the wisdom of allowing free movement between the EU and the CEECs had not abated by the time the May 2004 accession rolled around. In fact, the potential of a massive migration westward was a highly prominent and

122. Guild, *supra* note 121, at 128.

123. Katz, *supra* note 106, at 236; EC Treaty, *supra* note 9, art. 238 (cited in Hartnell, *supra* note 108, at 119-20).

124. Hartnell, *supra* note 108, at 124-27. The CEECs have also organized regional free trade areas amongst themselves. *See id.* at 181-226.

125. Goebel, *supra* note 105, at 1178.

126. *Id.*

127. Sadurska, *supra* note 117, at 2507.

hotly contested issue during accession negotiations.[128] Member States unabashedly proclaimed their predictions about the potential detrimental effect of the arrival of thousands of would-be CEEC workers in existing EU countries.[129] However, there was at the same time no doubt about the importance of the right to freedom of movement as a foundational component of the EU itself. Discussion of freedom of movement had long been reverentially couched in the rhetoric of European unity and integration and idealized as a symbol of the goal the EU saw itself as working to obtain.[130] In light of the worshipful eye the EU had long turned to freedom of movement, it would simply not be possible to admit new members to the Union without permitting them to exercise this fundamental right of European membership and citizenship.

Thus, the accession negotiations produced a compromise: the new Member States, with the exception of Cyprus and Malta, would eventually receive full freedom of movement, but not immediately upon accession. Instead, freedom of movement would be gradually phased in through a series of flexible transitional measures that allowed each EU-15 Member State to determine the proper timeline for its implementation.[131] The transitional measures are identical for all eight new CEEC Member States,[132] while Malta received the right to apply its own transitional measures[133] and Cyprus immediately received full freedom of movement.[134] For the CEEC countries, the current EU Member States are permitted to continue to apply whatever "national measures" they have already been employing for the first two years following accession.[135] In other words,

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128. ANDRÉ SAPIR ET AL., AN AGENDA FOR A GROWING EUROPE: THE SAPIR REPORT 130 (2004).

129. EU website, *supra* note 34.

130. *See supra* Section I.B.

131. Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union is Founded, 2003 O.J. L 236, art. 24. For a thorough and clear outline of the transitional measures permitted under the Treaty of Accession and its implementing legislation, see European Commission, *Freedom of Movement for Persons*, ch. 2, (December 2004), http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/index.htm [hereinafter European Commission Freedom Report]; BYRSKA, *supra* note 2, at 10-11.

132. Act of Accession Annexes V, VI, VIII, IX, X, XII, XIII, XIV.

133. Act of Accession Annex XI. During accession negotiations, Malta voiced its concerns that its tiny labor markets could come under pressure. Thus, for seven years after accession, Malta received the right to suspend freedom of movement for workers if it "undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation." *Id.* art. 2. Malta also received the right to "retain its work permit systems for nationals of other Member States" for up to seven years after accession. *Id.* art. 3.

134. Act of Accession, Annex VII; DIRECTORATE-GENERAL ENLARGEMENT, EUROPEAN COMMISSION, FREE MOVEMENT FOR PERSONS—A PRACTICAL GUIDE FOR AN ENLARGED EUROPEAN UNION 5, *available at* http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_pratica_guide_including_comments.pdf [hereinafter PRACTICAL GUIDE].

135. Act of Accession, Annex V(1), art. 2. Since Annexes V, VI, VIII, IX, X, XII, XIII and XIV are all identical; I have chosen to quote the language from Annex V, which applies to the Czech Republic. However, this is of no import as the language would be identical in all other Annexes besides those applying to Cyprus and Malta.

the old Member States can automatically delay implementation of freedom of movement for workers without any individualized showing that harm is likely to occur from allowing CEEC nationals to work within their borders. Before the end of the initial two year period, the Council must conduct a review in each Member State of "the functioning of the transitional provisions . . . on the basis of a report from the Commission."[136] After this review, Member States may continue to apply transitional measures for an additional three years, but they must inform the Commission of such intention; otherwise, full freedom of movement is immediately activated.[137] The new Member State whose nationals continue to be so restricted may then request an additional review.[138] Thus, if France restricts the freedom of movement of Czech nationals, the Czech Republic may request that the Council conduct a second review of France. At the end of this five year period, the Member State applying restrictions may continue to apply them for an additional two years, but only "in case of serious disturbances of its labor market or threat thereof and after notifying the Commission."[139] Thus, while it is anticipated that all transitional measures will end within five years, in extreme circumstances they could extend for up to seven years.[140] Because of the division of the seven year period into blocks of years, these transitional arrangements are often referred to as "2+3+2" arrangements.[141]

In addition to the 2+3+2 measures, old Member States also received certain other concessions. If an old Member State at any time

> undergoes or foresees disturbances on its labor market which could seriously threaten the standard of living or level of employment in a given region or occupation, that Member State shall inform the Commission and the other Member States thereof . . . and may request the Commission to state that [freedom of movement for workers] be wholly or partially suspended in order to restore to normal the situation in that region or occupation.[142]

Thus, old Member States retain the ability to suddenly apply restrictive measures despite any earlier decisions not to do so. In addition, Austria and Germany received the right to apply "flanking national measures" with respect to the provision of services within their territory, in recognition of the fact that their geographical location will likely make these states the most desirable destinations for CEEC migrants.[143] Therefore "[i]n order to address serious disturbances or

136. *Id.*
137. *Id.* art. 3.
138. *Id.* art. 4.
139. *Id.* art. 5.
140. European Commission Freedom Report, *supra* note 131.
141. *See* Euractiv, *Free Movement of Labour in the EU-25*, Oct. 15 2004, http://www.euractiv.com/Article?tcmuri=tcm:29-129648-16&type=LinksDossier [hereinafter *Free Movement of Labour in the EU-25*].
142. Act of Accession, Annex V(1), art. 7.
143. European Commission Freedom Report, *supra* note 131. Germany already receives more CEEC migrants than any other EU country. Dariusz Stola, *The Social and Political Context of Migration Between Central Europe and the European Union*, *in* THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 139 (Elspeth Guild ed., 1999). At least one independent report has determined that Germany and Austria are

the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services," Germany and Austria will be permitted to restrict the ways in which companies based in new Member States operate within their territory.[144] Notably, they may restrict such companies from sending workers to Germany and Austria to provide certain types of services, including construction and industrial cleaning in Germany, and horticultural, stone-cutting, metal-manufacturing, construction, security, industrial cleaning, home nursing, and social work activities in Austria.[145] The practical effect of the flanking measures is that it will be more difficult for workers from new Member States to obtain employment in Germany and Austria as long as these measures are in effect.[146]

All this is not to say that the new CEEC Member States walked away empty-handed from the accession bargaining table, though the value of the concessions they succeeded in winning are, at best, debatable. First, the transitional measures contain what is known as a "standstill clause,"[147] which provides that no Member State can apply measures that "are more restrictive than those prevailing on the date of signature of the Treaty of Accession."[148] Thus Member States must continue to provide the same degree of freedom of movement that obtained before enlargement, including any special agreements passed between a new and old Member State pre-accession. Second, Member States are required to "give preference to workers who are nationals of the Member States over workers who are national of third countries as regards access to their labour market."[149] Third, the family members of CEEC workers already residing with a legal worker in an old Member State as of the date of accession will receive "upon accession, immediate access to the labour market of that Member State" in spite of any transitional measures in place.[150] Fourth, a declaration was attached to the Treaty of Accession obliging old Member States to "endeavour" to grant increased access to labor markets as quickly as possible in order to speed up the integration of the new Member States and shorten the transitional period to the greatest extent possible.[151] Finally, all transitional measures, including flanking national measures, are reciprocal—if Italy restricts the movement of Hungarian nationals, then Hungary is free to do the same to Italian nationals.[152]

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likely to receive more migration after accession than other Western European Member States. SAPIR, *supra* note 128, at 131.

144. Act of Accession, Annex V(1), art. 13.

145. *Id.* Annex V(1), art. 13; PRACTICAL GUIDE, *supra* note 134, at 4.

146. PRACTICAL GUIDE, *supra* note 134, at 4.

147. European Commission Freedom Report, *supra* note 131.

148. Act of Accession, Annex V(1), art. 14.

149. *Id.*

150. *Id.* art. 8. However, family members who begin residing with such a worker *after* the date of accession will only have access to the labor markets of the old Member State after they have been resident in that state for at least eighteen months or beginning in the third year after accession, whichever is first.

151. European Commission Freedom Report, *supra* note 131.

152. Act of Accession, Annex V(1), art. 10.

Hungary can also restrict the movement of nationals of the other seven CEEC Member States if its nationals are restricted by any old Member State.[153] The value of this last concession seems especially dubious. New Member States cannot apply transitional measures of their own accord but must wait until old Member States "strike first," which essentially puts old Member States firmly in control of what type of transitional measures to apply and how long to continue their application. Moreover, it is unlikely to be in the interests of new Member States to ever restrict the free movement of workers from old Member States; as new Member States will probably not receive a flood of workers from the West, the application of such measures would serve no economic purpose and could in fact increase tensions between the affected old Member States and new Member States.

Several additional points about these transitional measures merit mention. First, the application of transitional measures is optional, not mandatory—thus states are free to choose to immediately implement freedom of movement for workers if they wish. In practice, however, this means that the actual level of freedom of movement permitted may vary from Member State to Member State, obliging would-be migrant workers to go about the potentially difficult task of ascertaining what the country in which they desire to live allows them to do.[154] Second, transitional measures only apply to freedom of movement *for workers*.[155] Thus, all EU citizens are immediately free to travel throughout the enlarged EU immediately following accession. A guide published by the European Commission to inform new EU citizens of their free movement rights states that, as of accession and throughout the transitional period, all EU citizens anywhere in the EU are free to: set up a business in another Member State, travel to another Member State, reside in another Member State as a student, pensioner or family member of a worker, deliver services across borders (with the exception of areas affected by flanking measures), receive equal treatment in working conditions, tax and social advantages and coordination of social security when working legally in another Member State, and be free from discrimination on national grounds once admitted as a legal worker in another Member State.[156] The guide further assures readers that the transitional measures have "been put in place to ensure to ensure that migration on a massive and disruptive scale is avoided. [Their] role is not to prevent all movement."[157] However, given the centrality of the free movement of workers to free movement of persons in general—as most EU citizens could not remain in another country without employment—the role of the transitional measures seems in effect to be to allow Member States to prevent nearly all movement besides weekend jaunts or scholarly pursuits. The effect of transitional measures is to allow only students

153. *Id.* art. 11.
154. PRACTICAL GUIDE, *supra* note 134, at 5.
155. *Id.* at 6.
156. *Id.* at 9.
157. *Id.* at 8.

and the independently wealthy to enjoy full freedom of movement.

Unsurprisingly, the vast majority of EU-15 Member States have chosen to exercise their option to apply protectionist measures to CEEC nationals. Though many Member States had originally expressed the intention not to utilize transitional measures, one by one they succumbed to "the scare" of a flood of CEEC migrants that was "contagious as a virus," and announced restrictive measures.[158] The result was a "race to the top" to limit migration from new Member States.[159] The UK, Sweden,[160] and Ireland were the only old Member States who declined to enact transitional measures, while Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, and Spain all chose to restrict migration for a minimum of two years and Italy decided to retain its current work permit system without employing further restrictions.[161] In contrast, of the new Member States, only Poland and Hungary have chosen to apply reciprocal restrictive measures in return, resulting in a two tier system in which nationals of old Member States are immediately free to work throughout the enlarged EU whereas nationals of new Member States must await permission from old Member States to exercise the same right.[162] To add insult to injury, the nations that did immediately grant full free movement rights to CEEC nationals have chosen to restrict CEEC migrants' access to welfare, in a transparent effort to functionally restrict freedom of movement for the poorest EU citizens.[163] While these nations are understandably concerned with protecting the viability of their own public assistance programs, the restriction nevertheless has the concomitant effect of preventing much undesirable migration. In addition, many old Member States have been less than forthcoming about the measures they have actually chosen to apply. For instance, as of the date of accession neither Greece nor Luxembourg had publicly specified which restrictions they would employ.[164] The confusion surrounding the actual transitional measures in place further increases the practical difficulty of exercising those rights that are available, particularly for poor and/or uneducated EU citizens—exactly the type of migrants old Member States are eager to avoid. Finally, there

158. BYRSKA, *supra* note 2, at 12.

159. Tito Boeri, *State of the Union: Migration Matters*, WALL ST. J. EUR., Nov. 11, 2004, at A9.

160. Sweden waffled shortly before accession and announced it would impose transitional measures. The Swedish Prime Minister, Goran Persson, stated, "We have to be realistic and understand that if everyone else says transitional arrangements are necessary then we must also be aware of the risks and protect ourselves. We would be naïve if we didn't see the risks if we were to be the only country welcoming people from east Europe to work for peanuts and giving them access to our social benefits." David Harrison & Damien McElroy, *'I Heard Britain is the best Place for us to go now. It Doesn't Treat Refugees like Animals,'* SUNDAY TELEGRAPH (London), Feb. 15, 2004, at 18. However, in the end Sweden stuck to its original promise and declined to impose transitional measures. *Free Movement of Labour in the EU-25*, *supra* note 141.

161. *Free Movement of Labour in the EU-25*, *supra* note 141; *see also* Harrison & McElroy, *supra* note 160.

162. BYRSKA, *supra* note 2, at 14; *Free Movement of Labour in the EU-25*, *supra* note 141.

163. Boeri, *supra* note 159.

164. BYRSKA, *supra* note 2, at 14.

is no central judicial mechanism charged with overseeing the fair application of transitional measures. There is no process to determine whether transitional measures are in compliance with the standstill clause, or to challenge the incorrect or unfair application of such measures in individual cases.[165]

In practice, then, the transitional measures restrict a great deal more freedom of movement than they appear to in the Treaty of Accession. Member States have clearly demonstrated their reluctance to accept migrants from new CEEC Member States, despite their unambiguous treaty-based obligation to do so. These transitional measures are both misguided and damaging to the effort to forge a new, inclusive, European identity.

IV.
ANALYSIS OF TRANSITIONAL MEASURES

A. Transitional Measures Are Not Based on Economic Reality and Are Not Economically Sound

During accession negotiations, old Member States repeatedly aired their concerns that the immediate grant of full freedom of movement to all new Member States would result in a massive influx of CEEC workers who would take needed jobs from current EU citizens.[166] Without considering any counterarguments, the concerns of the EU-15 states do seem plausible. After all, Western Europe has higher wages and living standards then Central and Eastern Europe, and chronic, high unemployment in Western Europe translates into fierce competition for desirable jobs.[167] It seems at first glance that transitional measures would provide an effective temporary remedy for such problems. However, statistics and history demonstrate that Western European concerns are essentially unfounded, both because so large a migration is unlikely to occur and because the effects of any westward migration would likely be quite different from Western European expectations. Thus, transitional measures are both unnecessary and misguided.

The EU-15 position is based upon popular belief in a wide variety of dire consequences should CEEC migrants be permitted to settle within their borders. A Eurobarometer Poll conducted in March 2003 showed that 62% of EU citizens "rather agree" that many citizens of new Member States would settle in old Member States after enlargement.[168] EU citizens worried that they would lose their jobs because migrants from the east would be willing to accept jobs for less money.[169] As Sadurska stated in 1991

> Central and Eastern Europe is a landscape of waste and desolation from which

165. *Id.* at 15.
166. EU website, *supra* note 36; *see infra* Section II.A.
167. Goebel, *supra* note 105, at 1178.
168. Gallup Europe on Behalf of the European Commission, *"Eurobarometer" Opinion Poll on Enlargement* (2003), http://europa.eu.int/comm/public_opinion/flash/fl140_en.pdf.
169. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 10.

> many may be seeking to escape . . . The problem is that instead of receiving a trickle of academics, students, professionals, and visitors, Western Europe is likely to face hundreds of thousands, even millions, if law and order break down, ready to move West in search of jobs, education, and housing. Such a mass migration would create unprecedented threats to the economic and social stability of the Community.[170]

These concerns flourished in light of the ambivalence (and often open hostility) that much of Western Europe has long harbored with regards to immigration in general. Many Europeans believe that immigration increases competition for decent jobs and housing, both already in short supply.[171] Citizens of wealthier EU Member States fear that indigents will come to take advantage of higher social welfare benefits, thus lessening the benefits available for that state's nationals.[172] EU citizens also worry that immigration will boost the crime rate,[173] or that immigrants simply will be unable to assimilate into their state's culture and way of life.[174] Most important of all, Western European nations fear losing their "identity" to immigration, that is, losing a racial, linguistic, religious, and cultural homogeneity that many Europeans perceive to have been historically static and essential to their development and stability.[175] Many EU citizens fear that their society itself will change or erode, that the consensus the EU has built about certain values and norms will be eradicated, or that their culture will be somehow "damaged" by the presence of migrants.[176] While perhaps a white, Christian, Latvian citizen may be perceived as less foreign than, for example, a Muslim refugee from Africa, it cannot be overlooked that Central and Eastern Europe's traditions, history, and cultures are indeed different from those of Western Europe. It is not implausible that EU citizens would view CEEC nationals as a mysterious and threatening Other from which Western European stability must be protected.

In light of Western Europe's insecurities about immigration in general, it is no wonder that many EU citizens reacted violently to the prospect of freedom of movement for CEEC Member States. Here was an enormous pool of potential immigrants, living in nearby countries far poorer than the EU average,[177] subject to sudden removal of all restrictions on their movement. This was a deeply threatening prospect to an EU populace already fearful of much more limited forms of immigration. Nor did it help matters that tabloids in EU Member States played upon these fears; the UK newspaper the Daily Express, for example, fea-

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170. Sadurska, *supra* note 117, at 2503.

171. Hathaway, *supra* note 92, at 720.

172. Van der Mei, *supra* note 57, at 829-30.

173. Katrin Bennhold, *Attacks in Spain put Migrants in Spotlight*, INT'L HERALD TRIB., Mar. 30, 2004, at 2.

174. Hathaway, *supra* note 92, at 720.

175. *Id.*

176. Harrison & McElroy, *supra* note 160; *see also* John Darnton, *As EU Expansion Nears, Apprehension Rises*, INT'L HERALD TRIB., Mar. 1, 2004, at 1.

177. The GDP level of the new Member States ranges from 74% of the EU average in Slovenia to a mere 35% in Latvia. It should be noted that Slovenia's GDP is higher than that of both Portugal and Greece. *See* MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 4.

tured an article proclaiming that "the Roma gypsies of Eastern Europe are heading to Britain to leech on us."[178] Some CEEC nationals publicly expressed concern that the Western European media's presentation of the free movement issue was "ignorant and offensive."[179] All of these factors created a "one-sided" public debate about migration that focused more on "common prejudices and national sensitivities" than fact.[180]

In addition to the debate on migration, Western European nationals also remain deeply divided over the extent to which their countries should continue down the path of greater European integration. Those who favor increased integration are commonly referred to as "Europhiles," while those in opposition are known as "Eurosceptics." Eurosceptics commonly cite the dangers of loss of sovereignty and national identity as likely to follow from any further expansion of EU institutions or power.[181] In the debate over the migration that could follow CEEC accession, Eurosceptics found a natural alliance with far-right, anti-immigration groups, like the French *Le Front National* of Jean-Marie le Pen, in opposing the possibility of a sudden influx of low-wage workers. Even more liberal groups may fall into the Eurosceptic camp through their desire to prevent depletion of the coffers of old Member States' generous welfare systems.[182] The presence and rhetoric of these factions naturally influence both the nature of public debate on migration and European enlargement and the policies pursued by old Member States. Thus, when the old Member States sat down at the accession bargaining table, the negotiations were influenced more by domestic political considerations—that is, a desire to please the powerful, growing anti-immigration and Eurosceptic factions back home—than by the actual effect freedom of movement would be likely to have upon immigration. The EU's prior laudatory rhetoric of the indispensable value of free movement to the project of European integration crumbled in the face of virulent public sentiment. In sum, with no effective counterargument to the "immigration-is-dangerous" viewpoint, "[m]igration realities were too rarely regarded in perspective."[183]

In reality, it is decidedly unlikely that "millions" of CEEC nationals would choose to migrate westward and flood EU labor markets.[184] It is further unlikely

178. Darnton, *supra* note 176.

179. BYRSKA, *supra* note 2, at 3.

180. *Id.* at 4.

181. Casey Burgess, *An Anglo-Nafta Union: Does It Make Sense?*, 8 L. BUS REV. AM. 685, 691 (2002). See also http://www.eurosceptic.com, a British website that advocates greater UK independence from the EU (last visited 3/11/06).

182. Tom Hundley, *Ethnic Divisions Threaten European Unity*, CHI. TRIB., Jan. 15, 2006, at C4.

183. IZABELA KORYŚ, INTERNATIONAL ORGANIZATION FOR MIGRATION, MIGRATION TRENDS IN SELECTED EU APPLICANT COUNTRIES: VOLUME III—POLAND: DILEMMAS OF A SENDING AND RECEIVING COUNTRY V (2004), *available at*: http://www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=3071. This study was funded by the European Commission as part of a project entitled "Sharing Experience: Migration Trends in Selected Applicant Countries and Lessons Learned from the 'New Countries of Immigration' in the EU and Austria." *Id.* at II.

184. Sadurksa, *supra* note 117, at 2503.

that any unduly large migration would occur at all. Both history and statistical reports support this proposition.

History demonstrates that there have been no mass migrations in Europe, despite chronic wage disparities between various countries.[185] "Although citizens of EU Member States enjoy the right to live and work anywhere within the EU, it is a well known fact that internal migration has not been very significant despite variations in living standards" among EU Member States.[186] Nor did the arguably more drastic political changes following the fall of the Soviet Union produce a large wave of migration westward; in fact, there was a decline of long-term emigration from Central Europe after 1989.[187] Furthermore, the experience of past EU enlargements demonstrated that no large-scale migration occurred,[188] in spite of the fact that some acceding countries were poorer than EU average and similar predictions were made about the possibilities of the devastating effects of a flood of migrants.[189] For example, the EU also invoked 7-year transitional measures limiting freedom of movement when Spain and Portugal acceded; in the absence of any overwhelming migration, the transitional period was subsequently shortened.[190] Strikingly, past accessions have demonstrated that migration tends to *fall*, not rise, after an enlargement.[191] Neither accession itself nor transitional periods have historically changed migration trends, small to begin with, at all.[192] In fact, after the accession of Spain and Portugal, migration actually flowed in the opposite direction (that is, from old Member States to the newly acceded Member States).[193]

The main explanation for this phenomenon is that accession to the EU typically spurs economic growth in the new Member State itself. Unrestricted access to the EU Single Market "provide[s] competitive EU firms with greater business opportunities, create[s] jobs, and raise[s] tax revenues for governments to spend

185. Christopher J. Cassise, *The European Union v. the United States Under the NAFTA: A Comparative Analysis of the Free Movement of Persons within the Regions*, 46 SYRACUSE L. REV. 1343, 1376-77 (1996). *But see* Phuong, *supra* note 32, at 648. Phuong states that massive migration from Eastern Germany to Western Germany and Austria helped produce the fall of the Berlin Wall. But this phenomenon can be at least partially explained by the fact that Germany had been once been a single country, and migrants already had linguistic, cultural and personal ties to make migration easier. This type of migration is not exactly on a par with more radical forms of international migration.

186. WEISS & WOOLDRIDGE, *supra* note 36, at 2.

187. Stola, *supra* note 143, at 141. Stola does note, however, that there appeared to be a rise of *short-term* migration following the fall of the Communism. *Id.* at 143.

188. *See* EU website, *supra* note 36.

189. Matthew Kaminski, Op-Ed., WALL ST. J. EUR., Apr. 30, 2004, at A10.

190. EU website, *supra* note 36; PRACTICAL GUIDE, *supra* note 134, at 4.

191. EU website, *supra* note 36. After the accession of Greece, Spain and Portugal, EU Member States witnessed a reduction in the number of migrant workers arriving from these countries. BERMANN ET AL., *supra* note 6, at 578. Linda Hantrais also concludes that the removal of formal barriers to freedom of movement has not resulted in widespread migrations of families. Linda Hantrais, *What is a Family or Family Life in the European Union?*, *in* THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 19, 29 (Elspeth Guild ed., 1999).

192. BYRSKA, *supra* note 2, at 3.

193. Kaminski, *supra* note 189.

on priority programmes."[194] This was especially true for Member States with "previously weaker economies," like Ireland, Spain, Portugal, and Greece.[195] Shortly prior to the May 2004 accession the EU anticipated that accession would have much the same effect for the ten new Member States; the European Commission estimated in November of 2003 that accession to the EU would provide new Member States with "up to one percent extra growth each year. . . during the first ten years of membership."[196] This means that new EU citizens do not need to migrate or to exercise freedom of movement in order to personally reap the economic benefits of EU membership. Instead, these benefits are available at home in the form of increased business and employment opportunities. Ironically, with more jobs and better pay where they already reside, CEEC nationals may in fact be *less* tempted to migrate westward than they would have been prior to accession.

Though there is no reason to think that the May 2004 enlargement will not follow the same pattern as previous enlargements, it is nevertheless possible "that models of previous enlargements may only be partially reliable."[197] However, additional evidence specific to the May 2004 enlargement further suggests that the actual number of CEEC nationals who choose to migrate westward will be small. A 2004 study on likely post-accession migration trends conducted by the European Foundation for the Improvement of Living and Working Conditions, an EU-agency based in Dublin, showed that only 1% of CEEC nationals of working age had a "firm intention" of migrating west. This amounts to approximately 220,000 people.[198] The study also concluded that two-thirds of the expected migration is likely to be temporary and "significant return migration" could be expected in the 10 years following enlargement, particularly if EU accession improves CEEC economies.[199] The Commission itself estimates that only about 335,000 people would migrate westward if full free movement were immediately available.[200] In addition, the Sapir Report, written by a group of independent experts invited by Commission President Romano Prodi to assess

194. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 7.
195. *Id.*
196. *Id.*
197. BYRSKA, *supra* note 2, at 3.
198. HUBERT KRIEGER, EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, MIGRATION TRENDS IN AN ENLARGED EUROPE: SUMMARY (2004), http://www.eurofound.eu.int/publications/files/EF0432EN.pdf [hereinafter MIGRATION TRENDS REPORT] (*cited in* EU website, *supra* note 36; BYRSKA, *supra* note 2, at 3; Kaminski, *supra* note 189). The study was based on a series of Eurobarometer surveys carried out in spring of 2002 in the 10 acceding countries, as well as the three candidate countries of Bulgaria, Romania and Turkey. The survey asked participants to indicate if they had a "'general inclination' to migrate," a "'basic' intention to migrate" or a "'firm intention' to migrate." 1% of survey participants responded that they possessed a firm intention to migrate over the next five years, while 4.5% indicated a general inclination to migrate. Thus, while as many as 4.5% could theoretically migrate, a number this high is "relatively unrealistic." The actual number of migrants is far more likely to track the 1% who expressed a firm intention to migration rather than the higher percentages who indicated only a general inclination to migrate. MIGRATION TRENDS REPORT, at 2.
199. MIGRATION TRENDS REPORT, *supra* note 198, at 5, 67.
200. European Commission Freedom Report, *supra* note 131.

various EU policies and propose strategies for future growth and stability, surveyed multiple studies conducted about the number of migrants likely to move, and also concluded the number was likely to be small in comparison to the size of the EU working population. Based upon the results from the studies surveyed, the Sapir Report concludes that for the first decade following the May 2004 enlargement, the number of actual migrants would vary from 1.5 to 4 million, which represents either 2–4.5% of the total population in the new Member States, or about 0.4–1.2% of the total EU population.[201] To put these figures into perspective, the EU currently accepts 1.5 million immigrants from non-EU countries *each* year.[202]

In addition, simplistic accounts of poor CEEC nationals eager to move west and sap the resources of EU Member States tend to presume that formal, legal barriers to migration alone prevent would-be migrants from moving. These accounts typically neglect to mention that a number of intangible, soft barriers prevent people from simply packing up and settling in another nation. Migration depends not only on employment opportunities and wage differentials, but also on multiple social and cultural factors.[203] Migrants face "social isolation caused by the language barrier, loneliness resulting from separation from one's family and cultural roots or loss of personal contacts and connections established in one's own country."[204] The appeal of higher wages may fade in light of the prospect of higher living expenses in wealthier Western European states and the necessity of negotiating "[a]dministrative 'red tape,'" like securing a visa or understanding the host Member State's pension system.[205] Another factor mitigating against migration and specific to migrants from Central and Eastern Europe is that CEEC culture is marked by a particular attachment to land; many CEEC nationals will therefore be especially reluctant to part with property that has belonged to their family for many generations.[206] Finally, migrants may simply not want to face the racism and xenophobia that could await them.[207] In sum, the decision to migrate to another country is difficult and does not entirely depend upon the existence or absence of formal barriers to movement. The sheer volume of illegal migration throughout the world lends ample support to this proposition.[208] It may be then that the difficulty involved in migrating to a new

201. SAPIR, *supra* note 128, at 131. The Sapir Report also suggested that most of the CEEC nationals who would be attracted to moving westward had already done so prior to accession. *Id.* at 131.

202. Kaminski, *supra* note 189.

203. SAPIR, *supra* note 128, at 131.

204. BYRSKA, *supra* note 2, at 3.

205. *Id.* at 4.

206. *Id.*

207. Handoll, *supra* note 29, at 37.

208. A theory exists that international migration will be at about the same level no matter how restrictive the immigration laws in place. The only difference is whether the migration is deemed legal or illegal. *See* KORYŚ, *supra* note 183, at IV ("[T]he interior dynamics of migration . . . will always take precedence [over state policies]. The difference is only in the degree of legality within which the economic activities of the migrants (usually labour) will happen."); *see also* Boeri, *supra* note 159. Boeri points out that "illegal migration grows when restrictions placed on legal mi-

country simply outweighs the potential economic incentives for a great number of the migrants that old Member State factions assume are so eager to stream westward.[209]

Not only is popular Western European sentiment likely mistaken about the number of CEEC nationals likely to migrate, but it is also mistaken about the value of any such potential immigration. Rather than regarding immigration with trepidation and hostility, an economically rational Western Europe should actually welcome the arrival of new workers. Ironically, old Member States actually *need* immigration and the labor it brings in order to keep their economies afloat.[210] This is true for two reasons.

First, the EU birth rate is falling drastically. A report on migration published by the European Commission in 2002 showed that the crude birth rate has nearly halved since 1960.[211] A separate 2004 Commission report on EU population statistics found that the birth rate in old Member States was insufficient not only for growth, but even to replace population lost through death.[212] In fact, without international immigration, the populations of some countries, including Germany, Greece, Italy, and Sweden, would actually be in decline.[213] Furthermore, the population of the EU is aging as citizens live longer. By 2020, 27% of the population of the old Member States is expected to be over 64 years of age, and thus retired.[214] These two factors add up to a severe shortage of labor, since there are simply not enough new workers to replace those that have retired or died. Experts are already projecting that "existing and future labour supplies within the EU will not be sufficient to meet labour market needs, at least in the

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gration are too tight." Thus, in the US, legal migration is 25% higher than in the EU while illegal migration is 25% lower, because "the U.S. has more realistic migration restrictions." This also means that the US receives more skilled migrants than Europe. *Id.*

209. *See* BYRSKA, *supra* note 2, at 3. "Such 'profit and loss calculation multiplied by the burden of obstacles faced by citizens of the new Member States is likely to be enough of an incentive to stay at home."

210. Craig Smith, *In Enlarged EU, A Need for Immigration*, INT'L HERALD TRIB., May 3, 2004, at 2.

211. In 1960, the EU birth rate was 20 births per one thousand inhabitants. In 2000, the rate was 11 per one thousand inhabitants. EUROSTAT, EUROPEAN COMMISSION, EUROPEAN SOCIAL STATISTICS: MIGRATION 9 (2003), *available at* http://epp.eurostat.cec.eu.int/portal/page?_pageid=1073,1135281,1073_1135295&_dad=portal&_schema=PORTAL&p_product_code=KS-BP-02-006 [hereinafter EUROSTAT MIGRATION STATISTICS]. The data for this report are collected in an annual questionnaire collectively administered by Eurostat (the EU statistics bureau), the United Nations Economic Commission for Europe, the United Nations Statistical Division, the International Labour Organisation, and the Council of Europe. *Id.* at 7. The report tracks migration data in old Member States and Switzerland, and provides some data for CEEC countries. *See also* BYRSKA, *supra* note 2, at 17.

212. EUROSTAT, EUROPEAN COMMISSION, POPULATION STATISTICS—DATA 1960-2003 73 (2004), *available at* http://epp.eurostat.cec.eu.int/portal/page?_pageid=1073,1135281,1073_1135295&_dad=portal&_schema=PORTAL&p_product_code=KS-BP-04-001.

213. EUROSTAT MIGRATION STATISTICS, *supra* note 211, at 10.

214. INTERNATIONAL ORGANIZATION FOR MIGRATION, WORLD MIGRATION 2003: MANAGING MIGRATION—CHALLENGES AND RESPONSES FOR PEOPLE ON THE MOVE 263 (2003), *available at* http://www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=2111[hereinafter IOM REPORT].

short-term."[215] Scientists project that the EU-15 will need half a million immigrants to fill labor shortages between 2005 and 2010.[216] In addition, old Member States have hefty pension and social security systems that need continuous funding through the wages and taxing of workers, particularly in light of the expected increase in retirees as the population continues to age.[217] Thus, Western Europe needs immigration to fill a shortfall of labor that already exists and to boost economies sure to flag without an influx of young workers.[218]

Second, old Member States are in need of cheap labor to fill low-paying jobs that many Western Europeans consider beneath them to accept.[219] In Spain, for example, Spanish nationals are reluctant to take low-paying jobs in fields like construction or tourism, despite the fact that these industries have recently spurred a great deal of economic growth and need workers to fill available positions.[220] In such cases, unskilled migrants would not "take jobs away" from deserving nationals, but would in fact fill shortages in sectors desperate for labor that current EU nationals are unwilling to provide. If migrants and nationals do not compete for the same jobs, then, logically, nationals should not feel threatened by the arrival of workers to cook their food, clean their bathrooms, and construct their homes. In fact, studies have shown that immigration has actually raised total levels of employment in some EU countries,[221] and that "economic migration has generally played a positive role in economic development."[222] EU-15 nationals can expect, therefore, to see benefits arising from migration due to the general boost the added labor will provide to the national economy.

The economic evidence against transitional measures is thus quite substantial. The summary of the report of the European Foundation for the Improvement of Living and Working Conditions states flatly that "[t]he overall volume of expected inwards migration after enlargement . . . is much less than predicted by some politicians and in the public debate. Most of the 'old' countries of the EU will be hardly affected."[223] If, then, a massive flood of workers is unlikely, and if those workers that do come perform valuable services that keep old Member State economies growing, social welfare systems stable, and Western EU citizens comfortable, then there is no economic justification whatsoever for the imposition of transitional measures. Economic common sense is a tough sell,

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215. IOM REPORT, *supra* note 214, at 263.
216. BYRSKA, *supra* note 2, at 17.
217. *Id.* at 17; Smith, *supra* note 210.
218. *See* Jamie Smyth, *Workers Unlikely to Overrun State*, IRISH TIMES, Apr. 30, 2004, at 3.
219. Heaton, *supra* note 75, at 670.
220. Bennhold, *supra* note 173.
221. *See id.*
222. IOM REPORT, *supra* note 214, at 263.
223. MIGRATION TRENDS REPORT, *supra* note 198, at 5, 67. The report similarly concluded that negative effects on the labor market would be concentrated in certain regions and specific sectors of the economy, and that any detrimental effects on the housing market would be lessened by the likelihood of a high proportion of young, single migrants who would put less pressure on the housing market than would larger families. *Id.* at 5.

however, to those Western Europeans who regard immigration in light of high unemployment rates and the perceived slipping away of their culture. What EU-15 nationals must "understand is that they [a]re getting more out of immigrants than vice versa."[224] Even the Sapir Report concluded that there is no economic need for transitional measures.[225] In light of both history and the statistical evidence complied by the EU itself and various independent experts, it seems clear that the transitional measures are based on little more the desire of the politicians negotiating the conditions of accession to pander to xenophobic and Eurosceptic domestic constituencies. While transitional measures may serve an intangible purpose by reassuring Western Europeans about the perceived dangers to their culture by the pace at which integration is proceeding, they are not based on any empirically verifiable economic need to prevent migration and thus serve no economic purpose.

B. Transitional Measures Take the Perspective of Old Member States at the Expense of New Member States

As noted in Section III.A, the pre-accession debate over free movement for workers and the need for transitional measures focused almost exclusively on old Member States' fears of an influx of cheap CEEC labor. But more was missing from the discussion than simple refutations of Western European points. The enlargement negotiations also failed to take into account the ways in which the new right to freedom of movement would affect new Member States in particular.[226] The introduction of freedom of movement is a radical change for new Member States for a variety of reasons, yet old Member States failed to consider the set of issues unique to the situation of the CEEC countries. Rather, EU "expansion rhetoric all too often appeals to the fears of the residents of current EU members while side-lining the concerns of their new neighbours."[227] Rather than concentrating exclusively on ways to protect themselves from threats unlikely to materialize, the old Member States should have devoted more attention to aiding new Member States in the potentially difficult transition to compliance with EU policies and successful implementation of freedom of movement.

One of the most important changes that accession to the EU brings is that CEEC Member States now represent the easternmost border of the EU. This is important for two reasons.

First, accession will have a serious effect on the local economy in eastern borderland areas. The relaxation of controls at new internal EU borders necessarily means that controls at the new external borders must become more strin-

224. Bennhold *supra* note 173 (quoting Susana Garcia-Cervero, an economist for Deutsche Bank in London).

225. SAPIR, *supra* note 128, at 131.

226. PIOTR KAZMIERKIEWICZ, TURNING THREATS INTO OPPORTUNITIES: IMPACT OF THE EXPANSION OF SCHENGEN *ACQUIS* ON THE NEW BORDLERANDS 18 (2003).

227. *Id.* at 18.

gent. In many of these eastern areas, such as between the border of Poland and the Ukraine, there exists a significant "shadow economy" of illegal migration and seasonal work that has provided significant economic benefits to poor communities.[228] Stringent EU border policies have rendered these types of economic activities much more difficult to carry on post-accession, to the detriment of residents in borderland areas who are dependent on cross-border trade. Affected residents are mostly "small-scale entrepreneurs who pose little threat to the labour or goods markets of the Union," but who cannot continue in their line of work once accession effectively eliminates their market.[229] Some experts have recommended that the EU introduce "compensatory measures" to provide aid to areas whose economies are in danger of suffering a downturn as a result of accession, but thus far the EU has not chosen to heed such calls.[230] Moreover, certain ethnic minorities are spread across bordering states; when one of these states accedes to the EU, it suddenly becomes a great deal more difficult for families and friends to visit one another. For example, there is a village inhabited by ethnic Hungarians located on the border between Slovakia and the Ukraine. Overnight, Slovakia became an EU Member State that guards a newly strict EU external border. Hungarian families living on the Ukrainian side of the border are now obliged "not only to apply for a visa, but also to travel 300 km to the closest authorized border crossing point, each time they want to visit their relatives living across the road."[231] As of the date of accession, no special EU legislation had been passed to address the special concerns of local border traffic at new external borders.[232] A barrier has thus been erected between the EU and its new neighbors to the east, hardly a move calculated to win popular goodwill among affected populations.[233] Such problems are arguably inevitable in the case of accession, but this does not alleviate the responsibility of old Member States to take steps to address and alleviate the complications likely to arise at the new borders.

The second result of the fact that new Member States now control the EU's eastern border is that new Member States will now be in charge of policing the westward flow of goods and persons, both legal and illegal, into the EU. Article 35 of the Act of Accession provides that the EU will supply € 900M to assist new Member States in upgrading their administrative and technical capabilities at border-crossing sites.[234] However, the resources needed for actual border controls only tell part of the story. With accession to the EU, many CEEC

228. *Id.* at 19.

229. *Id.*

230. *Id.* at 59-60. For example, new Member States need assistance to improve "basic infrastructure," reduce "corruption in the ranks of the border staff," and provide "reliable travel documents" to show the benefits of legal movement. *Id.* at 60.

231. BYRSKA, *supra* note 2, at 7.

232. *Id.* Prior to accession, the Commission did propose a regulation to provide special visas for local border traffic. Despite new Member States' ardent efforts to get an agreement in place prior to accession, no text could be agreed on prior to accession.

233. *Id.* at 8.

234. *Id.* at 5.

Member States will become, for the first time, not only sources of immigration but a pathway by which immigrants seek to gain access to desirable Western European states as well as a permanent destination for immigrants.[235] In addition, due to the safe third country policy, CEEC countries will have the sole responsibility for processing the asylum applications for refugees who arrive in the EU through its eastern borders. This group will include a high number of migrants arriving from countries located even deeper in Eastern Europe, like Russian or the Ukraine.[236] This allows Western European states to shift the asylum burden eastward, to countries that have no experience in and often are not adequately equipped to effectively process massive numbers of immigrants.[237] It is entirely possible that genuine refugees will not be identified and granted asylum in states with little experience in processing claims. This could result in a smaller number of refugees being allowed into the EU altogether, since a refugee whose application was denied in Lithuania will not be permitted to file a second application in Sweden.[238] This is a convenient result for Western European states eager to limit the funds spent on asylum processing and reluctant to allow foreigners to settle within their borders.[239] It has also been suggested that old Member States are seeking to "establish a filter or buffer zone between them and the countries of emigration."[240] New Member States will require assistance, both in terms of funds and technical know-how, in order to properly meet this new challenge and provide sufficient levels of protection to genuine refugees. Such assistance has not been forthcoming from old Member States.[241]

In addition to ignoring the new challenges of guarding the easternmost border of the EU, old Member States also failed to acknowledge yet another potential side effect of the implementation of freedom of movement for workers specific to new Member States. CEEC countries are in danger of experiencing a "brain drain" in which a large number of young, highly educated CEEC nationals move west to look for higher-paying jobs.[242] This type of migration would not place a burden on old Member States, but would instead negatively impact much-needed development in new Member States, who would have trouble bringing their economies in line with those of Western Europe without adequate numbers of skilled workers.[243] The study on migration trends conducted by the

235. KORYŚ, *supra* note 183, at III.

236. Phuong, *supra* note 32, at 641.

237. *Id.* at 650. In fact, 15 years ago none of the CEECs had any laws on asylum or immigration at all, since there was no immigration whatsoever under the Soviet regime. *Id.* at 644.

238. *See supra* Section I.B.

239. For an excellent discussion of this issue, see Phuong, *supra* note 32.

240. *Id.* at 663 (quoting S. Lavenex, *Asylum, Immigration, and Central Europe: Extending Schengen Eastwards*, 3 EUR. FOR. AFF. REV. 275, 290 (1998)).

241. *See generally* KAZMIERKIEWICZ, *supra* note 226.

242. BYRSKA, *supra* note 2, at 3; EU website, *supra* note 36.

243. Oana Lungescu, *EU Newcomers 'Risk Brian Drain,'* BBC NEWS, Feb. 27, 2004, http://news.bbc.co.uk/1/hi/world/europe/3492668.stm. The summary of the Migration Trends Report similarly concluded that "[t]he receiving countries of the EU can expect a high quality labour supply of young, qualified and mainly unmarried people, which should improve its short-term economic and its long-term socio-economic base through an improved demographic structure. This would

European Foundation for the Improvement in Living and Working Conditions found that the new Member States could lose 3-5% of nationals who have completed third-level education, as well as over 10% of their students. Between 2 and 3% of new Member State university graduates and students have expressed a firm intention to migrate west.[244] CEEC doctors and nurses may also be drawn westward by the prospect of higher salaries, leaving shortages of health care workers in their own countries.[245] Some Western European countries, including Germany and France, have even begun actively recruiting science students and researchers from Eastern European countries.[246] Despite the danger that CEEC countries will lose their best and brightest young talent, no legislation has been passed or policy promulgated at the EU-wide level to address the needs of new Member States in this regard. Moreover, it is difficult to see how old Member States stand to gain anything by supporting the imposition of measures designed to protect against brain drain, as their economies will be the primary beneficiaries of such labor flow.

In sum, accession negotiations failed to take into account the specific challenges of asylum, the borderlands economy, and brain drain confronting new Member States. Instead, the negotiations and resulting transitional measures were unduly preoccupied with the (largely imaginary) labor threats facing old Member States, a highly ironic result given the relative economic positions of Western and Central/Eastern Europe. It would have made for a far fairer and more equal partnership if accession negotiations and transitional measures had taken into account the unique perspective of new Member States, whose fragile economies are in far greater need of protection than the more robust Western European economies. The EU should reverse course and implement measures to help new Member States successfully negotiate the difficulties of accession they now face.

C. Transitional Measures are Incompatible with EU Free Movement Rhetoric

Transitional measures, with their xenophobic rationale and disproportionate focus on the needs of old rather than new Member States, are incompatible with the official EU rhetoric of freedom of movement and expansion. EU-15 states profess a deep commitment both to furthering European integration through freedom of movement and to welcoming new Member States to the Union, but the refusal of old Member States to act in accordance with their expansive and lofty pronouncements of rights and unity calls into question their dedication to these ideals.

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seem to offer more opportunities than risks for the old EU Member States." MIGRATION TRENDS REPORT, *supra* note 198, at 5.

244. MIGRATION TRENDS REPORT, *supra* note 198, at 3.

245. Lungescu, *supra* note 243.

246. Andrew Scott, *Brain Wars in Europe: EU Countries Compete for Scientists from new Member States*, THE SCIENTIST, Mar. 15, 2004, *available at* http://biomedcentral. com/ new/ 200403160/02.

Freedom of movement has long been declared a goal of fundamental importance to EU integration.[247] For example, the guide to free movement after enlargement published by the Commission begins by positing that freedom of movement for persons is "one of the most important expressions of our European citizenship."[248] Freedom of movement is considered a fundamental right of EU nationals, enshrined in the EC Treaty as one of four freedoms that serve as the building blocks of a unified internal market and as a tool to advance political integration.[249] On a more conceptual level, freedom of movement is necessary to create a feeling of true unity among EU nationals because it brings them into contact with each other, facilitates cross-cultural discussion and interaction, and allows individuals to participate in a Union-wide activity in a deeply personal way. Transitional measures are incompatible with the historical and conceptual importance of freedom of movement in the EU system. Because a lack of freedom of movement for workers will prevent many new EU citizens from fully participating in and enjoying the free movement rights that are available, the transitional measures belie the EU's purported commitment to free movement and integration. Furthermore, the poorest and most disadvantaged citizens of the new Member States will bear the brunt of this exclusion, since they will be least able to take the opportunity to travel or study in other EU Member States. The refusal of old Member States to honor their purported commitment to freedom of movement is inconsistent with its exalted status in EU ideology.

The symbolic ceremonies and grandiloquent language employed by EU leaders surrounding the May 2004 accession are little more than bombastic puffery if the EU refuses to follow through on its message of welcome by actually permitting CEEC nationals to work in their countries and exercise their rights as EU citizens on terms equal to EU-15 nationals. Romano Prodi's declaration that Europeans "are no longer kept apart by phony ideological barriers" seems especially ironic in that the lack of full freedom of movement of persons for new Member States is certainly a barrier between Member States, whether termed "ideological" or not.[250] The lack of free movement for workers functionally prevents new EU citizens from moving from one country to another, despite their clear right to do so under EU treaties and legislation. Xenophobic exclusion of new EU citizens is no way to welcome them to the Union, nor is it a prudent way to usher in a new area of transnational cooperation and integration, as it risks creating resentment amongst new EU citizens. Messages of unity and welcome will fall flat if not accompanied by simultaneous action designed to achieve these ideals. Transitional measures and the rationale behind them *create* barriers rather than eliminate them. They are incompatible with the public image of unity the EU wishes to present.

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247. *See supra* Section I.B.
248. PRACTICAL GUIDE, *supra* note 134, at 3.
249. EC Treaty, *supra* note 9, art. 3(c).
250. *Welcome to a New Europe*, *supra* note 4.

To resort to an old adage, the EU's actions speak louder than its words. Transitional measures are inconsistent with the exalted rhetoric in which EU leaders couch their discussion of both enlargement and freedom of movement. The EU's refusal to act in accordance with the values it professes may lead citizens of new Member States to question the strength of its dedication to these values.

D. Transitional Measures Prevent the Creation of a Common European Identity

More than preventing the actual displacement of many CEEC nationals, transitional measures will almost surely have a serious psychological effect upon new EU citizens. Before the development of free movement in the EU, "Europe had a culture of passports, visas, and import licenses."[251] The dismantling of borders and historical enmities contributed to a sense of European unity, a sense of sameness rather than difference. The ability to travel easily and work in other EU Member States without facing national discrimination helped to further engender a culture of equality. The nascence of European citizenship had a similar effect, and was explicitly linked to freedom of movement of persons by the Maastricht Treaty. [252] Transitional measures act to exclude nationals of new Member States from participating in these symbolic rites of membership.

Accession to the EU is especially symbolic in the case of CEEC states because of their long isolation from Western Europe during the Cold War. Their acceptance into the EU represents both their return to the European community and the success of the democratic and economic reforms they have undertaken in relatively short order.[253] "For a majority of new EU citizens only the abolition of internal borders will be a true symbol of belonging to the Union."[254] Similarly, new Member States will not feel that they have been accorded full membership rights if they are treated like "second-class state[s]" or junior members.[255] However, the imposition of transitional measures indicates that the EU is not yet ready to fully acknowledge the progress made by the CEECS and accept them on equal terms. The EU also runs the risk "of creating first and second class EU citizenship," where Western European citizens may remain and work where they please, while CEEC citizens face limitations based on distrust, discrimination, and xenophobia.[256]

In short, the psychological barriers erected by transitional measures will impede the development of a common European identity. Transitional measures will undermine the development of a true loyalty towards the EU on the part of CEEC nationals who feel excluded and unwelcome. They foreclose the partici-

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251. Guy Pevtchin, *The E.C.—An Example of Breaking Down the Barriers of Sovereignty—Implications for Canada and The United States*, 24 CAN.-U.S. L.J. 89, 90 (1998).
252. Maastricht Treaty art. 18.
253. Phuong, *supra* note 32, at 641.
254. BYRSKA, *supra* note 2, at 5.
255. Darnton, *supra* note 176.
256. BYRSKA, *supra* note 2, at 8.

pation of CEEC Member States in important expressions of EU identity and citizenship through freedom of movement by telling CEEC nationals that they are not free to interact with Western European nationals on an equal basis, and that the Union is not as interested in protecting their rights and interests as it is in protecting the rights and interests of old Member States. Transitional measures promulgate a culture of distrust and closure rather than interdependence and opening. They do not represent a good-faith effort to embark on a partnership based on respect and equality; rather they seem aimed at preserving Western Europeans' historic political dominance and economic superiority. Transitional measures will impede EU efforts to build a strong, cohesive union with citizens loyal to its ideals and united in a common sense of identity.

V.
CONCLUSION

This paper has sought to call into the question the wisdom of imposing transitional measures that limit the ability of CEEC nationals to exercise freedom of movement after the May 2004 accession. Because freedom of movement, particularly for workers, is so fundamental a component of EU citizenship and identity, transitional measures should not be imposed unless there is substantial economic justification for doing so. Pre-accession evidence does not justify the imposition of transitional measures; the post-accession evidence that is available thus far seems to point to an identical conclusion. As predicted prior to accession, initial reports indicate that there has been no massive flow of workers westward.[257] The European Citizen Action Service released a report in August of 2005 that found no massive influx of labor had occurred. For example, in England, new CEEC nationals amounted to just 0.4% of the total working population, five to ten times less than pre-accession forecasts had predicted.[258] Moreover, the report demonstrates that the limited migration that did occur did not increase the unemployment rate of old Member State nationals, because "the host economies had the capacity to absorb the new labour force."[259] In addition, the European Commission released a report in February 2006 finding that "[d]espite fears expressed on the occasion of successive enlargements free movement of workers has not led to disruption of national labor markets."[260]

257. Preliminary evidence suggests that "[t]here has been no massive flow of workers to the West." *Fears of Brain Drain from Eastern Europe Haven't Been Borne*, TORONTO STAR, Mar. 11, 2005 (quoting Dariusz Milczarek, director of the Center for Europe at Warsaw University).

258. Julianna Traser, European Citizen Action Service, *Report on the Free Movement of Works in EU-25: Who's Afraid of EU Enlargement?* 11 (2005), *available at* http://www.ecas.org/file_uploads/786.pdf [hereinafter *Who's Afraid of EU Enlargement?*].

259. *Id.* at 29.

260. European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006)* 15, *available at* http://europa.eu.int/comm/employment_social/news/2006/feb/report_en.pdf. Nor can transitional measures be credited with limiting migration. Sweden and the United Kingdom, the two countries which chose not to impose temporary restrictions on mobility, experienced "comparable if not lower" migration than into other old Member States. *Id.* at 9. Growth in migration rates in all Old

The Commission also found that the employment rate of nationals of many old Member States, including Austria, France, the Netherlands, Spain, and the United Kingdom, actually *increased* after enlargement, and that the skills brought to these countries by workers from new Member States complemented rather than substituted for skills of old Member State nationals.[261] Finally, the Commission noted the detrimental effects of continuing transitional measures, including "a proliferation of undocumented work, bogus 'self-employed' work, and fictitious service provision" in order to circumvent migration restrictions, and called upon old Member States to "not only take due account of the statistical evidence but also to address a positive message to their citizens as to the prospects of free movement across the European Union" when considering whether to extend transitional measures.[262]

Much of the Western European public, however, remains unconvinced. In 2005, voters in France and the Netherlands rejected the proposed European Constitution by wide margins in public referenda, in part because of fears of a flood of unwanted laborers.[263] In France, Eurosceptics rallied behind the symbol of the "Polish plumber," who would settle in and leave French plumbers unemployed.[264] At the same time, the riots that took place in low-income French suburbs in November of 2005 demonstrated the anger that many immigrants feel over the perceived racism and lack of opportunity they have encountered.[265] It is clear that the debate over migration taps into European nations' deeper ambivalence about their evolution from a number of separate, homogenous peoples into multicultural, multiethnic societies.[266] Immigration remains a crucially di-

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Member States remained stable from the two years immediately preceding enlargement. *Id.*

261. *Id.* at 11-12. The Commission's report also cited evidence contradicting many of the fears expressed by old Member States prior to accession, including statistics confirming that CEEC migrants had not "caused any surge in welfare expenditure" in old Member States and may have had "positive effects on labour markets [in old Member States] by relieving labour shortages in certain areas." *Id.* at 5, 13. In addition, the Commission noted that enlargement had brought positive economic growth to new Member States, brightening prospects for CEEC nationals and "suggest[ing] that there is no reason to expect increased pressure to move outside [CEEC] countries." *Id.* at 10.

262. *Id.* at 5, 15.

263. Craig Whitlock, *French Voters Reject European Constitution*, WASH. POST, May 30 2005; Marlise Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005. Despite periodic calls to revive the Constitution, there does not seem to be much hope that it will ever be ratified in its current form. David Rennie, *EU Constitution is Dead, Says Dutch Minister*, DAILY TELEGRAPH, Jan. 12, 2006.

264. Lauren Frost, *'Polish Plumber' Becomes Symbol of French EU Fears*, CHI. SUN TIMES, May 24, 2005. ECAS's recent report noted that "[a]ttempts to point out the marginal nature of post-enlargement labour flows, or the fact that France did not become the primary destination of migrants remained futile while the counter-argument of the 'Polish plumber' convinced the public." *Who's Afraid of EU Enlargement?*, *supra* note 259, at 17.

265. Mark Landler & Craig S. Smith, *French Officials Try to Ease Fear as Crisis Swells*, N.Y. TIMES, Nov. 8 2005. In fact, most rioters were of North African ancestry, and many had been born in France. Nevertheless, the anger felt by the rioters and the French government's official response to the unrest demonstrates the tension that exists between the French elite and segments of the population popularly perceived as "non-French" or "Other."

266. Tom Hundley, *Ethnic Divisions Threaten European Unity*, CHI. TRIB., Jan. 16, 2006, at C4.

visive issue in national politics and elections in Western European nations.[267] The fears and reactions that surfaced regarding the May 2004 accession will continue to inform public debate over the extent of future European integration and enlargement. Romania and Bulgaria are set to join the EU on January 1, 2007,[268] and the EU has also taken the especially controversial step of opening accession negotiations with Turkey.[269]

Despite persistent tensions between old Member State nationals and migrants, there may be hope yet for the free movement aspirations of CEEC nationals. With the approach of April 30, 2006, the end of the first two-year period and the deadline for old Member States to decide whether to renew transitional measures for an additional three years, already some old Member States, including Spain, Finland, Portugal, and Greece, are considering easing or lifting labor restrictions altogether.[270] Other old Member States should follow their lead and end to transitional measures as soon as possible.[271] Furthermore, old Member States "should not be allowed to extend their restrictions further than issues of access to their labor market."[272]

In contrast, the EU should take affirmative action to aid new Member States to further improve their ability to properly handle asylum claims; reduce the risk of brain drain by creating incentives for scientists, students, and doctors to continue working in CEEC states; and provide programs and financial assistance to borderland regions that may be suffering a post-accession economic downturn. Rather than spending time, energy, and money erecting new barriers

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267. *See, e.g.*, *Immigration on Election Agenda After Rabbitte Taps Into Politics of Fear*, THE SUNDAY INDEPENDENT, Jan. 22, 2006.

268. *Supra* note 126. It is possible, however, that the accession of Bulgaria and Romania will be postponed until 2008. The Commission will review the countries' success in implementing democratic and economic reforms in April or May of 2006, at which point it will recommend postponement of accession should it find either country to be "manifestly unprepared." Commission Press Release IP/05/1334, *Bulgaria and Romania Move Closer to Accession Goal*, Oct. 25, 2005, *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1344&format=HTML&aged=0&language=EN&guiLanguage=en. Already Eurosceptic factions in certain Western European nations, including France and the Netherlands, have expressed uneasiness about the progress that still needs to be made before Bulgaria and Romania will be permitted to accede. Mark Beunderman, *Public Opinion Could Delay EU entry of Romania and Bulgaria*, EU OBSERVER, Feb. 16, 2006, http://euobserver.com/9/20926.

269. Elaine Scolino, *Turkey Advances In Its Bid to Join European Union*, N.Y. TIMES, Oct. 7, 2004. The issue of Turkey's accession is particularly contentious because Turkey is large, poor and overwhelmingly Muslim. Many old Member State nationals perceive the cultural differences between Turkey and Western European to be much greater than those between Western and Eastern Europe, and worry that Turkey does not share the same liberal, democratic values. Already Member States are discussing the possibility of permanent restrictions on the free movement of Turkish citizens should Turkey's candidacy prove successful. *See id.* For a thorough analysis of the issues surrounding Turkey's potential accession to the EU, as well as Turkey's value to the West as a strategic link to the Middle East, see Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion*, 23 FORDHAM INT'L L.J. 606 (2000).

270. *Member States Ponder Lifting Labour Market Restrictions*, EURACTIV, Jan 28, 2006, http://www.euractiv.com/Article?tcmuri=tcm:29-151867-16&type=News.

271. Byrska recommends that old Member States end transitional measures before the conclusion of the first 2 year period. BYRSKA, *supra* note 2, at 17.

272. *Id.* at 19.

between Western and Eastern Europe, the EU should redirect resources towards integration initiatives, public information campaigns to inform all EU citizens of their rights, and programs that combat racism and xenophobia while promoting greater cross-cultural acceptance and respect.[273] This will allow new Member States and their citizens to feel welcome and equal to those already part of the EU, and will promote the creation of a common European identity. As Zdenek Skromach, the Labor Minister for the Czech Republic has stated, "[t]he real interest in working abroad is not large . . . [i]t is rather a question of the feeling that people are denied some rights."[274] The persistence of first and second classes of citizenship serves to increase divisiveness, resentment, and a sense of inequality between old and new Member States. Only by allowing full freedom of movement to all its citizens, regardless of national origin, will the EU be able to sow the seeds of loyalty and harmony necessary to continue on the path towards greater strength, unity and cohesion.

273. *See* IOM REPORT, *supra* note 214, at 264; KORYŚ, *supra* note 183, at VI; BYRSKA, *supra* note 2, at 18.

274. *Member States Ponder Lifting Labour Market Restrictions*, EURACTIV, Jan 28, 2006, http://www.euractiv.com/Article?tcmuri=tcm:29-151867-16&type=News.

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Methods and Approaches in Choice of Law: An Economic Perspective

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Methods and Approaches in Choice of Law: An Economic Perspective

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I. INTRODUCTION

From an economic point of view, legal orders fulfill two basic functions: first, they provide possessive security and, second, they guarantee transactional security.[1] Possessive security exists where property rights are clearly assigned to individuals and where those individuals can be sure that their rights will be protected against intrusion by third parties. Transactional security exists where individuals are ensured that promises to transfer property rights will be kept. In the context of domestic transactions, the national legal order and the enforcement mechanism of the one involved state usually provide both possessive and transactional security.[2] Special problems, however, occur in the context of international transactions: those transactions, by definition, touch on

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1. *See* Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. ORG. 5 (1985); Dieter Schmidtchen, *Territorialität des Rechts, Internationales Privatrecht und die privatautonome Regelung internationaler Sachverhalte*, 59 RabelsZ 56, 69 (1995).

2. JAMES M. BUCHANAN, THE LIMITS OF LIBERTY. BETWEEN ANARCHY AND LEVIATHAN 68-70 (1975); Kronman, *supra* note 1, at 28; Schmidtchen, *supra* note 1, at 69; Hans Jörg Schmidt-Trenz & Dieter Schmidtchen, *Private International Trade in the Shadow of the Territoriality of Law: Why Does It Work?*, 58 S. ECON. J. 329, 329 (1991).

more than one legal order and on the enforcement mechanisms of more than one state.[3] Very often the different legal orders involved define property rights and the requirements for their transfer in different and – worse – incompatible ways. Furthermore, different states may refuse to recognize and enforce property rights that have been created under a different legal order. As a result of the absence of a world state, a world legal order and a world enforcement mechanism, both possessive and transactional security are significantly reduced in international as opposed to domestic transactions.[4]

The deficit in both possessive and transactional security has been discussed by lawyers – albeit under different headings – for more than 800 years. Ever since the Middle Ages it has primarily been tackled by the rules of what today is called private international law or choice of law.[5] Those rules determine the applicable law in cases that involve more than one state and, thus, designate the legal order that will regulate the existence and the transfer of property rivhts. Down to the present day, private international law has developed into a sophisticated system discussed at length in countless legal treatises, books, commentaries and law review articles. However, compared with other areas of law, it has essentially remained untouched by economic theory. In fact, it has been covered only by a little bit more than a handful of law and economics scholars.[6] And to the extent that it has been covered, the focus has been on

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3. Schmidtchen, *supra* note 1, at 69-70; HANS JÖRG SCHMIDT-TRENZ, AUßENHANDEL UND TERRITORIALITÄT DES RECHTS. GRUNDLEGUNG EINER NEUEN, INSTITUTIONENÖKONOMIK DES AUßENHANDELS 31-32 (1990); Schmidt-Trenz & Schmidtchen, *supra* note 2, at 329.

4. Schmidtchen, *supra* note 1, at 69-70; SCHMIDT-TRENZ, AUßENHANDEL UND TERRITORIALITÄT DES RECHTS, *supra* note 3, at 31-32; Schmidt-Trenz & Schmidtchen, *supra* note 2, at 329.

5. In the common law world, the provisions that determine the applicable law are usually referred to as choice of law rules. They are seen as part of the broader area of conflict of laws that additionally encompasses provisions on jurisdiction to adjudicate and recognition and enforcement of foreign judgments. In civil law countries, in contrast, the provisions dealing with the applicable law have been referred to as private international law ever since the field became the object of scholarly writing. In the following article I will use both terms interchangeably. For a discussion of the terminology, see EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1-3 (2004); SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR TAYLOR VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 3, 6 (2003).

6. *See, e.g.*, Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883 (2002); Horatia Muir Watt, *"Law and Economics": quel apport pour le droit international privé?*, *in* ÉTUDES OFFERTES À JACQUES GHESTIN - LE CONTRAT AU DÉBUT DU XXIE SIÈCLE 685-702 (Gilles Goubaux, Yves Guyon & Christophe Jamin eds., 2002); Horatia Muir Watt, *Aspects Economiques du droit international privé*, 307 RECUEIL DES COURS 25 (2004); Erin A. O'Hara, *Opting out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551 (2000); Erin A. O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L. J. 941 (2002); Erin A. O'Hara & Larry E. Ribstein, *Interest Groups, Contracts and Interest Analysis*, 48 MERCER L. REV. 765 (1997); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000); Erin A. O'Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, *in* ENCYLOPEDIA OF LAW AND ECONOMICS vol. V, 631-60 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000); Francesco Parisi & Erin A. O'Hara, *Conflict of Laws*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW I 387-95 (Peter Newman ed.,

specific topics such as the applicable law in contracts, torts or product liability. The underlying fundamental issues of private international law that determine the general design of choice of law rules and that have been the focus of vigorous legal debates over the last several hundred years have largely been skipped: should choice of law rules of law allow application of foreign law or should they advise courts to adhere to application of forum law? Should choice of law rules determine the applicable law by choosing the law of one of the states involved or by crafting new substantive rules? Should choice of law rules define the spatial reach of different substantive laws or should they assign legal relationships to a particular legal order? Should choice of law rules account for the quality of the substantive law or should they rather ignore the outcome of individual cases? Should choice of law rules provide for legal certainty or rather flexibility?

In this article I will try to answer these questions by looking at choice of law from an economic perspective. More specifically, I will try to determine the efficient design of choice of law rules by analyzing the costs and benefits of existing or proposed approaches to choice of law. However, before going into the details two remarks are in order: first, I will determine the efficient design of choice of law rules from the perspective of a single benevolent and well-informed global legislator that aims for global welfare. I will ignore the fact that choice of law today is a matter of national law and as such subject to strategic interactions within and between states. Although this approach is simplistic, it will provide a first insight into the preferable design of choice of law rules.[7] Second, all along the analysis I will assume that international transactions today cannot happen without some form of choice of law rules, i.e., rules that determine the applicable law in cross-border cases. Even though it might be that other means such as uniform substantive rules or private cooperative arrangements are better suited to deal with the problems arising in international transactions from an economic point of view[8] there is no reason to believe or hope that such mechanisms will replace national choice of law rules in the near future.[9] Irrespective of whether a development towards more uniformity of

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1998); Hans-Bernd Schäfer & Katrin Lantermann, *Choice of Law from an Economic Perspective*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 87 (Jürgen Basedow & Toshiyuki Kono eds., 2006); Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L. L. 1 (2001); MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS (2001).

7. This approach is taken by most law and economics scholars in choice of law. *See, e.g.*, Guzman, *Choice of Law: New Foundations*, *supra* note 6; O'Hara & Ribstein, *From Politics to Efficiency in Choice of Law*, *supra* note 6; Schäfer & Lantermann, *Choice of Law from an Economic Perspective*, *supra* note 6; WHINCOP & KEYES, *supra* note 6.

8. This view is, for example, taken by Schmidtchen, *Territorialität des Rechts*, *supra* note 1, at 107; SCHMIDT-TRENZ, AUßENHANDEL UND TERRITORIALITÄT DES RECHT, *supra* note 3, at 282; Schmidt-Trenz & Schmidtchen, *Private International Trade in the Shadow of the Territoriality of Law*, *supra* note 2, at 336.

9. Jürgen Basedow, *Lex Mercatoria and the Private International Law of Contracts*, *in Economic Perspective*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 57 (Jürgen Basedow & Toshiyuki Kono eds., 2006).

substantive laws or towards more private cooperative arrangements would be desirable from an economist's perspective, it is unlikely to happen. As a result, I will presume the need for choice of law rules.

II.
THE STARTING POINT: LEX FORI OR LEX CAUSAE?

The first question that any choice of law theory has to answer is whether courts – when faced with cases that involve the legal orders of more than one country – should apply their own law or be open towards application of the law of a foreign country. Today, most legal systems follow a *lex causae* approach which requires courts to make a choice between forum and foreign law. However, throughout the history of private international law a *lex fori* approach that confines courts to application of their own law has had a substantial number of followers.

A. The Legal Debate

1. The Early Dominance of the Lex Fori

The origins of the *lex fori* approach can be traced back as far as to the 4th century B.C.[10] At that time the Greek city-states began to engage in trade with one another, which inevitably led to disputes involving members of different city-states. In order to deal with these disputes the Greeks developed several strategies, among them the conclusion of treaties between the city-states and the creation of special courts for commercial and maritime matters. However, due to the basic unity of Greek law, the dominant strategy was a *lex fori* approach that provided for application of each city-state's law in its own courts.[11] Application of forum law was also the dominant strategy for cross-border transactions in England in the aftermath of the Norman Conquest. The English common law courts – that existed next to specialized maritime and commercial courts, which had their own way of dealing with multistate cases[12] – refused to apply the law of a different country and applied their own law, the common law, instead.[13]

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10. For a detailed account, see GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 162 (2004); Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 420-22 (1984); FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 6-8 (1993); SCOLES et al., CONFLICT OF LAWS,, *supra* note 5, at 9; HESSEL E. YNTEMA, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 299-303 (1953).

11. KEGEL & SCHURIG, *supra* note 10, at 145; Juenger, *A Page of History*, *supra* note 10, at 420; JUENGER, MULTISTATE JUSTICE, *supra* note 10, at 7; SCOLES et al., CONFLICT OF LAWS, *supra* note 5, at 9.

12. *See infra* Part II.

13. For a detailed account, see JUENGER, *A Page of History*, *supra* note 10, at 436-41; JUENGER, MULTISTATE JUSTICE, *supra* note 10, at 22-24; KEGEL & SCHURIG, *supra* note 10, at 160-62; Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, *in* LAW: A CENTURY OF PROGRESS vol. III, 342-454 (William A. Reppy ed., 1937).

The reason for this practice was procedural rather than doctrinal. Under the English rules of civil procedure a suit had to be filed in the jurisdiction in which the action had taken place. Therefore, a suit could only be brought in an English court if the action had taken place in England. If this was the case, however, it meant that the rules of the common law applied. At first, English courts stood strictly by these procedural rules: cases that involved foreign facts were dismissed for lack of jurisdiction and the plaintiff, whether foreign or English, was forced to litigate abroad. After some time, however, English courts perceived the denial of jurisdiction in these cases as unjust. Therefore, they eventually allowed plaintiffs to assert that a foreign place such as Hamburg, Brussels or Paris actually was located in England. This, in turn allowed the courts to hear the case and to apply the common law. Objections raised by defendants against this practice were dismissed by pointing to the fact that the law had invented a fiction for the "furtherance of justice".[14]

2. The Statutists' Method: Choosing Between Forum and Foreign Law

The origin of the *lex causae* approach is commonly assigned to the 12th century.[15] Back then, Italian scholars had to face the problems that resulted from the co-existence of different local laws in the city-states of Upper Italy – just like Greek scholars had had to deal with increasing trade between Greek city-states in the 4th century. However, in answering the question of which law to apply in cases involving members from different city-states, they did not – like the Greeks – resort to application of the *lex fori* approach. Instead, they decided to apply the law of one of the city-states involved, be it forum or foreign law. By allowing, and even requiring, courts to apply the law of another city-state the Italian scholars as well as their French and Dutch successors – who were later called statutists – invented the *lex causae* approach, which has dominated the choice of law scene ever since. It has survived all attacks by academics, notably those of Carl Georg Wächter.[16] In a seminal article that was published in 1841 and 1842[17] he analyzed the statutists' method and concluded that they had not managed to develop consistent and generally accepted solutions for problems of

14. *Mostyn* v. *Fabrigas*, (1774) 98 E.R. 1021, at 1030.

15. For a detailed account, see Rodolfo De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 118 RECUEIL DES COURS 433, 443-48 (1966); KEGEL & SCHURIG, *supra* note 10, at 148-51; JUENGER, *A Page of History*, *supra* note 10, at 424-30; JUENGER, MULTISTATE JUSTICE, *supra* note 10, at 11-16; SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 10-13; SYMEONIDES ET AL., CONFLICT OF LAWS, *supra* note 5, at 7-10; CHRISTIAN VON BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT: ALLGEMEINE LEHREN 480-95 (2003); Yntema, *The Historic Bases of Private International Law*, *supra* note 10, at 303-04.

16. For a detailed account, see De Nova, *Historical and Comparative Introduction to Conflict of Laws*, *supra* note 15, at 452-56; Juenger, *A Page of History*, *supra* note 10, at 446-48; JUENGER, MULTISTATE JUSTICE, *supra* note 10, at 31-34; SCOLES ET AL., *Conflict of Laws*, *supra* note 5, at 15-16.

17. Carl Georg von Wächter, *Über die Collision der Privatrechtsgesetze Verschiedener Staaten*, 24 ACP 230-311 (1841); Carl Georg von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten*, 25 ACP 161-200, 361-419 (1842).

cross-border transactions.[18] He, therefore, proposed to discard the statutists' *lex causae* approach in favor of a *lex fori* theory that required judges to apply forum law in most of the cases.[19] The immediate impact of his writings, however, was marginal because he did not have any followers at his time.

3. Modern Forms of Forum Favoritism

The fact that Wächter's *lex fori* theory was not applied in practice during the 19th century does not mean that he had no influence on the development of choice of law theory. To the contrary: his ideas had a remarkable revival during the 20th century, when American scholars rebelled against the then leading American approach to choice of law – the vested rights theory as incorporated in the Restatement (First) of Conflicts.[20] Under the impression of the perceived arbitrary results of the vested rights theory – which followed a *lex causae* approach – several scholars, notably Albert E. Ehrenzweig, asked courts to apply and interpret their own law only.[21] By the same token, Brainerd Currie favored application of forum law, even though his governmental interest analysis did not openly advocate a *lex fori* approach.[22] For some time during the 20th century choice of law approaches such as Ehrenzweig's *lex fori* theory and Currie's governmental interest analysis enjoyed great popularity in the United States. Today, however, a *lex fori* approach is not widely-used in practice. In fact, only Kentucky, Michigan and Nevada in the United States apply their own law at the expense of foreign law.[23] And even these three states restrict application of the *lex fori* to torts cases. In all other cases – and in all other jurisdictions – courts do not hesitate to decide a dispute in accordance with foreign law. A *lex causae* approach, therefore, has largely prevailed in both Europe and the United States.

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18. von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten*, *supra* note 17, at 232-36, 270-311; Von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten*, *supra* note 17, at 161-200, 361-419.

19. von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten, supra* note 17, at 236-70.

20. In Europe, a *lex fori* oriented approach did not have many followers. Worth mentioning is only *Axel Flessner*. According to his theory of "facultative private international law" (*Fakultatives Kollisionsrecht*) courts apply their own law as a rule and resort to the application of foreign law only if requested by either the plaintiff or the defendant. *See* Axel Flessner, *Fakultatives Kollisionsrecht*, 34 RABELSZ 547-84 (1970); AXEL FLESSNER, INTERESSENJURISPRUDENZ IM INTERNATIONALEN PRIVATRECHT (1990).

21. For a detailed account, see SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 38-43; SYMEONIDES ET AL., CONFLICT OF LAWS, *supra* note 5, at 167-68.

22. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). For a detailed discussion, see LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 43-108 (1991); CHRISTIAN JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS. DIE "GOVERNMENTAL INTEREST ANALYSIS" UND DIE "KRISE DES INTERNATIONALEN PRIVATRECHTS" 43-50 (1971); HERMA HILL KAY, *A Defense of Currie's Governmental Interest Analysis*, 219 RECUEIL DES COURS 19 (1989).

23. SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 85-86; SYMEONIDES ET AL., CONFLICT OF LAWS, *supra* note 5, at 299-303.

B. The Economic Perspective

From an economic perspective, the openness towards application of foreign substantive law that can be found in all modern legal systems is surprising: since courts are commonly more familiar with domestic law, it seems that it would be less costly and therefore more efficient for states to follow Wächter's and Ehrenzweig's *lex fori* approach and always require application of forum law. Indeed, next to legal scholars a number of law and economics scholars have argued for general application of forum law.[24] They have essentially taken the view that application of forum law reduces the cost of litigation because the *lex fori* is the law that judges and attorneys know best and for which reference materials will be most easily accessible. Second, they have pointed out that a *lex fori* approach provides for a simple, clear and predictable rule that reduces the parties' compliance costs. Finally, they have indicated that application of forum law creates valuable precedents for future cases – a social benefit that will be lost by application of foreign law. Against the background of these seemingly strong arguments in favor of applying forum law, is there nevertheless an economic reason to resort to foreign law? Essentially four arguments can be made: first, application of foreign law enhances pre-litigation predictability, second, it discourages forum shopping, third, it promotes regulatory competition, and fourth, it preserves the comparative regulatory advantage of foreign jurisdictions.

1. The Predictability of the Law

One of the most prominent arguments in favor of a *lex fori* approach is its alleged simplicity, clarity and predictability.[25] At first sight, this argument seems persuasive: after all, both parties know that the forum will always apply its own domestic law. However, a closer look reveals that a *lex fori* approach enhances predictability only after a suit has been brought. Prior to litigation *lex fori* provides for considerable uncertainty because parties do not know where litigation will take place. They will only be able to determine the eventually applicable law if they have entered into a forum selection agreement or if they know who will be the plaintiff in a future legal dispute and where the plaintiff will sue. In all other cases the parties will be left in the dark about the applicable law with the result that they cannot structure their transactions around a specific substantive law and even avoid the application of inappropriate laws.[26] A *lex*

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24. Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Laws as Spontaneous Order*, 27 CARDOZO L. REV. 1367, 1372-73 (2004); Stuart E. Thiel, *Choice of Law and Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291, 301 (2000). For the arguments for a *lex fori* approach, see also Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390.

25. Ghei & Parisi, *supra* note 24, at 1372.

26. WILLIAM H. ALLEN & ERIN A. O'HARA, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1023 (1999); O'HARA & RIBSTEIN, *Conflict of Laws and Choice of Law*, *supra* note 6, at 634-35.

causae approach on the other hand enables the parties to ascertain the applicable law well in advance. It allows the parties to adjust their behavior to the respective legal framework and – as the case may be – to avoid its application altogether. As a result, pre-litigation predictability strongly encourages application of foreign law.[27]

It could be argued, however, that the pre-litigation predictability ensured by application of foreign law is a false one:[28] under a *lex causae* approach the applicable law depends on the rules of private international law, which vary from state to state and country to country. As a result, the applicable law depends on the place where litigation takes place – just like under a *lex fori* approach. Therefore, it could be argued that pre-litigation predictability under a *lex causae* approach is at best marginally higher than under a *lex fori* approach. In view of the fact that in most cases parties can narrow down the states in which litigation is likely to take place and thus the applicable law, it could even be said that the differences in predictability between both approaches is in fact non-existent.[29] However, from the perspective of a global legislator these considerations are not to be taken into account. Instead, differences between national choice of law rules are to be ignored because a well-informed and benevolent global legislator would determine the applicable law in a globally uniform way, thereby eliminating the uncertainty resulting from different private international laws. Under this simplistic assumption, there can be no doubt that a *lex causae* approach trumps a *lex fori* approach in terms of pre-litigation predictability and certainty.

2. The Effect of Forum Shopping: Zero-Sum Game or Race to the Courthouse?

Next to fostering prelitigation predictability a *lex causae* approach has been acclaimed for discouraging forum shopping by not providing an additional incentive for choosing a particular forum. However, whether this argues for a *lex causae* approach – and against application of the *lex fori* – depends on whether forum shopping actually should be discouraged. Different reasons have been advanced to underline that this is the case.[30] To begin with, it has been argued

27. O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 634; O'Hara & Ribstein, *From Politics to Efficiency in Choice of Law*, *supra* note 6, at 1153; Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI.-KENT. L. REV. 1325, 1328-29 (2002); Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390. *See also* Trachtman, *supra* note 6, at 58.

28. O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 634; Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390.

29. Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 FORDHAM L. REV. 227, 254-55 (1990); Stewart E. Sterk, *The Marginal Relevance of Choice of Law*, 142 U. PA. L. REV. 949, 1015 (1989).

30. For an overview of the legal discussion, see Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1680-89 (1989-1990).

that forum shopping skews the litigation process towards plaintiffs because they can choose the forum ex-post and exclusively based on their own preferences.[31] They can file the suit in a court that is closest to their domicile, that proceeds in their native language, and that applies their favorite procedural law. Under a *lex fori* approach they can additionally choose the substantive law that best supports their case. However, although the purely plaintiff-oriented choice of the forum might produce inefficiencies, it does not necessarily do so: very often plaintiff's benefits will directly correspond to the defendant's losses. For example, the language advantage the plaintiff will have in her home court directly corresponds to the language disadvantage the defendant has in a foreign court. The same holds true for the availability of legal information, the accessibility of legal advice and the substantive law chosen under a *lex fori* approach. Unless the losses incurred by the defendants are lower than the benefits received by the plaintiff, forum shopping will be a zero-sum game that does not cause any efficiency losses. It may even be efficient provided that the plaintiff's gains are higher than the defendant's losses.[32] As a result, it is difficult to say whether the simple fact that forum shopping skews litigation towards the plaintiff causes welfare losses.[33]

Further arguments have been raised to prove the inefficiency of forum shopping. However, like the afore-mentioned argument, they do not make a clear-cut case against plaintiffs' choice of forum. Above all, it has been argued that the possibility of forum shopping is inefficient because it tends to result in litigation far from the "natural" forum, i.e., the forum that is the closest to, most knowledgeable about, or most accessible to the litigants.[34] This argument – which seems to assume an increase in litigation costs as a result of a remote or unconnected forum – is doubtful for at least two reasons: first, it is questionable whether there is a "natural" forum for the litigation of international cases because these cases typically have connections to different legal orders. Second, even if there is a "natural" forum in international cases, the rules on jurisdiction to adjudicate will provide a successful tool to prevent litigation in obviously unconnected and remote fora.[35] In the United States and the common law world

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31. Peter Mankowski, *Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse*, *in* VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN 118, 121 (Claus Ott & Hans-Bernd Schäfer eds., 2002); Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390; O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 634. *See also* Moore & Parisi, *Rethinking Forum Shopping in Cyberspace*, *supra* note 27, at 1328-29.

32. Mankowski, *supra* note 31, at 120-21; Michael J. Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 425 (1999).

33. *See* Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390.

34. Statement of Rep. Luken, *in* 135 Cong. Rec. E2243 (June 21, 1989). *See also* Note, *Forum Shopping Reconsidered*, *supra* note 30, at 1691; Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N. C. L. REV. 889, 925 (2001).

35. Note, *Forum Shopping Reconsidered*, *supra* note 30, at 1691; Sterk, *Marginal Relevance of Choice of Law*, *supra* note 29, at 1014. It has been questioned, whether this holds true for patent cases in the United States. *See* Moore, *Forum Shopping in Patent Cases*, *supra* note 34, at 925-26.

in general, the doctrine of *forum non conveniens* as well as the minimum contacts requirement[36] will usually avoid any such outcome. In Europe, the EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[37] provides for a set of jurisdictional rules that requires some connection between the forum and the litigation or the defendant. As a result, it is unlikely that litigation will actually take place in unconnected and remote fora.

In addition, it has been said that forum shopping frustrates the capacities in legal services kept ready in the defendant-friendly states while overburdening the plaintiff-favoring states because it distributes litigation unevenly across jurisdictions.[38] However, whether uneven distribution of litigation actually takes place is doubtful. Considering that the natural defendant in most jurisdictions may file for a declaratory relief before the natural plaintiff has filed a claim and assuming that the natural defendant would file her claim in a defendant-friendly forum, there is no *a priori* bias towards one jurisdiction or the other. But even if natural defendants are less likely to file a claim than natural plaintiffs and uneven distribution of litigation actually takes place on a large scale, this is not necessarily inefficient. To the contrary, it may even turn out to be efficient: the more frequented courts could build up expertise in certain areas and handle corresponding cases more efficiently. Over time, they could establish track records increasing outcome predictability and decreasing litigation.[39] As a result, it is unclear whether uneven distribution of litigation actually decreases efficiency.

Finally, it has been argued that the possibility of forum shopping leads to inefficient substantive laws because states will compete for litigation and enact substantive laws which favor plaintiffs and, therefore, are not likely to be efficient.[40] However, it is not clear whether states actually engage in a competition for litigation. More importantly, it is not clear whether they have any incentive to do so. At least in most Western countries the state does not make money from offering judicial services and entertaining court systems. To make states skew their substantive laws towards plaintiffs they would also have to outweigh the expected losses suffered by domestic defendants. Whether this is actually the case is doubtful. At least, it lacks empirical evidence. What is

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36. *See* SCOLES ET AL., *Conflict of Laws*, *supra* note 5, at 292-95.

37. Council Regulation 2001/44/EC of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2001] O.J. L 12, 1.

38. Mankowski, *supra* note 31, at 124; O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 635; Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390; STERK, *Marginal Relevance of Choice of Law*, *supra* note 29, at 1014.

39. Moore & Parisi, *Rethinking Forum Shopping in Cyberspace*, *supra* note 27, at 1333. *See also* Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations From Forum Shopping Plaintiffs*, 19 U. PA. INT'L. ECON. L. 141, 152-53 (1998). For patent cases in the United States, see Moore, *Forum Shopping in Patent Cases*, *supra* note 34, at 924-25.

40. Sommer, *The Subsidiary: Doctrine Without a Cause?*, *supra* note 29, at 256-57.

more likely than a conscious, revenue-driven twist of substantive laws towards plaintiffs is that national legislators fall prey to interest group lobbying. Assume, for example, that a party is statistically more likely to be the plaintiff. Then this party will have an incentive to lobby for favorable legislation in the jurisdiction where litigation will most likely take place. The same holds true for local lawyers who wish to attract more plaintiffs.[41] However, it is difficult to say in the abstract how likely there is to be interest group lobbying and how far the resulting substantive laws would actually decrease as a result.

Does this mean that forum shopping from an economic perspective—at least as long as empirical data is lacking—cannot clearly be identified as being efficient or inefficient? Some scholars have indeed argued that way.[42] However, the following considerations indicate that the possibility of forum shopping leads to an increase in litigation costs and therefore most likely to inefficiencies: first, the possibility of forum shopping creates an incentive to engage in a "race to the courthouse" because each party will try to be the first to file a lawsuit as soon as a legal dispute becomes likely.[43] The natural defendant, knowing that the natural plaintiff will strategically choose the forum based on her preferences, will try to preempt the natural plaintiff's choice of jurisdiction by filing for declaratory relief. The natural plaintiff, in turn, knowing that the natural defendant can file for declaratory relief will try to file her lawsuit in her preferred forum before the defendant has time to do so. As a result, the possibility of forum shopping is likely to induce the filing of lawsuits that may not yet have matured into court claims. At worst, it might even induce the filing of a lawsuit that might have been settled out of court had the threat of the plaintiff's or the defendant's choice of jurisdiction not been imminent. Second, in addition to fostering a "race to the courthouse" the possibility of forum shopping increases the chances that parties will argue about the appropriateness of the forum in addition to the merits of the case.[44] As the place of litigation will influence the outcome of the case, both parties will increase their respective expenses and thereby waste valuable resources. The incentive to do so will grow if the potential gains and losses are high, which will be the case if different fora – for example as a result of a *lex fori* approach – offer different applicable laws.[45] The latter will additionally increase litigation costs because the parties

41. Ghei & Parisi, *supra* note 24, at 1372-73.

42. *Id.* at 1392.

43. Mankowski, *supra* note 31, at 123-24; Moore & Parisi, *Rethinking Forum Shopping in Cyberspace*, *supra* note 27, at 1328; Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 389; Sommer, *The Subsidiary: Doctrine Without a Cause?*, *supra* note 29, at 255; Michael J. Whincop & Mary Keyes, *Economic Analysis of Conflict of Laws in Torts Cases: Discrete and Relational Torts*, 22 MELB. U. L. REV. 370, 378-80 (1998).

44. Mankowski, *Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse*, *supra* note 31, at 123; Moore & Parisi, *Rethinking Forum Shopping in Cyberspace*, *supra* note 27, at 1334; Whincop & Keyes, *Economic Analysis of Conflict of Laws*, *supra* note 43, at 378-80.

45. It has even been said that the applicable law is the most common motive for forum shopping. *See* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a*

will have to determine the content of different laws in order to identify the preferred forum.[46] In contrast, a *lex causae* approach offers less incentives to invest in a dispute about the appropriateness of the forum. This is because courts – at least as long it is assumed that the applicable law is determined by a global legislator – will apply the same law around the world and therefore produce less divergent substantive results.

Against this background, it seems that forum shopping indeed should be discouraged.[47] This holds true even though forum shopping may be beneficial to both parties.[48] Litigation in a forum that benefits both parties can be achieved by means other than forum shopping, notably choice of court agreements. Today, under most legal systems parties can choose the forum even in international cases. Although some legal orders restrict the free choice of court in order to protect a perceived weaker party, they usually allow for unrestricted free choice of the forum after a legal dispute has arisen. For example, § 38 (1) of the German Code of Civil Procedure allows *ex ante* free choice of court for certain classes of parties, such as merchants, that are not considered in need of legal protection. Section 38 (3) No. 1 of the German Code of Civil Procedure additionally allows everybody else, i.e., even consumers, to choose the forum after a dispute has arisen. Likewise, Art. 13 No. 1, 17 No. 1 and 21 No. 1 of the EC Regulation on Jurisdiction and Recognition and Enforcement of Foreign Judgments provide for *ex post* choice of court agreements in consumer, insurance and employment cases, while Art. 23 allows *ex ante* agreements in all other cases.[49] And even in the United States, where forum selection clauses traditionally have met with skepticism, party agreements about jurisdiction are now generally accepted.[50] As choice of court agreements avoid the increase in litigation costs likely to be incurred as a result of forum shopping they are the more efficient instruments for moving litigation to the forum beneficial to both parties. Therefore, discouraging forum shopping indeed argues for a *lex causae* approach and strengthens the case against a *lex fori* approach.

Venue, 78 NEB. L. REV. 79, 88 (1999).

46. *See also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 306 (1985).

47. *See also* Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390; O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 634.

48. Dorward, *The Forum Non Conveniens Doctrine*, *supra* note 39, at 152-53; Thiel, *supra* note 24, at 301.

49. Council Regulation 2001/44/EC of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2001] O.J. L 12, 1.

50. SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 478-91; ARTHUR TAYLOR VON MEHREN, THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS 250-56 (2003).

3. The Role of Regulatory Competition: Race-to-the-Top or Race-to-the-Bottom?

In addition to fostering pre-litigation predictability and discouraging forum shopping, some scholars have advanced a third argument for the application of a *lex causae* approach. Considering that a *lex causae* approach enhances pre-litigation predictability and allows parties to structure their activities around the law of a particular state, they have argued that states will internalize the costs of inferior laws, thereby promoting competition among jurisdictions for more efficient substantive laws.[51] However, whether this assertion holds true is difficult to say. It rests on the assumption that states have an interest in having their laws applied which depends on whether states can derive some sort of benefits from application of their laws.[52] This, in turn, seems to vary with different areas of law: in corporate law, for example, where states obtain revenue from filing fees and – in the United States[53] – from franchise tax, it goes without saying that states have an interest in extending the application of their laws as far as possible.[54] In other areas, such as contract and tort law, the potential gains are less obvious. However, it seems likely that even in these areas states can derive at least some revenue from attracting foreign businesses and having local lawyers working on the relevant cases.[55] Additionally, it seems likely that states may at least indirectly benefit from not losing domestic businesses.[56] As a result, chances are that states indeed have an interest in having their laws applied and that they will engage in regulatory competition if parties can choose the application of foreign law by agreement or by conduct.

The mere existence of regulatory competition does not mean, however, that more efficient substantive laws will be the result. In corporate law, for example, it has long been discussed whether regulatory competition will lead to a race-to-the-top or to a race-to-the-bottom. In the race-to-the-bottom scenario states compete for corporate charters by skewing their substantive corporate laws one-sidedly towards managers.[57] In the race-to-the-top scenario, in contrast, states

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51. Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 390; O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 634; O'Hara & Ribstein, *Interest Groups, Contracts and Interest Analysis*, *supra* note 6, at 765-74.

52. EVA-MARIA KIENINGER, WETTBEWERB DER PRIVATRECHTSORDNUNGEN IM EUROPÄISCHEN BINNENMARKT 312 (2002).

53. In Europe, only the real seat state can impose franchise taxes. *See* Council Directive 69/335/EEC of 17 July 1969 Concerning Indirect Taxes on the Raising of Capital, [1969] O.J. L. 249, 25.

54. For a detailed analysis of European corporate law, see Jens Christian Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L. L. 477, 520-33 (2004).

55. For a more skeptical account, see KIENINGER, *supra* note 52, at 312-14.

56. *See* Roger van den Bergh, *Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy*, 16 INT'L. REV. LAW. & ECON. 363, 366 (1995).

57. *See, e.g.*, Lucian Arye Bebchuk, *Federalism, and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1440 (1992); Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 130 (2001); Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The*

focus on managers' incentives to make the corporation's shares attractive to shareholders and compete for corporate charters by making their substantive corporate laws more beneficial and efficient for both managers and shareholders.[58] Which of the two scenarios actually prevails in practice – in corporate law and outside – depends on a variety of factors whose comprehensive discussion for different areas of laws is beyond the scope of this article.[59] However, it seems clear that – at least in some areas of law – a race-to-the-top, i.e., a development towards more efficient laws, may actually occur if choice of law allows application of foreign law. And even though the prospect of regulatory competition resulting in more efficient substantive laws may be subject to certain conditions, it is sufficiently sound to support, on a general level, application of a *lex causae* approach.[60]

4. The Benefit of Comparative Regulatory Advantages

A last argument that has been made to support application of foreign law over pertinent application of the *lex fori* revolves around regulatory competence. A *lex fori* approach, it has been said, ignores the comparative regulatory advantages foreign laws might have and, therefore, does not always lead to application of the most efficient substantive law.[61] This argument assumes that states have idiosyncratic knowledge about the conditions within their territory and, therefore, can tailor their laws to best suit these conditions. As a result, there is a good chance that their laws will regulate transactions taking place within their territory more efficiently than the laws of other states. The most prominent example for a state's regulatory comparative advantage revolves around a car accident in country A between nationals of countries B and C.

Race to Protect Managers from Takeovers, 99 COLUM. L. REV. 1168 (1999); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1801 (2002).

58. *See, e.g.*, Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. L. 259 (1980); Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 542 (1984); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 16 (1993); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 847 (1993).

59. For a discussion of both scenarios in European corporate law, see Dammann, *Freedom of Choice in European Corporate Law*, *supra* note 54. For a detailed discussion of American contract law, see Larry Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003).

60. Regulatory competition that leads to more efficient substantive laws may also occur under a *lex fori* approach. However, it can only take place via forum selection clauses that require the parties to litigate in the courts of the state whose laws they wish to apply. Compared to a *lex causae* approach that triggers a race-to-the-top via choice of law clauses this way to exit state regulation is much more expensive.

61. O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 635; Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 391. *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 602-03 (2002); POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, *supra* note 47, at 306.

Provided that the legislative status quo in country A mirrors the conditions within its territory without distortion, the tort and accident laws of country A will be designed to encourage an optimal level of care, which in turn will encourage both domestic and foreign nationals to exercise the optimal level of care while driving in country A. Therefore, the tort and accident laws of country A should regulate the accident between the nationals of countries B and C.[62] Application of the laws of countries B and C simply because a lawsuit has been filed in their courts, in contrast, would be inefficient because they are not tailored to the conditions in country A. Therefore, they would not provide for *ex ante* optimal incentives to drive carefully in country A.

To be clear, the concept of comparative regulatory advantages does not mean that courts should always apply foreign law. By the same token, it does not mean that the laws of a state should apply to all transactions taking place within its territory. Rather, the argument behind the concept of comparative regulatory advantage is that there are cases where the law of a foreign state provides for the most efficient solution to an international transaction and that application of forum law in these cases would be inefficient. And in this limited sense it makes a good case for a *lex causae* approach.

III.
THE CHOICE BETWEEN METHODS I: SUBSTANTIVISM OR SELECTIVISM?

If from an economic perspective state courts should not always apply the *lex fori* they face the problem of determining the applicable law in cases that touch on different legal orders. In the history of private international law, essentially two methodological approaches have emerged to solve this problem: first, the substantive method of creating new substantive law and, second, the selectivist method of choosing between existing laws. Up until today, the latter has prevailed in both Europe and the United States. However, the former was applied during Roman times and in England up to the 18th century. Additionally, it was advocated by a number of American and European scholars during the 20th century.

A. The Legal Debate

1. The Roman Praetor Peregrinus and the English Law Merchant

The beginnings of the substantivist approach to choice of law are to be found in Roman times, more specifically in the 3rd century B.C. Back then,

62. For a more detailed analysis of the choice of tort law, see Ralf Michaels, *Two Economists, Three Opinions? Economic Models for Private International Law of Tort – Cross-Border Torts as Example*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 143 (Jürgen Basedow & Toshiyuki Kono eds., 2006); O'Hara & Ribstein, *From Politics to Efficiency in Choice of Law*, *supra* note 6, at 1216-19; Schäfer & Lantermann, *Choice of Law from an Economic Perspective*, *supra* note 6, at 113-16; Whincop & Keyes, *Economic Analysis of Conflict of Laws*, *supra* note 44, at 370-95; WHINCOP & KEYES, POLICY AND PRAGMATISM, *supra* note 6, at 89-106.

Romans were increasingly engaged in international trade and, therefore, had to face more and more legal disputes involving members of foreign countries. But instead of applying their own law in cases that had connections to foreign legal orders – as the Greeks did – the Romans created a new institution empowered to handle litigation involving non-Romans: the *praetor peregrinus*. Drawing on general legal principles, the notion of good faith as well as his own legal imagination, he solved multistate cases by *ad hoc* crafting new substantive rules especially designed for cross-border transactions. These new substantive rules gradually developed into a separate body of norms, the *ius gentium*, which applied to international disputes only and was distinct from the *ius civile* that regulated disputes between Roman citizens.[63]

The Roman substantivist method invented by the *praetor peregrinus* died out when the *ius gentium* was incorporated into the *ius civile* and codified in the *Corpus Juris Justinianus*. However, it had a revival in the English commercial and maritime courts several centuries later. These courts, which existed next to the forum-oriented common law courts,[64] did not apply the common law, which had been developed to meet the needs of a rural society. Instead they referred to the Roman *praetor peregrinus* and engaged in the *ad hoc* development of a set of new substantive rules especially designed for commercial and maritime cases. These rules that became later known as law merchant and maritime law drew on different historic and geographic sources and claimed universal application.[65] However, they met the same fate as the *ius gentium* because they were eventually absorbed by the English common law courts and indistinguishably incorporated into the common law.

2. The Statutists' Method: Choosing Among Existing Laws

The roots of the selectivist method – and thereby the roots of modern choice of law theory – are to be found in the statutists' method developed by Italian scholars in the 12th century.[66] When they had to answer the question how

63. SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 12; SYMEONIDES ET AL., CONFLICT OF LAWS, *supra* note 5, at 9; Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 17 (2001).

64. *See supra* Part II.

65. When English common law courts started to nationalize both the law merchant and the maritime law they had to deal with the question whether to continue their tradition of applying forum law, which now included the allegedly supranational commercial and maritime law. They eventually decided to apply foreign law in appropriate situations and began to develop a system of choice of law rules that—for lack of English precedents—drew heavily on continental doctrine, above all the Dutch doctrine of comity. *See, e.g.*, *Potinger* v. *Wightman*, 36 E.R. 26, 29-31 (1893).

66. For a detailed account, see De Nova, *Historical and Comparative Introduction to Conflict of Laws*, *supra* note 16, at 443-48; KEGEL & SCHURIG, INTERNATIONALES PRIVATRECHT, *supra* note 10, at 148-51; Juenger, *A Page of History*, *supra* note 10, at 424-30; JUENGER, MULTISTATE JUSTICE, *supra* note 11, at 11-16; SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 10-13; SYMEONIDES ET AL., CONFLICT OF LAWS, *supra* note 5, at 7-10; VON BAR & MANKOWSKI, *supra* note 15, at 480-95; Yntema, *The Historic Bases of Private International Law*, *supra* note 11, at 303-04.

to solve disputes between members of different city-states they did not develop a new set of substantive rules as the Romans did. Instead, they applied the law of one or the other city-state and thus made a choice between existing laws rather than blending them. In practice, this method of choosing the applicable law from existing laws has prevailed up until today. Even Carl Friedrich von Savigny – who criticized the workings of the statutists' method insofar as it amounted to a unilateral choice of law theory – did not question that international disputes had to be solved by applying the laws of one of the states involved. However, the substantivist approach formed the basis for some of the most important American approaches to choice of law in the 20th century.

3. Modern Forms of Substantivism

At the beginning of the 20th century, choice of law in the United States was dominated by the vested rights theory. First formulated by the English scholar Albert V. Dicey[67] and later brought to the United States by Joseph H. Beale,[68] it advanced the idea that courts decided cases according to foreign law if a right had been created abroad. What made the vested rights theory so important, however, was not the theory itself but the reaction it triggered in the academic community when it was eventually incorporated into the Restatement (First) of Conflicts.[69] Today known as the American conflicts revolution, conflicts scholars across the country engaged in a vigorous debate about the foundations of choice of law and advocated countless new methodological approaches.[70] One of the most important and influential approaches that emerged from this debate was Friedrich K. Juenger's best law approach. As a reaction to the perceived arbitrariness of the vested rights theory of the Restatement (First), he suggested that courts should not choose between application of existing laws but strive for the application of the best law.[71] Arguing that national laws were not suited for the resolution of international disputes he granted courts the right to *ad hoc* construct new substantive rules especially designed for international cases.[72] Juenger's writings were embraced and enhanced by a number of

67. ALBERT V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (1896).

68. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

69. The American Law Institute, Restatement of the Law of Conflict of Laws (1934).

70. There was no comparative "revolution" in Europe. This is why the development of choice of law during the 20th century was mostly driven by the United States. European scholars took note of this development. However, for the most part they rejected the new approaches and adhered to the classical concept of choice of law. *See, e.g.*, EGON LORENZ, ZUR STRUKTUR DES INTERNATIONALEN PRIVATRECHTS (1977); KLAUS SCHURIG, KOLLISIONSNORM UND SACHRECHT (1981).

71. For a more detailed discussion, see SYMEONIDES ET AL., CONFLICT OF LAWS, *supra* note 5, at 168-69; SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 50 n. 19.

72. FRIEDRICH K. JUENGER, ZUM WANDEL DES INTERNATIONALEN PRIVATRECHTS (1974). *See also* JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE, *supra* note 11; FRIEDRICH K. JUENGER, SELECTED ESSAYS ON THE CONFLICT OF LAWS (2000).

American scholars, notably Luther M. McDougal,[73] Arthur T. von Mehren and Donald T. Trautmann[74] as well as – in Europe – Ernst Steindorff.[75] They all promoted – to different degrees and according to different guidelines – the *ad hoc* crafting and application of new substantive law rules. However, the response from practice was more than faint.[76] In the United States, a substantivist approach was finally rejected in 1969 when the Restatement (Second) of Conflicts was adopted. In Europe, it was never seriously considered as a relevant approach to choice of law.

B. The Economic Perspective

At first glance, it seems economically surprising that the substantive method of creating new substantive laws has not had more followers throughout the history of private international law. It strives for application of the "best substantive rule" in every single case and is, therefore, likely to guarantee the best substantive outcome across the board. In contrast to the selectivist method that calls for application of a pre-existing national legal order, the substantivist method facilitates tailor-made solutions for international disputes which, in the long run, may set incentives for optimal individual behavior in cross-border transactions. Assuming that the best substantive outcome of a case is the one that maximizes the joint benefits of the parties while at the same time minimizing externalities, a substantivist approach seems likely to promote global efficiency. So, why has the substantivist approach not been more successful in practice?

1. The Costs of Compliance and Adjudication

Two reasons can easily be identified. First, the creation of new substantive law on a case-by-case basis provides for a maximum of pre-litigation uncertainty.[77] Before going to court – more precisely, before the rendering of a judgment – parties will not know which legal norms will govern a future dispute. Worse, it seems that the parties do not even have a chance to find out what the applicable legal framework might be. Due to the fact that the court can

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73. Luther L. McDougal, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 MERCER L. REV. 483 (1983-1984).

74. Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974-1975); Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROB. 27 (1977); ARTHUR TAYLOR VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS. CASES AND MATERIALS ON CONFLICT OF LAWS (1965).

75. ERNST STEINDORFF, SACHNORMEN IM INTERNATIONALEN PRIVATRECHT (1958).

76. In fact, only one case has been reported in which the judge considered application of the substantivist approach in the form of what he calls a "national consensus law." *See In re "Agent Orange" Products Liability Litigation*, 580 F.Supp. 690, 713 (E.D.N.Y 1984).

77. *See also* SYMEONIDES, *American Choice of Law at the Dawn of the 21st Century*, *supra* note 63, at 15.

apply any existing or nonexistent legal rule or any combination thereof according to what it deems the "best rule" for the case they cannot determine the outcome of litigation in advance and adjust their behavior to the governing law. Unless the newly created substantive law develops into a coherent set of legal norms over time – which may or may not happen – any potential incentive effect of substantive law is effectively destroyed. Second, the substantivist method makes adjudication of international cases complex and difficult. By asking courts to apply the legal framework that is best for the particular case, it requires courts to engage in a complicated search for the best possible law. Taken seriously, it requires courts to scan every single legal system of the world for relevant legal norms, to compare the results of their application and – as the case may be – to create new substantive legal norms to optimally serve the needs of the particular case. Regardless of whether courts are in a position to engage in any such complex investigation – an assertion that can be doubted[78] – it is clear that it makes the costs of adjudication soar.

2. International Disputes: The Case for Special Rules?

What does this mean for the overall efficiency of the substantivist method? The answer depends on whether the perceived benefit of having the "best law" applied outweighs the infinite pre-litigation uncertainty and the skyrocketing adjudication costs. This, in turn, depends on whether international cases are so different from domestic cases that their efficient resolution requires the development of new substantive laws. In other words, are international cases so different from domestic cases that they cannot be adequately dealt with by application of domestic law? Some proponents of the substantivist approach have indeed argued that domestic laws are inappropriate for the resolution of cases that involve more than one legal order.[79] And indeed, there are cases that seem to support this view. Take for example an airplane crash or a ship collision on the open sea. Or take an international joint venture consisting of two or more companies from different countries that set out for oil production in a third country. Applying the law of one country as a result of the selectivist method in these cases indeed seems to encounter difficulties. However, does this hold true across the board? Are all cases that involve more than one legal order so different from domestic cases that application of domestic law is inappropriate? Doubts arise when looking to cases that seem to be more ordinary than the ones mentioned earlier. Take for example an accident that occurs in country A between individuals of country B and C. Does this accident require treatment that differs from an accident in country A between nationals of country A? It does not look that way. To the contrary, it seems that application of the domestic law of country A is the most efficient way to handle the dispute. Under the

78. For a more detailed discussion see *infra* Part VI.B *et seq*.

79. *See, e.g.*, JUENGER, ZUM WANDEL DES INTERNATIONALEN PRIVATRECHTS, *supra* note 72, at 25-28; STEINDORFF, *supra* note 75, at 9, 267-70.

assumption the legislator of country A knows the conditions in country A and the preferences of the population best, and under the assumption that the legislative process in country A is not distorted by public choice problems,[80] the domestic law of country A provides for optimal *ex ante* incentives to avoid accidents in country A. Relative to any other substantive law – foreign or international – the domestic law of country A is generally superior in regulating the conduct of driving cars in country A. Take another example: the sale of computers concluded between nationals from country A and B on the Internet. Does this contract require treatment different from a contract between the nationals of country A on the Internet? Most likely, the legal problems that will arise are the same – delivery of a defective computer, late payment of the contract price and the like. And even though the choice between the law of country A or country B seems more difficult than in the above described accident case, there is no reason to doubt that both the domestic law of country A and the domestic law of country B would be able to tackle the issues arising under this contract.

As a result, it seems that some cases require a special set of substantive rules whereas others can go without. This, in turn, means that in some cases the benefits of a substantivist method may potentially outweigh the legal uncertainty involved with its application, whereas in other cases this potential is lacking. However, for the following reasons this finding does not imply that the substantivist method is generally more efficient. First, the cases in which a substantivist approach may yield profit seem far more exceptional and therefore far less numerous than the cases that are likely to benefit from the selectivist method. Second, a good part of the cases that allegedly call for application of the substantivist method can equally, if not more efficiently, be handled by other means, most importantly party autonomy and private arrangements such as *lex mercatoria*. In fact, allowing the parties to choose the applicable law or to define the legal framework for their transaction on a case-by-case basis – a common practice in international trade these days – seems to enhance global efficiency more than allowing the court to apply whatever it deems the "best law." As a result, it appears that only few cases would actually benefit from the creation of substantive law by courts. This, however, suggests that the substantivist method should not inform the general design of choice of law rules.

IV.
THE CHOICE BETWEEN METHODS II: UNILATERALISM OR MULTILATERALISM?

If economic analysis suggests that courts in solving choice of law issues

80. For a more detailed discussion of public choice and choice of law, see GUZMAN, *supra* note 6, at 900-04; O'Hara & Ribstein, *Interest Groups, Contracts and Interest Analysis*, *supra* note 6; O'Hara, *A Public Choice Analysis of Contractual Choice of Law*, *supra* note 6; O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, *supra* note 6.

should be open to apply the law of a foreign state – as opposed to pertinent application of the *lex fori* and creation of new international substantive law – another question arises: how exactly should the line between forum and foreign law be drawn? When should courts apply foreign law and when should they be allowed to resort to forum law? Since the selectivist method emerged in the 12th century two approaches have dominated the scene: first, the so-called unilateralist method of defining the spatial reach of legal norms according to their wish to be applied, and, second, the so-called multilateralist approach of assigning a legal relationship to a legal order according to objective criteria. Today, multilateralism provides the basis of most contemporary choice of law systems in both the United States and Europe. However, elements of unilateralism can be found on both sides of the Atlantic.

A. The Legal Debate

1. The Statutists' Method: Defining the Spatial Reach of Legal Norms

The unilateralist method goes back to the Italian scholars of the 12th century.[81] When they were faced with the question of which city-states' law to apply in a particular case they decided to tackle the problem by defining the intended spatial reach of the conflicting local laws. To this end, they divided the respective provisions into two basic categories – personal and territorial. Rules that were considered personal applied to cases involving the citizens of that city-state no matter where they were, whereas territorial rules claimed application to everybody, whether citizen or foreigner, who stayed within the city boundaries. To decide which local law fell into which category the Italian scholars – and their French and Dutch successors – at first relied on the wording of the particular substantive rule. Later on, they based the classification on the presumed or apparent legislative intent. However, no matter which criteria the statutists applied to discern the spatial reach of local laws they did not manage to develop generally accepted solutions for cross-border cases.[82] Hence, it is not surprising that the statutists' unilateral method was eventually superseded and replaced by the multilateral method.

2. Carl Friedrich von Savigny: Assigning the Seat of the Legal Relationship

The founding father of the multilateral method – and thereby the modern approach to choice of law – is Carl Friedrich von Savigny. In his legendary treatise on the "System of Current Roman Law",[83] published in 1849, he

81. For a detailed account see DE NOVA, *Historical and Comparative Introduction to Conflict of Laws*, *supra* note 15, at 443-48; KEGEL & SCHURIG, *supra* note 10, at 148-51; JUENGER, *A Page of History supra* note 11, at 424-30; JUENGER, *supra* note 10, at 11-16.

82. See criticism of this fact by von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten*, *supra* note 7.

83. FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS vol. VIII (1849).

promoted the idea that choice of law rules were meant to guarantee uniform results regardless of the place of litigation. Therefore, he argued, the applicable law had to be determined by looking for the one legal order in which the underlying legal relationship belonged. In his words, the applicable law had to be chosen by looking for the legal order where the relationship had its "seat." This seat, he claimed, had to be identified by classifying legal relationships into broad categories and then linking those categories with a legal order by means of connecting factors such as the domicile of a person or the place of a transaction. As a result, he developed a system of *a priori* choice of law rules that assigned a legal relationship to one particular legal order regardless of whether that legal order had expressed a wish to be applied. In doing so, he rejected the statutists' unilateral method of defining the spatial reach of legal rules and promoted what became later known as the multilateral method.[84]

Today, Savigny's ideas are still readily identifiable in modern choice of law systems. In Europe, for example, the EC Convention on the Law Applicable to Contractual Obligations (Rome Convention)[85] assigns a contract to the law of the state, with which it is most closely connected. In the United States, the Restatement (Second) of Conflicts generally provides for application of the law of the state which has the most significant relationship to a dispute. As a result, both the Rome Convention[86] and the Restatement (Second) apply the multilateral method of assigning a legal relationship to one particular legal order. Moreover, both the Rome Convention and the Restatement (Second) use objective criteria to determine the applicable law that resemble Savigny's notion of the seat of the legal relationship.[87]

3. Modern Forms of Unilateralism

That the unilateral approach was eventually replaced by Savigny's

84. However, SAVIGNY did not discard the unilateral method all together. Instead he restricted it to what he called "strictly positive, mandatory laws", which he defined as rules that expressed a strong public policy based on moral or economic considerations. *See id.* at 34-38, 160-61.

85. EC Convention on the Law Applicable to Contractual Obligations, [1980] O.J. L 266, 1-19 (Rome Convention). The Convention will soon be replaced by an EC Regulation. *See* the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final. For a detailed account of the growing communitarization of private international law, see Jürgen Basedow, *Specificité et coordination du droit international privé communautaire*, *in* TRAVAUX DU COMITÉ FRANCAIS DE DROIT INTERNATIONAL PRIVÉ, DROIT INTERNATIONAL PRIVÉ 275-96 (2002-2004); Jürgen Basedow, *The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam*, 37 C. M. L. REV. 687 (2000).

86. *Supra* note 85.

87. However, just like *Savigny* the EC Convention accepts the unilateral method for certain cases. According to Article 7, when applying the law of a country, effect may be given to the mandatory rules of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.

multilateral method does not mean that it simply vanished from the choice of law scene. To the contrary: it formed the basis for the most influential approach that arose in the course of the American conflicts revolution: Brainerd Currie's governmental interest analysis. He advanced a modern form of the unilateralist choice of law method in that he – just like the statutists – set out to determine the applicable law by defining the spatial reach of substantive laws. However, instead of classifying laws according to their personal or territorial purport, Currie advocated an *ad hoc* judicial interpretation of the involved substantive laws based on the policies underlying those laws. Such an interpretation, he argued, would determine a state's interest in having its law applied in a certain case – the "governmental interest" – which in turn would define the laws' intended sphere of operation in terms of space and designate the applicable law.[88]

Without exaggeration, Currie's governmental interest analysis can be classified as the most important and most influential modern approach to choice of law. In fact, even though a multilateralist approach has prevailed on a large scale both in the United States and Europe, unilateralists elements are present in virtually all contemporary choice-of-law systems. This becomes obvious when looking at the Restatement (Second), which is followed by most of the jurisdictions in the United States. Although it essentially adopts a multilateralist approach by advocating the application of the law of the state that has the most significant relationship with the case in question, it recognizes the concept of state interests as an important factor for the choice of law. Indeed, the process of identifying the state with the most significant relationship comprises, among others, the examination of the relevant policies of both the forum and other interested states.[89] In Europe, although faithful to multilateralism in general, unilaterlists elements can be found in the form of mandatory laws, that are applied to multistate cases simply because of their wish to be applied. According to Article 7 (1) of the Rome Convention,[90] for example, when applying the law of a country, effect may be given to the mandatory rules of another country, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.[91]

B. The Economic Perspective

The question of how to draw the line between forum and foreign law lies at the heart of any modern choice of law theory. Answering it from an economic perspective requires a closer look at the working of both unilateralism and

88. *See* CURRIE, *supra* note 22. For a detailed discussion see BRILMAYER, *supra* note 22, at 43-108; JOERGES, *supra* note 22, at 43-50; KAY, *supra* note 22.

89. Section 6 of the Restatement. For a detailed discussion see Symeonides, *American Choice of Law at the Dawn of the 21st Century*, *supra* note 63, at 26-41.

90. *Supra* note 85.

91. For a detailed discussion, see Symeonides, *American Choice of Law at the Dawn of the 21st Century*, *supra* note 63, at 32-34.

multilateralism in practice. Since both methods approach choice of law issues from opposing ends – the unilateral method starts with the substantive law whereas the multilateral approach starts with the legal relationship – it is not surprising that they require courts to make very different inquiries. Under a unilateral approach courts have to proceed in two steps. In the first step, they examine the contending substantive laws in turn, asking whether one or both have pretensions to be applied. As these serial inquiries are independent, it might happen that the laws of more than one state claim application or neither. In the second step, therefore, courts have to determine which of the several laws shall govern the dispute. In contrast, the multilateral method calls for a one-step process only. It requires courts to make a choice between the laws of different states by assigning a legal dispute to the law of one state in accordance with a set of objective criteria. Therefore, a decision to assign a legal dispute to the law of one state is simultaneously a decision not to assign it to another. Against this background, what are the costs and benefits of both a unilateral and a multilateral approach?

1. The Costs of Specification, Compliance and Adjudication

Essentially, a unilateralist approach seems to incur two important benefits. To begin with, it avoids the problem of determining objective criteria for the choice of law necessary under a multilateralist approach.[92] Additionally, in case that only the law of one state claims application – the so-called "false conflict" case – it renders a complicated choice between competing laws obsolete. Therefore, a unilateralist approach does not only seem to incur low specification costs, but also low adjudication costs. However, a closer look reveals that this is not true: first, a unilateral approach needs to define when the substantive law of a state claims application. More specifically, it must identify the criteria – such as the legislative intent or the governmental interest – that determine the spatial reach of legal norms. Therefore, specification costs are not as low as they appear to be at first blush. Second, determination of whether substantive laws wish to be applied requires defining the respective spheres of operation. This, however, calls for a complicated determination of the underlying legislative intent, which is not only difficult but may even be impossible: substantive laws may be silent or ambiguous as to their intended sphere of application. Likewise, a consistent legislative intent may not even exist because states or legislators are not monolithic entities and individual legislators may have very different reasons to pass a law. Furthermore, even if it is possible to determine the intended spatial reach of legal norms there might be cases in which the laws of more than one state – or worse – the laws of no state claim application, the so-called "true conflict" and "no interest" cases. Since unilateralist approaches usually do not

92. BRILMAYER, *supra* note 22, at 16-17.

specify how to handle these cases[93] courts have to determine the applicable law without any further guideline. Therefore, a unilateralist approach not only allows adjudication costs to soar, but also brings about the utmost pre-litigation uncertainty and thereby high compliance costs.[94]

2. The Benefit of Certainty and Uniformity of Results

A multilateral approach, in contrast, keeps both adjudication and compliance costs low. It provides courts with an objective set of criteria to determine the applicable law which spares the courts a complicated – if not impossible – search for the legislative intent behind substantive laws. It also provides guidelines for the decision of all kinds of cases, notably "true conflicts" and "no interests" cases that cause difficulties under a unilateralist approach. As this also fosters prelitigation predictability a multilateral approach incurs significantly lower adjudication and compliance costs than a unilateralist approach. Admittedly, the costs associated with a multilateral approach vary depending on the objective criteria chosen. Take for example the best law approach advocated by *Juenger* and the characteristic performance rule of the Rome Convention:[95] both approaches are multilateral in nature because they assign a legal relationship to one particular legal order. However, whereas the best law approach leaves wide discretion to the court, thereby increasing both compliance and adjudication costs,[96] the Rome Convention's characteristic performance rule is easy to apply and therefore likely to reduce compliance and adjudication costs.[97]

In addition to keeping compliance and adjudication costs low, a multilateral approach decreases the chances that parties will engage in a costly race to the courthouse. Since it assigns a legal relationship to one particular legal system according to objective criteria it increases the chances that the result of the choice of law analysis will be the same no matter which court is competent to hear the case. Therefore, parties have no – or a significantly reduced – incentive to engage and invest in forum-shopping. The unilateral method, in contrast, requires a rather complex interpretation of different substantive laws which will almost certainly vary from court to court. Because this will increase the likelihood of differing results the expected gains from forum-shopping will be higher. For this reason, it seems that a multilateral approach to choice of law is generally to be preferred over a unilateral approach.

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93. For example, see the statutists' method *supra*. Others, such as Currie's governmental interest analysis, provide for application of the *lex fori*, which does not appear to be efficient from the outset.

94. It has been argued that the most important example of a unilateralist approach, Currie's governmental interest analysis, additionally leads to systematic overregulation. *See* Guzman, *supra* note 6, at 908.

95. *Supra* note 85.

96. For a more detailed discussion of the better law approach see *infra* Part V.B *et seq*.

97. For a more detailed discussion of the costs and benefits associated with the characteristic performance rule *infra* Part VI.B *et seq*.

V.
THE TENSION BETWEEN GOALS: CONFLICTS JUSTICE OR MATERIAL JUSTICE?

If a multilateral approach to choice of law is more efficient than a unilateral one, determination of the applicable law requires an efficient set of criteria that defines both the reach of forum law and the reach of foreign law. This, in turn, requires determination of the goals of private international law. Over the course of history, conflicts scholars have been oscillating between the following two options: conflicts justice and material justice.

A. The Legal Debate

1. The Classical Approaches

The methodological approaches that evolved up until the 20th century differed from one another in many regards. The statutists' method focused on defining the spatial reach of local laws, Savigny concentrated on assigning legal relationships to legal orders and the vested rights theory placed emphasis on rights that had been created abroad. However, in one respect they were on the same footing: they adhered to the assumption that choice of law was about assigning a case to the most appropriate legal order and not about reaching the most appropriate results in individual cases. In other words, the classical theories agreed that choice of law was striving for conflicts justice and not for material justice. However, during the 20th century the assumed solid ground began to shake. Triggered by the incorporation of the vested rights theory into the Restatement (First) and the perceived arbitrary results of its application, American conflicts scholars questioned the wisdom of conflicts justice and began promoting concentration on material justice in individual cases.

2. The American Conflicts Revolution

The first one to leave the confines of the classical concept of choice of law during what became later known as the American conflicts revolution was David F. Cavers.[98] He essentially blamed both the vested rights theory and Savigny's choice of law concept for selecting the applicable law without regard to its content and argued that international cases did not differ from purely national ones in that the court in both cases had to resolve a dispute in a substantively fair and just way. Therefore, he claimed that choice of law was about attaining "material justice" rather than "conflicts justice" and suggested that courts – in making choice of law decisions – should look to the content of the different laws involved and consider the result of their application in the

98. For a detailed account SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 50-52.

individual case.[99] This approach, which today is known as the material justice approach to private international law, gained more weight later during the 20th century under the influence of Robert Leflar. He developed what he called "choice influencing considerations": a list of five factors to be considered in choice of law cases in order to determine the applicable law.[100] This list differed from similar compilations of decisive factors – among them the principles of preference prepared by Cavers[101] – in that it allowed courts to apply what they perceived as the "better law."[102] And even though Leflar stressed that the quality of the law was only one out of five factors to be considered, most courts paid no or little attention to the first four criteria – predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests. Instead, they resorted quickly to application of what they perceived as the better law, which was more often than not the law of the forum.[103] As a result, Leflar's list of choice influencing considerations became soon generally known as the "better law approach."

Today, no contemporary choice of law system applies a better law approach as suggested – or at least supported – by Leflar. In Europe it was never seriously under discussion, although it was appreciated by some scholars as a subsidiary rule, notably Konrad Zweigert.[104] In the United States, it was rejected with the adoption of the Restatement (Second) of Conflict of Laws: according to Section 6 courts must determine the applicable law with regard to a number of factors designed to find the legal order with the most significant relationship to the dispute. However, while the list of these factors includes most of Leflar's choice influencing factors,[105] any reference to the quality of the law or the outcome of individual cases is missing.

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99. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 1-113 (1965); David F. Cavers, *A Critique of the Choice-of-Law Process: Addendum 1972*, 17 HARV. INT'L L. REV. 651, 651-56 (1976).

100. For a detailed account see BRILMAYER, *supra* note 22, at 64-66; EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS. A MULTILATERALIST METHOD 27-29 (2001); SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 52-58.

101. CAVERS, THE CHOICE-OF-LAW PROCESS, *supra* note 99, at 114-224.

102. Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert Leflar, *Conflicts of Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

103. *See, e.g.*, *Heath* v. *Zellmer*, 151 N.W.2d. 664 (Wis 1967); *Milkovich* v. *Saari*, 295 Minn. 155, 203 N.W. 2d. 408 (Minn. 1973). For a detailed discussion of the problem see SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 53-54.

104. Konrad Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws?*, 44 U. COLO. L. REV. 283, 283-99 (1973).

105. Section 6 mentions the following factors: (1) the need of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied.

B. The Economic Perspective

From an economic perspective a material justice approach appears to incur at least one important benefit: it determines the applicable law by looking to the substantive outcome on a case-by-case basis. In contrast to a conflicts justice approach it strives for finding the "proper result" in individual cases and, therefore, it is likely to generate what is perceived as "material justice." Under the assumption that "material justice" can be equated with the maximization of the joint benefits of the parties and the absence of externalities, looking for material justice is likely to enhance global efficiency. Why then did the material justice approach – just like the substantivist approach – not enjoy lasting popularity?

1. The Costs of Compliance and Adjudication

There are two obvious reasons that explain this finding. First, a material justice approach increases the compliance costs of the parties because it increases uncertainty.[106] Prior to filing a lawsuit – more precisely, prior to the rendering of a judgment – parties will not know which law the court will deem to be the proper one. To adjust their behavior to the applicable law, they will have to seek expensive legal advice. And even if they do, some uncertainty will always remain because the material justice approaches are specifically designed to allow for individual decisions in individual cases. Second, a material justice approach increases the costs of adjudication. This is because choosing the applicable law on the basis of the best substantive fit in individual cases requires determination, evaluation and comparison of the substantive laws involved.[107] Even if courts are actually in a position to compare and weigh different substantive laws – an assertion that must be doubted[108] – any such investigation into the substantive law of a foreign country is extremely complicated and time-consuming. It therefore increases the costs of adjudication.

2. The Negative Effects of Specific Investments

Next to the high compliance and adjudication costs there is a third reason that explains the lack of success of the material justice approach. Different empirical studies have shown that the material justice approaches that emerged during the American conflicts revolution in practice tends to result in the application of the *lex fori*.[109] In fact, application of the *lex fori* is more frequent in states that apply a material justice approach than in states that still adhere to

106. *See also infra* Part VII *et seq.*
107. *See also id.*
108. *See also infra* Part VI.B *et seq.*
109. *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 370-74, 377-78 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 87-88 (1989).

the Restatement (First) or any other approach that strives for conflicts justice. This finding, in turn, suggests that courts in looking for material justice tend to favor their own law over foreign law regardless of the outcome of the individual case. Of course, it might be that the application of the *lex fori* is an expression of a thorough comparison of the substantive laws involved on a case-by-case basis. However, it seems more likely that it is an expression of a forum bias which results from previous investments into acquiring knowledge about the *lex fori*.[110] As a result, it appears that the perceived benefit of a material justice approach – efficiency in individual cases – is not likely to be realized in practice. A material justice approach, therefore, seems to incur considerable costs without resulting in any benefits. Therefore, approaches that aim for conflicts justice rather than material justice are generally to be preferred.[111]

VI.
THE DEGREES OF PRECISION: LEGAL CERTAINTY OR FLEXIBILITY?

In addition to the dichotomies discussed so far choice of law theory has revolved around a question that concerns the degree of precision, detail or complexity of regulation. Should choice of law rules primarily be designed to provide for legal certainty or should they rather allow for flexibility? In other words: should choice of law provisions be framed as rules or as standards? Until the 20th century there was a strong tendency towards legal certainty triggering the need for rather strict rules in both the United States and Europe. However, during the 20th century the American conflicts revolution produced a number of methodological approaches that favored flexibility. In fact, the desire for more flexibility was one of the driving forces behind the American conflicts revolution.

A. The Legal Debate

1. The European Approach

In Europe, ever since the birth of choice of law in the 12th century, the desire to provide for legal certainty has prevailed. The statutists tried to develop clear cut rules to determine the spatial reach of legal norms, Wächter promoted his *lex fori* approach to ensure more predictability in the choice of law analysis, and Savigny spent much time with the development of clear connecting factors for different categories of legal relationships. Today, a rule-based approach is still dominant in European choice of law methodology. However, under the influence of the American conflicts revolution some adjustments have been made to allow for more flexibility in individual cases. The Rome

110. *See also* Ghei & Parisi, *supra* note 24, at 1376; Guzman, *supra* note 6, at 896-97.
111. *See also* Guzman, *supra* note 6, at 897.

Convention,[112] for example, determines the applicable law with a set of rather strict rules designed to find the law with which the contract is the most closely connected. However, these rules for the most part amount to rebuttable presumptions that can be set aside if a court finds that in individual cases the contract is more closely connected with the law of another state.[113] As a result, the Rome Convention in principle applies strict rules to make choice of law decisions. However, it allows departure from these rules on a case-by-case basis.

2. The Vested Rights Theory and the Restatement (First) of Conflicts

In the United States, as in Europe, choice of law theory started with a rule-oriented approach: the vested rights theory. It advanced the idea that courts had to decide a case in accordance with foreign law if the right in question had vested abroad. Unfortunately, determination of whether a right had vested abroad was not always easy. Therefore, American courts – and eventually the Restatement (First) of Conflicts – focused on the occurrence of certain events, usually the last act necessary to complete the cause of action.[114] Not surprisingly, the concentration on the place of the last act did not lead to satisfactory results in every single case. More often than not, application of the vested rights theory was perceived as leading to arbitrary results triggered by strict and mechanical rules. In the middle of the 20th century, American legal scholarship, therefore, took a sharp turn. In order to ensure justice in individual cases a majority of American scholars started to reject rule-based approaches and came up with proposals for flexible choice of law rules. Juenger advocated his best law approach, Cavers advanced his principles of preference, and Leflar prepared his choice influencing factors. With the help of many more American scholars, notably von Mehren and McDougal, they eventually triggered the replacement of the Restatement (First).

3. The Restatement (Second) of Conflicts

The Restatement (First) of Conflict of Laws had met with severe criticism and launched a vigorous academic debate as soon as it was published in 1934. To account for both the most prominent criticism and the new approaches to private international law promoted by legal scholarship, the American Law Institute eventually decided in 1951 to draft a new Restatement. Under the guidance of Willis L. M. Reese, the Reporter for the ambitious project, the

112. *Supra* note 85. For a detailed account, see Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L. L. 571, 586 (1999).

113. If the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final, is enacted, the rebuttable presumptions will be turned into strict rules.

114. For a detailed discussion of the vested rights theory see BRILMAYER, *supra* note 22, at 18-22; KAY, *supra* note 22, at 26-28; SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 18-22.

Institute set out to remedy the perceived flaws of the Restatement (First) by incorporating the best features of modern approaches to choice of law while avoiding their defects. Whether the Restatement (Second) that was finally adopted in 1969 has actually managed to take the good without the bad is still open for discussion. More often than not it has been argued that the blending of different approaches has resulted in a "mishmash" that makes the determination of the applicable law more difficult, if not impossible. One thing, however, can be said with certainty. The Restatement (Second) has accounted for the most important claim of all modern American scholars in that it determines the applicable law by applying a flexible standard: the principle of the most significant relationship.[115] However, just like the Rome Convention has abandoned the European adherence to strict rules, the Restatement has accounted for the need of certainty in international transactions and laid down a set of more specific rules. Because these rules are phrased as rebuttable presumptions it seems that American and European choice of law methodology – after some divergence during the course of the 20th century – have arrived at a very similar point.[116]

B. The Economic Perspective

The discussion about whether choice of law should provide for legal certainty or flexibility finds a close relative in the law and economics literature: the rules versus standards debate. It has been high on the economic agenda for quite some time and produced important insights into the workings and effects of both types of norms. Can these insights provide guidelines for the long-lasting debate in choice of law?

1. Rules versus Standards: The Economic Debate

In economic theory, rules are usually defined as simple and clear legal norms whose precise content is promulgated prior to individuals' behavior. In contrast, standards are usually understood as unclear and fuzzy legal norms whose precise content is determined after the relevant individuals' behavior has taken place.[117] Whether legal norms should be phrased as rules or standards depends on which of the two incurs the least overall specification, compliance

115. For a detailed account of the Restatement (Second), see BRILMAYER, *supra* note 22, at 67-69; SCOLES ET AL., CONFLICT OF LAWS, *supra* note 5, at 58-68.

116. Reimann, *supra* note 112, at 586-87.

117. Hans-Bernd Schäfer, *Legal Rules and Standards*, *in* GERMAN WORKING PAPERS IN LAW AND ECONOMICS No. 2, 1 (2002); Thomas S. Ulen, *Standards und Direktiven im Lichte begrenzter Rationalität*, *in* DIE PRÄVENTIVWIRKUNG ZIVIL- UND STRAFRECHTLICHER NORMEN 347, 347 (Hans-Bernd Schäfer & Claus Ott eds., 1999). Kaplow, however, has argued that the decisive criterion for distinction is not the precision of a legal norm, but just the time of regulation. *See* Louis Kaplow, *General Characteristics of Rules*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS vol. 5, at 502, 509, 586-90 (Boudewijn Bouckaert & Gerrit De Geest eds., 1999). *See also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961 (1999).

and adjudication costs.[118] At large, the following general statements can be made: for rules, specification costs are usually high because both initial drafting and subsequent revision require intensive investigation, deliberation and negotiation. For standards, in contrast, the costs of both drafting and revising are usually low because they leave difficult issues for future resolution by the courts and, therefore, require less discussion at the outset. Additionally, standards usually need less revision than rules because they are less sensitive to quick economic and social changes and, therefore, less likely to obsolesce. Therefore, the specification costs for standards are usually much lower than for rules.[119]

Compliance costs, in contrast, are usually low for rules because their simplicity and clarity makes them easily accessible. For standards, in contrast, the costs of determining the content are usually high because individuals have to engage in the difficult, if not at times impossible, prediction of how a court will eventually determine the desired degree and level of conduct. They will either have to study the law and relevant precedents themselves or pay for costly legal advice. And in the end, there will almost always remain some uncertainty about the content of the law and the future decision of a court. As a result, compliance with a standard, in principle, is more complicated and therefore more costly than compliance with a rule.[120] However, it may also be the other way round: although a particular rule may be very simple and therefore easy to understand, it can happen that the entire set of rules necessary to regulate a certain conduct is more complex than a corresponding standard. For example, the above-mentioned speed limit of 65 miles per hour is a clear and simple rule. Nevertheless, the entire traffic code necessary to regulate driving is most probably more complex and difficult to understand than the general requirement of the standard to drive carefully. The process of finding the one clear and simple rule regulating the relevant conduct might, therefore, incur information costs, which may even exceed the information costs under a standard.[121] However, the latter may rather be the exception than the rule so that rules at large indeed seem to incur less compliance costs than standards.

Likewise, the costs of norm adjudication are usually low if legal norms are phrased as rules because their simplicity and clarity allows for easy determination of the content by the adjudicator. For standards, in contrast, these costs are usually high because they leave ample room for judicial discretion. Therefore, unless the system of rules itself is complex, the application costs of a

118. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 72-74 (1983); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 568-70 (1992).

119. Diver, *supra* note 118, at 73; Willis L. M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. Q. 315, 320-22 (1972).

120. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 61, at 556-57. *See also* Diver, *supra* note 118, at 73; Reese, *supra* note 119, at 316-17.

121. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 61, at 557-58. *See also* Kaplow, *supra* note 118, at 593-96.

rule will be lower than the application costs of a standard.[122] The same considerations lead to the result that the costs for monitoring the correct application of a rule are usually lower than the costs of monitoring the application of a standard.[123] The content and of a standard is simply more difficult to determine. Therefore, it is likewise more difficult to determine when adjudicators stay within their boundaries.

In summary, it can be said that rules tend to incur high specification costs and low compliance and adjudication costs, whereas standards lean towards low specification costs and high compliance and adjudication costs.[124] However, this does not mean that rules are generally less costly than standards and, therefore, are generally to be preferred. It is perfectly possible that the total costs involved in specification, compliance and adjudication of a rule exceed the corresponding costs of a standard. Therefore, the choice between rules and standards depends on a comparison of the associated costs on a case-by-case basis.[125] Admittedly, any such comparison will face difficulties resulting from the number of variables responsible for the desirable degree of precision. And any generalization as to when rules are to be preferred over standards is necessarily suspect. Nonetheless, it can be said that formulation as a rule tends to be more appropriate than formulation as a standard if a legal norm will be applied and adjudicated frequently. This is because the additional costs of specification – which will arise only once – will most likely be outweighed by the savings in the costs of compliance and adjudication. In contrast, formulation of a legal norm as a standard seems advisable if a norm is less frequently applied or if the regulated conduct is subject to quick economic and social change.[126] By the same token, designing a legal norm as a rule seems to be superior, if information about the regulated conduct and the optimal level of regulation are readily available as well as processible for the legislator. Leaving the specification to the courts in these cases would multiply the corresponding costs and thereby lead to a waste of judicial resources. If, however, the relevant information is not readily available, it seems more appropriate to phrase the legal norm as standard and to leave the ultimate decision to the courts.[127]

2. Rules versus Standards: The Implications for Choice of Law

The costs and benefits involved with application of rules and standards may vary from one area of the law to the other. Due to the fact that the costs of

122. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 61, at 557. *See also* Diver, *supra* note 118, at 73; Reese, *supra* note 119, at 317-18.

123. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 61, at 557.

124. Kaplow, *supra* note 118, at 568-70; POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 61, at 556-58.

125. Diver, *supra* note 118, at 75-76; Sunstein, *supra* note 117, at 974, 1003-04.

126. Kaplow, *supra* note 118, at 563, 571-77; Schäfer, *supra* note 117, at 2; Sunstein, *supra* note 117, at 1003-04; Ulen, *supra* note 117, at 356-57.

127. *See* Schäfer, *supra* note 117, at 2-3; Sunstein, *supra* note 117, at 1003.

specification, compliance and adjudication differ according to the context, it might be that rules are less costly in some areas, whereas standards are more beneficial in others. Additionally, even if in a certain area of law rules are generally to be preferred over standards or vice versa, it might be that certain issues within that area require a different treatment. Therefore, the following considerations are to be handled with care. They try to identify the costs and benefits typically incurred with the application of rules and standards in choice of law. However, they are subject to potential modification for certain areas or certain issues within choice of law.

3. The Law of Large Numbers: Norm Specification and Economies of Scale

It has been seen that the costs for initial specification of rules are usually higher than the costs for the initial specification of standards. In this respect, choice of law is no exception. Take for example the better law standard promoted by Leflar and compare it to a rule such as Article 4 (2) of the Rome Convention,[128] which provides that contracts shall be governed by the law of the country where the party who is to effect the performance which is characteristic of the contract has her habitual residence.[129] It seems clear that Leflar's approach incurs significantly less costs in initial specification than the European characteristic performance rule. It neither requires intensive investigation or empirical research nor does it likely provoke lengthy deliberation and negotiation. Additionally, Leflar's better law approach is almost immune against social and economic changes and, therefore, less likely to be in need of subsequent revision than the very specific European characteristic performance rule.

The decisive question, therefore, is whether in choice of law savings in compliance and adjudication costs may outweigh the high costs of initial specification for rules. As has been described, the answer to this question turns to a large extent on the frequency with which a particular choice of law rule will be applied and adjudicated in practice. Naturally, it is hard to answer this question on a general level without having regard to specific issues in choice of law. And unfortunately, figures about the frequency of both international transactions and the associated legal problems are not readily available. However the following can be said with some certainty. First, the number of cases that trigger choice of law issues is substantial. Due to increased international commerce, international travel and international migration a growing number of cases have connections to more than one legal order. For example, more and more people travel abroad where they book hotels, rent cars and go shopping. In 1999 alone, 73 million people went from Germany to

128. *Supra* note 85.

129. For a more detailed economic analysis of the characteristic performance rule, see Schäfer & Lantermann, *Choice of Law from an Economic Perspective*, *supra* note 6, at 98-99..

France for business or personal reasons, 59 million to Italy, 89 million to Poland and more than 100 million to the Czech Republic.[130] Also, more and more people have access to the Internet, which allows for increased international commerce. In the Federal Republic of Germany, for example, more than 95% of all businesses and around 60% of all private households have Internet access. 52% of all businesses and 43% of all private households with Internet access engage in the exchange of goods and services via the Internet.[131] Finally, more and more people leave their home countries to work and live abroad. Germany, for example, counts more than 7 million foreign nationals.[132] Additionally, 50.000 foreign nationals get married in Germany every single year.[133]

Second, although the fact patterns underlying cases with international connections are usually more diverse than in purely domestic cases, this does not imply that the underlying legal issues are more diverse. In fact, there is no reason to believe that the number and diversity of countries involved renders *ex ante* regulation impossible. It rather seems that choice of law cases just like cases in any field of substantive law for the most part revolve around a limited number of iterative problems. In contracts, for example, choice of law both in the United States and Europe has traditionally been struggling with the scope of party autonomy, the applicable law in the absence of party stipulation as well as the applicable law in consumer contracts, insurance contracts and employment contracts. In torts, pervasive issues have been, for example, the scope of the *lex loci delicti* rule, the applicable law in cross-border torts as well as the applicable law in product liability cases. As a result, although choice of law issues "arise in a myriad of factual contexts involving people and events from different places."[134] This does not mean that the specific issues in question are equally different and diverse.[135] And even though there may be issues in choice of law that arise infrequently, there is some reason to believe that on a large scale the frequency of both international transactions and the recurrence of specific choice of law issues allow and even support formulation of the corresponding legal norms as rules.

4. The Availability of Information: Allocation of Resources and Expertise

Apart from the frequency of application, the availability of information

130. *See* STATISTISCHES BUNDESAMT (FEDERAL STATISTICAL OFFICE), STATISTISCHES JAHRBUCH FÜR DAS AUSLAND 2002 278 (2002).

131. STATISTISCHES BUNDESAMT (FEDERAL STATISTICAL OFFICE), INFORMATIONSTECHNOLOGIE IN UNTERNEHMEN UND HAUSHALTEN *2004* 7, 38-39 (2004), *available at* http://www.destatis.de/down load/d/veroe/ pb_ikt_2004.pdf.

132. Information according to the STATISTISCHES BUNDESAMT (FEDERAL STATISTICAL OFFICE), *available at* http://www.destatis.de/basis/d/bevoe/bevoetab4.php.

133. *See* BUNDESMINISTERIUM DER JUSTIZ (FEDERAL MINISTRY OF JUSTICE), INTERNATIONALES PRIVATRECHT – PRIVATE RECHTSBEZIEHUNGEN MIT DEM AUSLAND 1, *available at* http://www.bmj.de/media/archive/956.pdf.

134. Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 393.

135. *But see id.*

about the regulated conduct indicates whether formulation of legal norms as rules or as standards is desirable from an economic point of view. As has been pointed out, formulation of legal norms as rules seems more appropriate if such information is readily available and processible for the legislator, whereas formulation as standards is to be preferred if such information can better be gathered by the courts on a case-by-case basis. In other words: if the legislator is in a better position to gather and process the relevant information, the legislator should provide for precise choice of law rules. If not, the decision should be left to the courts by way of standards. Against this background, what is the situation in choice of law? Who is in a better position to determine the applicable law? The answer to these questions depends to a large extent on issues previously discussed, namely whether choice of law should resort to the selectivist or the substantivist method and whether choice of law should strive for conflicts or material justice. If choice of law were about achieving justice in individual cases it would be rather clear that the courts would be in a better position to determine the applicable law. Likewise, the courts would have superior knowledge if the substantivist method of creating new substantive law based on the legal systems involved in particular cases were to be applied. However, as both the material justice approach and the substantivist method should be rejected, it seems that courts are not in a better position than legislators to determine the applicable law. As a general rule, judges in both civil law and common law countries do not have the expertise to take the policy decisions required under any of the approaches that emerged during the American conflicts revolution. Prior to being raised to the Bench, judges have usually been trained only in their own legal system. Therefore, they do not have sufficient knowledge of foreign legal systems to determine whether the law of a foreign country in a particular case provides for the best law. Neither can they determine the underlying policies of foreign law in order to compare or weigh the governmental interests at stake. And even if judges had sufficient expertise in foreign and comparative law it is unlikely that they would have the time and the resources to engage in the research necessary to take a decision based on a vague standard in a particular case. Indeed, empirical studies have proven that courts that follow any of the modern American approaches tend to apply their own law.[136] And even though it is possible that application of the American *lex fori* has been the result of a thorough comparison of the different legal systems involved, it seems rather unlikely. Therefore, it appears that legislators are in a better position to determine the applicable law.[137] The availability of information and the ability

136. *See* Borchers, *supra* note 109, at 370-74, 377-78; Solimine, *supra* note 109, at 87-88; *see also* O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 641-42; Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 394-95.

137. This is not to say that legislators are in a perfect position to determine the applicable law. Public choice problems, for example, may distort the legislative process and lead to inefficient results. However, for the afore-mentioned reasons, legislators seem to be in a comparatively better position to make choice of law decisions than courts. *See* O'Hara & Ribstein, *From Politics to*

to process such information, thus likewise favors rules over standards in choice of law.[138]

5. The Adjustment of Conduct: Norm Compliance and Uncertainty

As has been seen earlier, the costs of compliance are generally higher for standards than for rules. Again, choice of law does not seem to be an exception. Staying with the comparison between Leflar's better law approach and Article 4 (2) of the Rome Convention it is certainly more difficult for private individuals to find out what the "better" law is that a court might apply to a contract than to determine the habitual residence of the party who is to effect the performance which is characteristic of the contract. Considering that the "characteristic performance" is commonly understood as "non-monetary performance" the provision seems pretty straightforward. Therefore, it seems to keep compliance costs significantly lower than a best law approach. However, does that mean that compliance costs under Article 4 (2) of the Rome Convention are generally lower than under a standards-based approach? Doubts arise from the surrounding provisions that establish exceptions from the general rule. According to Article 4 (3) and (4) of the Rome Convention, the characteristic performance rule does not apply if the subject matter of the contract is a right in immovable property or a right to use immovable property or if the contract is for the carriage of goods. Additionally, Article 4 (5) provides that the characteristic performance rule is generally to be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. Articles 5 (3) further excludes application of the characteristic performance rule in consumer contracts to the benefit of the law of the country where the consumer has her habitual residence in a few cases: (1) if the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising in the consumer's country of habitual residence, and the consumer has taken all the steps necessary on her part for the conclusion of the contract in that country; (2) if the other party or his agent received the consumer's order in the consumer's country of habitual residence; or (3) if the contract was for sale of goods and the consumer traveled from the country of his habitual residence to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.[139] Finally, Article 6 (2) exempts individual employment contracts from the characteristic performance rule.

Considering the many exceptions and exclusions, it is evident that

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Efficiency in Choice of Law, *supra* note 6, at 1178-79.

138. *See also* Schäfer & Lantermann, *Choice of Law from an Economic Perspective*, *supra* note 6, at 89-92.

139. Art. 5 of the Rome Convention is likely to be changed in the near future. According to the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final, consumer contracts will be governed by the law of the country in which the consumer has her habitual residence.

application of the Rome Convention's characteristic performance rule is not as simple as it appears to be. Many provisions have to be examined in order to make sure that the law of the country actually applies where the party affecting the characteristic performance has her habitual residence. However, even though the rules of the Rome Convention are more complex than they appear at first glance, determination of the applicable law eventually is possible. Therefore, the parties will be able to adjust their behavior to the legal framework. In contrast, under a standard such as the better law approach, certainty about the future decision of a court will never be reached, no matter how much the parties invest in legal advice.[140] As a result, costly uncertainty remains if legal norms are phrased as standards in choice of law. And even though this is the very nature of standards it seems that the uncertainty created through standards in choice of law is particularly great: application of a standard in choice of law and the resulting uncertainty require the parties to account for the substantive norms of the potentially applicable laws. Assuming that a standard potentially allows for the application of the law of two, three or four countries, this means that parties will have to consider the content of two, three or four different substantive laws to adjust their behavior. Further assuming that the substantive laws of these countries are not crystal clear but leave room for two, three or four different interpretations means that uncertainty is multiplied if choice of law resorts to standards instead of rules. Accordingly, it seems that rules – even if they are complex – incur less compliance costs than standards in choice of law.

6. The Challenges of Application: Norm Adjudication and Discretion

By the same token, the costs of adjudication are generally lower under a rule than under a standard. Take for example Leflar's better law approach and Currie's governmental analysis. Both approaches require a court to engage in a complicated examination and comparison of the substantive laws of the different legal systems involved. And irrespective of whether courts are actually in a position to accomplish any such investigation it seems clear that it requires time and resources which in turn incurs high application costs. Under the rules of the Rome Convention, in contrast, the costs of application are significantly lower. Even though the characteristic performance rule is so intermingled with exceptions that it is not as straightforward as it appears, it does not call for normative determination of the merits of substantive laws or governmental policies. Instead it provides the court with a complex, but still rather clear road map for the determination of the applicable law. Consequently, it incurs less application costs than any of the standards proposed in the course of the American conflicts revolution. Moreover, it decreases adjudication costs on yet another ground: due to the fact that rules do not leave discretion to the courts, it

140. For a detailed analysis of the different modern American approaches Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 392-93.

is likely that the choice of law analysis will be the same across different courts. Because variances are not to be expected on a large scale, incentives for forum shopping together with the associated costs will decrease. In contrast, under a standard, in particular a standard that requires the comparison of substantive laws, the choice of law analysis and thereby the outcome of a case will almost certainly vary from court to court. This, in turn, will encourage parties to engage in forum shopping and thereby increase the costs of adjudication.[141] As a result, rules seem to incur less overall costs at the adjudication stage.

7. The Effect of Vagueness: Efficient Judgments or Inefficient Forum Bias?

The preceding considerations allow the following conclusions. First, in choice of law, rules incur higher specification costs than standards. However, the frequency of application of choice of law rules and the *ex ante* availability and accessibility of information are likely to result in subsequent savings, which will outweigh the increased specification costs. Second, the costs of compliance and adjudication of rules are lower than for standards. The foregoing analysis, therefore, seems to suggest that in choice of law, rules should generally prevail over standards. Drawing this conclusion would, however, ignore one of the most important benefits of standards over rules, namely the potential for justice in individual cases.[142] While rules can easily be over-inclusive or under-inclusive and, therefore, lead to absurd results when applied, standards can generate adequate solutions on a case-by-case basis. For this reason, in weighing the costs of benefits involved with the application of rules and standards, the decisive question is: Can the costs of standards be outweighed by the fact that they allow courts to account for the needs of individual cases? Can the higher costs of compliance and adjudication be outweighed by the benefit of providing for the best choice of law solution on a case-by-case basis? A definite answer seems difficult on an abstract level because the costs and benefits associated with standards may vary with the standard applied.

Nonetheless, the following observations can be made: first, the American standards that emerged in the course of the American conflicts revolution and that require the courts to compare and weigh substantive laws or governmental interests have failed to provide for the envisioned just outcome in individual cases. Instead, they have mostly served as a justification for application of the law that the courts know best. It follows that standards that require a normative determination of the merits of foreign substantive laws or foreign governmental interests are not likely to provide for the benefit of individual justice that might be able to outweigh the high compliance and adjudication costs. Therefore, if

141. Ghei & Parisi, *supra* note 24, at 1373-75; RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, *supra* note 46, at 306. For a more detailed account of the inefficiencies involved with forum shopping, see *supra* Part II.B *et seq.*

142. O'Hara & Ribstein, *Conflict of Laws and Choice of Law*, *supra* note 6, at 635; Parisi & O'Hara, *Conflict of Laws*, *supra* note 6, at 391; Schäfer & Lantermann, *Choice of Law from an Economic Perspective*, *supra* note 6, at 91.

standards are to be applied at all, they should resort to criteria – such as the American criterion of the most significant relationship or the European criterion of the closest connection – that are more objective and do not involve investigation and comparison of foreign law or foreign policies. Second, even if a standard can be found that allows more successfully for generation of just results in individual cases it seems unlikely that the associated benefits will indeed outweigh the high compliance and adjudication costs incurred by any standard. This is because every standard provides courts with an incentive to apply forum law regardless of the particularities of the case and thereby reduce the potential benefits to be gained.

Against this background, economic theory seems to support the view that choice of law should resort to rules rather than standards. But maybe the economically best solution would not be to choose between rules and standards, but rather to combine the two.[143] In practice, combination models can be found in the Restatement (Second) of Conflicts and the Rome Convention on the Law Applicable to Contractual Obligations. Both provide for a set of precise rules which courts have to apply in the first place. These rules, however, are phrased as rebuttable presumptions and can be set aside if courts find that they do not lead to application of the law that has the most significant relationship or the closest connection with the case under discussion. As a result, the idea underlying both the American and the European regimes is the same: courts should decide in the spirit of the general principle, normally applying the specific rules but overriding these rules should the general principle so require. Both regimes, thus, try to combine the virtues of rules with the advantages of standards. And the simple fact that Americans and Europeans have more or less independently arrived at the same model,[144] might be seen as proof that a combination of precise rules and standards is economically the most efficient approach in choice of law.

VII.
CONCLUSION

Since the emergence of the law and economics movement in the 1960s, economic theory has been applied to the legal system across the board: to torts, contracts, restitution and property law; to criminal law; to civil, criminal and administrative procedure. Therefore, one would assume that by the year 2005 all areas of law had been the subject matter of a thorough economic analysis. Surprisingly, this is not the case. At least one field of law has essentially remained a hideaway for legal scholarship, more or less untouched by economic

143. *See also* Schäfer & Lantermann, *Choice of Law from an Economic Perspective*, *supra* note 6, at 91-92 (arguing for rules in principle and escape clauses in exceptional cases).

144. Reimann, *supra* note 112, at 572-73.

theory: choice of law. With little exception[145] the question of which law is applicable to international transactions that involve more than one legal order has largely been ignored by the economic analysis of law. This is not only surprising against the background of a steadily growing number of international transactions, but also against the background of the methodological state of choice of law which has long been described as "dismal swamp."[146] Indeed, despite several hundred years of vigorous academic debate and an outburst of legal theories and approaches in the 20th century striving for methodological clarification, the most fundamental questions of choice of law are still under discussion. Should courts apply foreign law at all? Should the law of one of the states involved apply or should multistate substantive law specifically designed for international transactions be created? Should choice of law rules define the reach of both forum and foreign law? Should they be unilateral or rather multilateral? In choosing the applicable law should courts take into account the substance of the law? Should they try to find the "correct" law or the "correct" result? Should they search for material justice or rather for conflicts justice? Should they strive for legal certainty or rather for flexibility on a case-by-case basis?

In this article I have tried to answer these fundamental questions in choice of law from an economic perspective. More specifically, I have tried to determine the globally efficient design of choice of law rules from the perspective of a single benevolent and well-informed global legislator. In doing so, I have argued that choice of law rules should (1) be open towards application of foreign law, (2) apply the law of one of the states involved, (3) determine the reach of both foreign and forum law, (4) strive for conflicts justice, and (5) apply rules instead of standards. With this analysis, I hope to have prepared the ground for further economic discussion about both fundamental and more specific issues in choice of law. I also hope to have shown that economic theory can help to overcome the persisting methodological chaos in choice of law by providing the tools of measurement necessary to guide the discourse, adjudication, legislation and negotiation in choice of law.

145. *See supra* note 6.

146. "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." *See* William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

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Protecting the Freedom of Transit of Petroleum: Transnational Lawyers Making (up) International Law in the Caspian

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Protecting the "Freedom of Transit of Petroleum":

Transnational Lawyers Making (Up) International Law in the Caspian

By
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ABSTRACT

Over the past decade, U.S.-based energy-sector law firms have negotiated the legal architecture, financing, and construction of Central Asia's Baku-Tbilisi-Ceyhan ("BTC") oil pipeline in fulfillment of an oil project that analysts have dubbed the "contract of the century." Regional organizations decry the usual litany of economic, human rights, and environmental costs universally associated with big oil. The pipeline's most striking feature, however, is the way the deal was made. Instead of using merely contract instruments, the law firms crafted an international treaty that invokes a "principle of the freedom of transit of Petroleum" which, *inter alia*, chills development of local regulatory regimes, dodges challenges posed by the recent surge in human rights cases following *Doe v. Unocal*, and upends international law's central tenet of sovereignty through radically asymmetrical terms and wholesale transfer of land and other property rights.

Cumulatively, this article argues, these provisions have created a thousand-mile swath of militarized corporate sovereignty running from Azerbaijan's Caspian shore to Turkey's Mediterranean, the ramifications of which are sure to

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be felt not only by communities living along this pipeline's path, but also by their counterparts around the globe. By internationalizing the "freedom of transit of Petroleum," the BTC consortium has begun the process of making international law, attempting to place protection of this industrial product on par with protection of human rights.

I.
THE BTC PIPELINE'S LEGAL ARCHITECTURE

A. Introduction

This article examines the creation of Central Asia's Baku-Tbilisi-Ceyhan ("BTC") oil pipeline. Over the past decade, a handful of U.S.-based, energy-sector law firms have negotiated the legal architecture, financing, and construction of the BTC pipeline to carry oil from under the Caspian to the Mediterranean Sea over a thousand miles of Azerbaijan, Georgia, and Turkey for export to western markets. In anticipation of operationalizing the pipeline this spring,[1] it is currently being filled with crude from the Azeri-Chirag-Guneshli field, in fulfillment of what analysts had dubbed "the contract of the century." [2] Both the Clinton and Bush II Administrations pressed for the pipeline, one of the world's most ambitious,[3] to provide access to Caspian Sea oil reserves without going through the Persian Gulf or Russia.[4] Led by British Petroleum ("BP"), the BTC consortium[5] views the pipeline as an economical

1. *See First Shipment from BTC Oil Line Set for May*, OIL & GAS J., Feb. 27, 2006, at 9.

2. The "contract of the century" was the 1994 Production Sharing Agreement ("PSA") between the Azeri state oil company, SOCAR, and a consortium of eleven international oil companies known as Azerbaijan International Operating Company ("AIOC"). *See* Daphne Eviatar, *Wildcat Lawyering*, AM. LAW., Nov. 4, 2002, at 83. This PSA was the first to open up the Azeri-Chirag-Guneshli field, estimated to contain 5.4 billion barrels of recoverable oil. The BTC pipeline is being built to provide a new export route for this oil. *See* Christopher P.M. Waters, *Who Should Regulate the Baku-Tblisi-Ceyhan Pipeline?*, 16 GEO. INT'L ENVTL. L. REV. 403, 405 (2004); *see generally* BP Caspian website, http://www.bp.com/lubricanthome.do?categoryId=6070.

3. Project participants expect the BTC pipeline system to flow up to one million barrels per day, worth roughly eight billion USD per year. *See* BP Caspian website, http://www.bp.com/lubricanthome.do?categoryId=6070; Paul Starobin, *Opening the Caspian Oil Tap*, BUS. WK., Dec. 24, 2001, *available at* http://www.businessweek.com/magazine/content/01_52/b3763128.htm.

4. As U.S. dependence on Middle Eastern oil grows, relations between the U.S. and Turkey increasingly focus on energy. *See* Selma Stern, *Turning Towards Turkey: Its Importance as an Energy Distributor and Ally in Post-9/11 Stabilization*, 28 FLETCHER F. WORLD AFF. 201, 204 (2004). The U.S. was a main mover behind the BTC pipeline because of the U.S. being "generally circumspect about Russian-Iranian cooperation." *Id.*; *see also* Daphne Eviatar, *The Geopolitics of Picking a Path*, AM. LAW., Nov. 4, 2002, at 99 ("Strategically the United States wants a new pipeline to bypass Russia so that if U.S.-Russian relations turn sour, the Russian government can't completely halt the flow of Caspian oil to the United States."). The E.U. is also eager to diversify its oil sources by relying on increased access to Turkey's energy corridor. *See* Yigal Schleifer, *Pipeline Politics Give Turkey an Edge*, CHRISTIAN SCI. MONITOR, May 25, 2005, at 6; *see also* Douglas Frantz, *Iran and Azerbaijan Argue Over Caspian's Riches*, N.Y. TIMES, Aug. 30, 2001, at A4.

5. The consortium is called the BTC Pipeline Company ("BTC Co."), whose shareholders are: BP (U.K.) 30.1%; SOCAR (Azerbaijan) 25%; Unocal (U.S.) 8.9 %; Statoil (Norway) 8.71 %; TPAO (Turkey) 6.53 %; Eni (Italy) 5%; Total (France) 5%; Itochu (Japan) 3.4 %; INPEX (Japan)

and environmentally safer way alternative to transporting Caspian oil by a combination of pipelines and tankers through the Turkish Straits.[6] Local peoples' organizations in all three countries and international non-governmental organizations ("NGOs") opposed to the pipeline decry the usual litany of social, economic, environmental, and human rights costs universally associated with "big oil."[7]

To attract the three billion dollar investment needed for this large-scale, high-risk[8] venture, BP, represented by the law firm Baker Botts, sought to ensure the most favorable terms for other interested oil companies. To do so, the Houston-based team crafted not only a series of "host government agreements" but also an intergovernmental treaty among the host states to "ensure the principle of the freedom of transit of Petroleum,"[9] a "freedom" that, *inter alia*, includes a virtual freeze of future developments in local regulatory law,[10] an expedited process for the expropriation of land needed for the pipeline,[11] and indemnification from liability for human rights violations resulting from pipeline security control.[12]

Stability and predictability are vital to investors, lenders, and other financial stakeholders in a megadevelopment project[13] like the BTC pipeline.[14]

2.5%; ConocoPhillips 2.5% (U.S.); Amerada Hess 2.36%. (U.S.). *See* BP Caspian website, http://www.bp.com/lubricanthome.do?categoryId=6070. The project is also referred to as the Baku-Tblisi-Ceyhan Main Export Pipeline ("MEP").

6. *See id.*

7. Recent project controversies include: the monitoring of letters of Azeri activists; the alleged torture of human rights defender Ferhat Kaya in Turkey; the increased use of police forces to break up peaceful demonstrations held by villagers in Georgia; underpaid local construction workers and violations of International Labour Organisation standards; a number of BTC affected communities still waiting for compensation and widespread cases of corruption during the land compensation process; polluted drinking water sources despite the use of 'highest standards'; and the discovery of cracked pipes that could potentially cause massive environmental damage. CEE Bankwatch, Baku-Tbilisi-Ceyhan Pipeline, Caucasus (2005), http://www.bankwatch. org/ project.shtml?s=153907. NGOs monitoring the project include CEE Bankwatch Network (Central and Eastern Europe), Amnesty International (U.K.), Friends of the Earth (England, Wales & Northern Ireland), Les Amis de la Terre (France), Green Alternative (Georgia), and National Ecological Center of Ukraine. *See id.*

8. As with most petroleum pipeline investment, BTC investors face various risks, from technology risks in pipeline development to "unforeseen changes in the investment policies and laws of the host country" (among other stability risks); risks "not associated with changes in the fiscal framework," such as "civil unrest or ethnic disturbances" (political risk); and risks that "environmental pollution and other tortuous [sic] acts" will diminish efficiency of the wells (operational risk). B.O.N. Nwete, *To What Extent Can Stabilization Clauses Mitigate the Investor's Risk in a Production Sharing Contract?*, 3 OIL, GAS & ENERGY L. INTELLIGENCE 118, 128 (2005), *available at* http://www.gasandoil.com/ogel. Contributing to the BTC pipeline's high-risk profile is the fact that it cuts across roughly seven conflict zones through earthquake-prone terrain. *See* Baku-Ceyhan Campaign, Conflict, Militarization, Human Rights and the Baku-Tbilisi-Ceyhan Pipeline (2005), http://www.bakuceyhan.org.uk/more_info/human rights.htm.

9. Agreement Among The Azerbaijan Republic, Georgia and The Republic of Turkey, pmbl., http://subsites.bp.com/caspian/BTC/Eng/agmt4/agmt4.PDF [hereinafter IGA].

10. *See* Part IIIA1, *infra* (discussing economic equilibrium clause).

11. *See* Part VI, *infra* (discussing BTC's property rights provision).

12. *See* Part V, *infra* (discussing BTC pipeline security provisions)

13. Megadevelopment refers to a class of large-scale, high-risk projects that exploit energy

The BTC project agreements follow a decades-long tradition of seeking stability and predictability through stabilization clauses, as described in more detail below. This article posits, however, that the stabilization sought via this pipeline's project agreements moves far beyond the reach of typical stabilization clauses, and does so through a relatively unexamined combination of legal instruments.

The concept of using an intergovernmental treaty, or intergovernmental agreement ("IGA"), in conjunction with other, more typical project agreements in order to address structural complications anticipated in cross-border megadevelopment projects has existed for at least the last decade.[15] Few actual IGAs, however, have been disclosed to the public, making comparative analysis and comprehensive review of the field difficult. The BTC pipeline is thought to be only one of at least a handful of cross-border oil and gas projects in the Caspian region and West Africa to emerge in recent years that is structured around an IGA. For example, as the BTC pipeline came into existence, so too did the West Africa Gas Pipeline ("WAGP"), conceived by Royal Dutch Shell, Chevron, West African Gas Pipeline Ltd., and others to export gas from Nigeria through Benin and Togo to Ghana.[16] Although it is known that Ghana and Nigeria have signed a WAGP Treaty in conjunction with other project agreements, WAGP project participants have thus far declined requests by civil society actors to disclose the treaty.[17]

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or other natural resources of typically resource-rich, capital-poor countries. Megadevelopment is usually organized by consortia of transnational corporations, in cooperation with state authorities, and financed by a combination of private investors, bank loans, and international financial institutions. *See, e.g.*, Peter Bosshard, Janneke Bruil, et al., *Gambling with People's Lives: What the World Bank's New "High-Risk/High-Reward" Strategy Means for the Poor and the Environment*, Environmental Defense, Friends of the Earth, International Rivers Network, Sept. 2003; William H. Fisher, *Megadevelopment, Environmentalism, and Resistance: The Institutional Context of Kayapo Indigenous Politics in Central Brazil*, 53 HUM. ORG.: JOURNAL OF THE SOCIETY FOR APPLIED ANTHROPOLOGY 220 (1994).

14. *See* Nwete, *supra* note 8, at 20 n.11 (citing S. Asante, *Stability of Contractural Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401, 403 (1979) (describing importance of stability and predictability to investors, lenders, and other stakeholders in transnational investments).

15. *See* Scott Sinclair, Note, *World Bank Guarantees for Oil and Gas Projects, in* PUB. POL'Y FOR THE PRIVATE SECTOR, Nov. 1998, *available at* http://rru.worldbank.org/Documents/PublicPolicyJournal/157sincl.pdf (recommending that private investors in large-scale, cross-border oil and gas projects in developing countries utilize an intergovernmental agreement as part of a bundle of available, albeit "unique type[s] of risk mitigation").

16. *See* Energy Information Administration, West African Gas Pipeline (WAGP) Project (Mar. 2003), http://www.eia.doe.gov/emeu/cabs/wagp.html.

17. *See* Memorandum from Doug Norlen, Policy Dir., Pac. Env't, to Publish What You Pay Campaign 3 (Dec. 2005) (on file with author) (describing use of Freedom of Information Act ("FOIA") to compel disclosure of extractive and energy sector investment contracts, specifically, unsuccessful attempt to compel public disclosure of WAGP Treaty through FOIA requests to the U.S. Overseas Private Investment Corporation, a WAGP public financier). Project participants tend to be reluctant to disclose publicly any project agreements, not merely IGAs. *See, e.g., id.* (describing unsuccessful attempts by NGO to compel public disclosure of the Sakhalin II PSA, governing one of the world's largest integrated oil and gas projects in Russia and the Chad-Cameroon Pipeline's Conventions of Establishment); *see generally* http://www.publishwhat

In the case of the BTC, project participants only agreed to make public the IGA and some of the other key project agreements after significant public pressure from international civil society convinced the International Finance Corporation to pressure BP to publish them.[18] BP also released in tandem the IGAs governing the Caspian Sea's Shah Deniz offshore gas field and its export system, a gas pipeline that BP expects to run parallel to the BTC oil pipeline.[19] Aside from these documents, the BTC IGA and accompanying project agreements represent some of the first of this species to be publicly disclosed by project participants. As this article explores, when compared to terms found in more typical project agreements governing oil and gas production historically, it appears that the BTC project agreements represent substantially greater protections for the transnational project participants and substantially lower protections for human rights and state sovereignty. It may be that the BTC project agreements are merely representative in both form and content of other project agreements governing comparable megadevelopment endeavors that are currently being pursued. But without a more complete body for comparison, such assessment is difficult to make. In the meantime, by focusing on the BTC, this article seeks to contribute to the growing literature[20] examining the documentation that is available of recent innovations in megadevelopment's legal architecture.

B. Theoretical Context: The Struggle Between Pipeline Communities and Pipeline Lawyers

International law seems to move in two inextricably related yet radically

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youpay.org (describing international campaign to pressure the oil, gas, and mining industries to disclose payments to host governments for the extraction of natural resources). *But see* Ian Rutledge, *The Sakhalin II PSA- a Production 'Non-Sharing' Agreement: Analysis of Revenue Distribution*, SHEFFIELD ENERGY & RESOURCES INFO. SERVS., Nov. 2004, *available at* http://www.pacificenvironment.org (analyzing Sakhalin II PSA after the document was leaked to NGOs); AMNESTY INTERNATIONAL, CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT (2005), *available at* http://www.amnesty.org (analyzing Chad-Cameroon Conventions of Establishment, obtained independently of disclosure by project participants).

18. *See* Daphne Eviatar, *Transparent Motives*, AM. LAW., Nov. 2002, at 99; Telephone Interview with Doug Norlen, Pol. Dir., Pac. Env't (June 21, 2005); telephone interview with Nick Hildyard, Dir., The Corner House (June 30, 2005).

19. Much of the legal documentation for the BTC project, including the IGA and the Azerbaijan, Georgia and Turkish Host Government Agreements ("HGAs"), are available at http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013492. *See also* Overview of South Caucasus Pipeline, http://www.bp.com/genericarticle.do?categoryId= 9006670& content Id=7014371 (describing the South Caucuses gas pipeline project).

20. *See, e.g.*, Ian Rutledge, *supra* note 17 (analyzing Sakhalin II PSA); *see also* AMNESTY INTERNATIONAL, *supra* note 17 (analyzing Chad-Cameroon Conventions of Establishment); AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE: THE BAKU-TBILISI-CEYHAN PIPELINE PROJECT (2003), *available at* http://www.amnestyusa.org/business/humanrightsontheline.pdf (providing early analysis of BTC project agreements); Waters, *supra* note 2; Matthew Nick, *Rethinking Multinational Corporate Governance in Extractive Industries: The Caspian Development Project and the Promise of Cooperative Governance*, 38 VAND. J. TRANSNAT'L L. 577 (2005).

separate worlds. In one world, local community organizations led by activists such as Manana Kochladze[21] and their national and international counterparts advocate for protection of basic economic, social, cultural, political, and civil rights through an admittedly problematic[22] framework of international human rights law. In the other world, transnational capital, hand-in-hand with first-world statesmen, combine public international law's legacy of positivism and sovereignty with private international law's foreign direct investment regime to open worldwide markets for megadevelopment projects in sectors ranging from highway infrastructure and tourism to mineral extraction and energy.[23] In both worlds, international law provides each side the bases for asking for what its constituency believes it deserves.[24] And in both worlds, colonization as a global phenomenon is a historical fact whose legacies and modern-day persistence intimately shape the interaction between the two worlds, sometimes overtly, but always at least as a subtext.

These worlds collide most dramatically when organized local communities stand, both ideologically and physically, in megadevelopment's path. Transnational lawyers[25] figure centrally in the response of both worlds to such collision. Tracking the tension between these competing sets of transnational lawyers is important to any thoughtful discussion of the broader tensions accompanying propagation of and resistance to economic globalization. While this article principally focuses on the work product of the BTC lawyers without pursuing their individual worldviews and motivations, it also attempts to maintain the reader's awareness of the context in which this kind of megadevelopment project forms. For example, here, teams of transnational

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21. Manana Kochladze is an environmental and public interest defender from Georgia who was awarded the Goldman Environmental Prize in 2004 for her work advocating against the BTC pipeline through the organization she founded, Green Alternatives. *See* Goldman Environmental Prize, Manana Kochladze (2004), http://www.goldmanprize.org (follow "Recipients" hyperlink; then follow "Manana Kochladze" hyperlink).

22. *See generally* MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002) (critiquing human rights discourse for its origins in and perpetuation of imperialism).

23. *See* Jonathan Fox, *Introduction: Framing the Inspection Panel*, *in* DEMANDING ACCOUNTABILITY, xi, xvi (Dana Clark et al., eds., 2003) (noting the "two competing sets of rights").

24. For example, while both worlds employ notions of national sovereignty and development to advance their causes, they do so to radically different ends. *See id.*

25. Transnational lawyering is a nomenclature used to acknowledge that today's "lawyering practices and projects are intertwined with transnational institutions, processes and agendas" where the "parameters, constraints, and opportunities created by a single sovereign power [are no longer] assumed." Law and Society, Transnational Lawyering, http://www.lawandsociety.org/ (follow "Collaborative Research Networks" hyperlink, then follow "Transnational Lawyering hyperlink"). Transnational lawyers include lawyers:

> who work on commercial transactions involving multiple national jurisdictions; lawyers who work on relations among sovereign actors . . . and among supra-national actors, such as the WTO . . . or other similar institutions; lawyers involved in building supra-national legal regimes and institutions; and lawyers who mobilize across national borders to advance social, political and economic agendas, including lawyers working for international NGOs and other social movement organizations.

Id.; *see also* Harold G. Maier, *Forward: Some Implications of the Term "Transnational,"* 25 VAND. J. TRANSNAT'L. L. 147 (1992).

lawyers crafted the BTC project agreements over many years. During those years, other teams of transnational lawyers working with communities affected by or living along the pipeline path worked to gain public access to those agreements. How these two sets of transnational lawyers, and the interests they represent, interact as the pipeline begins operation is largely dictated by the terms that the first set of lawyers decided behind closed doors in conjunction with the international oil companies ("IOCs") and host statesmen they represent. This article thus focuses on those terms, while bearing in mind the human agency involved in their creation. Such awareness aims to assist in the effort of learning to see that economic globalization is not a force propelled by its own machinations toward an inevitable end, but rather a set of structures of power crafted, maintained, and wrought anew by human minds, one policy, project, and war at a time.[26]

Any examination of the tension between these two sets of transnational lawyers would be incomplete without a look at the changing role of the state in regulation of the global economy. In some post-colonial African nations, for example, governments rose to power that were very assertive about de-linking control of their countries' natural resources from transnational capital.[27] It is noteworthy that these governments, regardless of how quickly their efforts were extinguished, drew power from their historical alliance with the local social movements for rights protection. The people and the government were, for brief moments, aligned. Today, in a post-Cold War and post-structural adjustment world, all but a struggling handful of today's governing states in the developing world have, to varying degrees, accepted neoliberal economic development's continued designs on natural resources. In fact, Turkey, Georgia and Azerbaijan's warm welcome of the BTC Company's investment is emblematic of the more pervasive trend.

But as this article explains, after the warm welcome, transnational capital's request of the state is largely for it to get out of the way and to ensure that others do not get in the way.[28] Such a demand, enshrined here in the IGA, leaves local

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26. This article is the first of two to examine that subtext in the context of the way in which the BTC pipeline was intellectually constructed. This article principally explains how the BTC pipeline's legal architecture exemplifies if not surpasses traditional megadevelopment arrangements in its potential to curtail pipeline-affected communities' avenues of redress. The second article explains why the BTC project agreements raise eyebrows when examined against the backdrop of traditional sovereignty doctrine, but are hardly remarkable when examined against the backdrop of a post-colonial critical theory of sovereignty. It also fleshes out the concept of corporate sovereignty as applied to the BTC pipeline and examines how the BTC pipeline is in step with the rhetoric of "good governance," today's framework defining the agenda of donor states and international lending institutions. In so doing, these articles aim to contribute to the effort of articulating parallels between today's project of good governance and globalization, and the colonial project of civilization and commerce.

27. *See* Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 57-60 (2004) (characterizing efforts by third world host countries to subject foreign investment to their domestic laws as having been met with "profound hostility and resistance").

28. *See, e.g.*, AMNESTY INTERNATIONAL, CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT, *supra* note 17, at 21 (observing that the Chad-Cameroon

social movements without a strong ally in the state. Experiences of pipeline communities in other regions bear out this thesis. This is so even where, as here, the host states also participate in the megadevelopment as equity partners and subcontractors.[29] For example, where a project agreement delegates to the host state responsibility for pipeline security, public forces often enjoy the oil consortia's financial and other support to carry out this responsibility. Abuse of that responsibility has turned out to be one of the most immediate threats to the lives and safety of communities living along Unocal's Yadana pipeline in Burma, Occidental Petroleum's Canon Limon pipeline in Colombia, and near ChevronTexaco's platforms in the Niger Delta region of Nigeria, among others.[30] Without power in national legislative or executive arenas and little to no effective recourse through national courts, many local communities turn instead to advocacy by international NGOs. The influence of these alliances on the development of human rights law over the past few decades has been important, albeit incremental. However, even in the most high-profile cases, such alliances have rarely been able to effect the lasting change demanded by local community partner organizations whose members' lives, sometimes literally, depend on halting megadevelopment as these projects currently tend to manifest.[31] This solution, therefore, seems to be a crucial, but insufficient means by which to address the profound absence of alignment between the state and local community interests.

This article does not suggest that pipeline communities, their lawyers, and states are merely at the mercy of pipeline lawyers. Over the past decade, several pipeline communities have brought actions in U.S. federal and state courts against international oil companies for, *inter alia*, environmental pollution and their alleged role in authorizing, and sometimes funding, the commission of human rights abuses along pipeline corridors including forced labor, rape and

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Pipeline project agreements "are designed to achieve two major objectives, [one of which is] to secure the smooth operation of the projects by eliminating interference with their activities").

29. The Azeri state oil company, SOCAR, is the project's second largest investor, while Turkey's TPAO is the fifth. Turkey's BOTAS also operated as the turnkey construction company that built the pipeline in Turkey. *See* BP Caspian website, http://www.bp.com/ lubrican thome .do?categoryId=6070.

30. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (Burma); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (Colombia); Bowoto v. ChevronTexaco Corp., No. C99-02506 (N.D. Cal. filed May 27, 1999) (Nigeria).

31. For example, in India's Narmada River Valley, community activists and their international NGO counterparts have waged a highly organized campaign to stop a hydroelectric project involving 3000 dams on the Narmada River, the construction of which has already begun flooding myriad villages and farmland. Despite intermediate legal victories in national tribunals and a highly publicized international campaign, the Indian high court and public forces have nonetheless moved forward with dam construction in a way that continues to violate many established human rights of the affected communities as well as national and international laws and policies. *See* Friends of River Narmada, *Large* Dams on the Narmada River, http://www.narmada.org/nvdp.dams/ index.html#history (last visited Mar.31, 2006). Over time, an exception to this general trend may emerge along the Thai-Burma border from the after-effects of the *Doe v. Unocal* settlement. *See infra* Part II (discussing *Unocal* case).

murder in the course of forced labor, genocide, and extrajudicial killing.[32] Of these actions, the first one filed, *Doe v. Unocal*, has gone the furthest.

The Burmese villager plaintiffs in *Doe v. Unocal* alleged that Unocal was secondarily liable for forced relocation, forced labor, rape, torture, and murder that their communities endured at the hands of security forces along the company's Yadana natural gas pipeline that stretches from the Andaman Sea over land to Thailand.[33] In December 2004, after eight years of litigation, on the eve of rehearing *en banc* by the Ninth Circuit Court of Appeals, and in anticipation of a nearing jury trial in California state court, Unocal agreed to settle the claims.[34] In bringing these actions, the transnational lawyers representing pipeline communities are not only shepherding their clients' human rights claims. They also are attempting to shape the legal framework of corporate accountability for human rights abuses–an area of international law with historically few teeth.

The BTC security agreements, which form one aspect of the pipeline's bundle of project agreements, provide a fascinating lens through which to examine some ways the transnational corporate lawyer may be responding to expressions of dissent by pipeline communities to international law's continued facilitation of first world extraction of the developing world's natural resources. Shortly after the plaintiffs filed *Doe v. Unocal*, BP negotiated the BTC pipeline agreements that, as discussed below, if enforced, could effectively indemnify the involved oil companies from future judgments against them for pipeline-related human rights violations.[35] This innovation in private international law seems to have emerged in response to the operational and political risks the *Unocal* litigation represents.[36] Baker Botts accomplished this step both through private

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32. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging, *inter alia*, genocide and crimes against humanity in Sudan); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (alleging participation in, *inter alia*, extrajudicial killing and torture in Nigeria); Bowoto v. ChevronTexaco Corp., No. C99-02506 (N.D. Cal. filed May 27, 1999) (same); Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (alleging participation in, *inter alia*, forced labor and rape and murder in course of forced labor in Burma); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (alleging, inter alia, extrajudicial killing in Colombia); Jota v Texaco, Inc. 157 F.3d 153 (2d Cir. 1998) (alleging environmental and personal injuries in Ecuador); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994) (same). These actions are only some of an estimated three dozon actions brought under the Alien Tort Claims Act ("ATCA") by plaintiffs alleging claims arising out of alleged abuses by transnational corporations. *See* Lisa Girion, *Unocal to Settle Rights Claims*, L.A. TImes, Dec. 14, 2004, at A1 (noting estimate of number of corporate ATCA cases).

33. Doe v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002).

34. *See* Edward Alden, *Unocal Pays Out in Burma Abuse Case*, FIN. TIMES, Dec. 14, 2004, at 12.

35. *Doe v. Unocal* plaintiffs filed suit in 1996; Baker Botts commenced BTC security agreements with Turkey, Georgia, and Azerbaijan in 1998. Although it would be helpful to know whether other post-1996 pipeline agreements include similar indemnification provisions, the agreements governing many megadevelopment projects remain undisclosed. *See supra* Part IA (discussing disclosure of megadevelopment project agreements).

36. In fact, over a third of BTC's project investors have been defendants in recent or ongoing ATCA cases. *See Unocal*, 395 F.3d 932 (Unocal and Total as defendants); *In re* South Africa Apartheid Litigation, 2004 U.S. Dist. LEXIS 23944 (S.D.N.Y. 2004) (BP as defendant).

contracts with each involved host state and by facilitating an IGA among the host governments which, as a treaty, is, by definition, governed by public international law principles.[37] Just as the form of the agreements reflect the use of both private and public international law, so too does the substance. The security provisions could influence the development of substantive public international law regarding corporate accountability for human rights violations by halting the important trend begun in the *Unocal* litigation. If the security provisions were to prove enforceable, other megadevelopment projects would undoubtedly replicate them (if they have not already), a movement which could, in essence, nip in the bud aggrieved communities' efforts to vindicate human rights through meaningful litigation against the corporations themselves. Thus, while attractive to fellow oil investors, other stakeholders are uneasy about how such security provisions could compromise the ability of local communities in a pipeline's path to seek meaningful redress for pipeline-related violations of internationally protected human rights.

With this context in mind, Part II of this article briefly traces the historical development of megadevelopment project structure. The following four parts then explain the legal architecture of the BTC project agreements. The BTC project agreements overcome the local regulatory regimes (Part III), invent an "international" law principle of the freedom of transit of petroleum (Part IV), overcome liability for security-related human rights abuses (Part V), and challenge state sovereignty (Part VI). Part VII concludes with a discussion of how megadevelopment projects such as the BTC pipeline reflect what some call "corporate sovereignty," and the roles the transnational lawyer may play in remedying the inequities perpetuated by it.

II.
UNDERSTANDING MEGADEVELOPMENT PROJECT STRUCTURE

In many regards, the legal architecture of the BTC pipeline typifies today's megadevelopment project arrangements. In other ways, the BTC agreements significantly differ. This part first briefly sketches the evolution of the investment milieu within which today's megadevelopment project participants generally operate. The parts following then explain how the BTC project agreements seem to move beyond the limits of this investment milieu toward further investment stability and away from protection of state sovereignty and human rights.

Generally speaking, historically, an international oil company (IOC) that wanted to pump second or third world oil would enter into a service or concession contract with the host country that would include, *inter alia*, a foreign arbitration clause. If the host country decided to nationalize or otherwise

37. *See* Vienna Convention on the Law of Treaties art. 2(I)(a) (May 23, 1969), U.S.T., 1155 U.N.T.S. 331, 331; 8 I.L.M. 679.

expropriate the oil project, the IOC could seek an arbitral award. However, the IOC often encountered difficulty enforcing an award against the host country. The IOC could not reasonably go to the host country itself for the payment, and third party countries in which the host country held assets were, for a time, loathe to honor the IOC's arbitration judgment because to do so would offend traditional international law notions of sovereign immunity. First world states partially ameliorated this problem in 1958 through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[38] which gelled interstate friendliness to foreign arbitration awards. The problem of the host country's sovereign immunity defense, however, persisted until the fairly recent confluence of three major efforts by investing countries.

First, U.S. courts began accepting investors' argument that since a party's intent to aggravate a contract cannot be read in to the contract, the host country, in making the contract in the first place, must have impliedly waived sovereign immunity. Though courts were split on the argument,[39] the U.S. Congress eventually codified this rule of construction.[40]

Second, the notion that a supra-national body should be involved in regulating international arbitration awards took hold in the World Bank's creation of the International Center for Settlement of Investment Disputes ("ICSID") in 1966. The ICSID Convention, to which most all resource-rich developing countries have agreed, standardized the rules governing international arbitration and created a powerful weight on host countries to comply with arbitral awards. Now, most megadevelopment project agreements contain ICSID clauses.[41]

Third, under President Reagan, the U.S. Department of State took the lead in pioneering bilateral investment treaties ("BITs") with individual states, primarily in the developing world. These treaties are instruments created under public international law that spell out the states' mutual assent to terms designed to protect foreign investment aggressively, usually including the rules and definitions governing not only arbitration, but also tax stabilization, expropriation, and nationalization.[42] The treaties, which the U.S. enjoys now with almost fifty countries,[43] aim to protect investments of U.S. nationals

38. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 9 U.S.C. § 201 *et seq.* (2006) (entered into force Dec. 29, 1970).

39. *See, e.g.*, Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012 (2d Cir. 1993); Practical Concepts v. Bolivia, 811 F.2d 1543 (D.C. Cir. 1987); Zernicek v. Petroleos, 614 F. Supp. 407 (S.D. Tex. 1985).

40. 28 U.S.C. § 1605(a)(6) (2006) (addition to the Foreign Sovereign Immunities Act declaring that arbitral clauses include waivers of sovereign immunity).

41. The BTC project's ICSID clauses are found in article 18 of each HGA.

42. *See* Zachary Elkins, Andrew T. Guzman & Beth Simmons, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000 (Aug. 2004) (U.C. Berkeley Public Law Research Paper No. 578961), *available at* SSRN: http://ssrn.com/abstract=578961 or DOI: 10.2139/ssrn.578961; Mark S. McConnell, *Limitations Imposed by the Constitution and Treaties of the United States on the Regulation of Foreign Investment*, *in* MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES § 1.30, 30 (John Byam et al. eds., 1993).

43. *See* United Nations Conference on Trade and Development website,

abroad.[44] Many BITs now contain umbrella clauses in which the sovereign agrees to honor any commitments it has made regarding investments.[45] The clauses are "designed to protect investors' contractual rights against interference from a breach of contract or an administrative or legislative act."[46] Under this regime, breaches of contract under domestic law are, in essence, elevated to violations of international law.[47] When a state agency of a host country that has signed a BIT with the U.S. breaches an agreement with a U.S. national (corporation), arbitration tribunals may construe the sovereign itself as having breached not only the contract with the corporation, but also the BIT with the U.S.[48] In response, the U.S. defends its treaty and its corporations by placing diplomatic and other pressure on the host country to remedy the breach as the dispute winds its way through *ad hoc* or ICSID arbitration.[49] Over the last two decades, developing countries have been willing to make a "trade of sovereignty for credibility"[50] by entering into BITs for the perceived promise of increased foreign direct investment.[51]

This increasing willingness is reflected in how the form and content of the oil contracts themselves have changed over time. In the mid-twentieth century, host governments began to perceive that the concession system was too generous to IOCs. By the late 1960s, riding the tide of the United Nations' recognition of states' permanent sovereignty over natural resources,[52] states began to replace the traditional concession contract with the production sharing agreement ("PSA").[53] A PSA is a civil contract that sets the terms for an oil or

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http://www.unctadxi.org (listing all of the countries with w hich the United States has made BITs).

44. *See* McConnell, *supra* note 42, at 31.

45. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1532 (2005).

46. *See id.* at 1568-69.

47. *See id.* at 1571; Paolo De Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 MIAMI INTER-AM. L. REV. 41, 62 (2004).

48. *Id.*

49. Other first world countries employ bilateral investment treaties as well; the Europeans in fact started using BITs to protect foreign investment earlier than the U.S., albeit in a far less aggressive form. *See* Elkins et al., *supra* note 42.

50. *Id.*

51. This trend persists notwithstanding admissions by economists at the international financial institutions themselves that BITs do not necessarily increase the flow of foreign direct investment to a state. *See* Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite, (June 2003) (World Bank Policy Research Working Paper No. 3121), *available at* SSRN: http://ssrn.com/abstract=636541; United Nations Conference on Trade and Development (UNCTAD), World Investment Report: The Shift Towards Services (2004), http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3235&lang=1; World Bank, World Bank's Global Economic Prospects (2004), http://publications.worldbank.org/ ecommerce/ catalog/product?item_id=3426794.

52. *See* G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

53. *See* Hilda Yumiseva, *Can Production Sharing Contracts Promote Transparency in the Management of Oil Income? The Case of Equatorial Guinea*, 3 OIL, GAS & ENERGY L. INTELLIGENCE 111, 114-15 (2005), *available at* http://www.gasandoil.com/ogel.

gas operation in which the host state typically receives a majority percentage of "profit oil," or annual oil production after cost recovery, and the investor assumes all costs and risks associated with production.[54] In addition, a standard PSA specifies a fixed duration (typically twenty-five years), fixed exploration period (typically two years, after which the IOC has the option to terminate the PSA or proceed to developing the resource), the formula by which the cost oil and profit oil will be determined, the annual cap on how much cost oil can be recovered out of gross annual revenue, and the profit or income tax that the IOC is to pay to the host state.[55]

While the PSA may have emerged in an effort by host states to assert greater control over the terms of oil production by IOCs, over time, the potent feature of the PSA has come to be its arbitration and stabilization provisions.[56] As a contract, a PSA "override[s] any national or state laws which bear upon petroleum taxation or any other aspects of what may be termed the 'eminent domain' rights of the state" and "can only be changed by mutual agreement."[57] The PSAs are "[pivotal legal instrument[s] in investment projects [that] aim to ensure that investing companies can operate under stable, predictable conditions."[58] Rather than the municipal law of the host state, the international arbitration processes described above largely govern disputes arising out of the standard PSA, thus "internationalizing" the PSA contract.[59] Other state-investor agreements, known also as transnational investment agreements and host government agreements ("HGAs"),[60] typically share these latter characteristics, even when their commercial object is the transport of oil or gas rather than its exploration and production, as is the case here.

Most megadevelopment contracts involving first world corporations now operate under this investment friendly regime—a combination of rules governing foreign investment emanating from U.S. legislation, international financial institution agreements (i.e., the ICSID), international treaties, and internationalized contracts. To this extent, the "sovereign immunity problem" related to enforcement of arbitration awards has been effectively addressed from the perspective of the multinational corporation.

As the idea for the BTC pipeline entered into this investment milieu, megadevelopment still faced at least two major legal obstacles to their goal of

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54. *See id.*; Nwete, *supra* note 8, at 131.

55. *See* Rutledge, *supra* note 17, at 13 (describing general features of "standard" PSAs); Yumiseva, *supra* note 54, at 115 (describing Equatorial Guinea's model PSA).

56. S.W. Stein, *Non-Fiscal Elements in Petroleum Production Sharing Agreements in Developing Countries*, 3 OIL, GAS & ENERGY L. INTELLIGENCE 132, 137-38 (2005), *available at* http://www.gasandoil.com/ogel.

57. Rutledge, *supra* note 17, at 13.

58. AMNESTY INTERNATIONAL, *supra* note 17, at 21.

59. Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 347 (1988).

60. AMNESTY INTERNATIONAL, *supra* note 17, at 21; *See* Waters, *supra* note 2, at 404-05 (noting that "[f]rom the beginning of post-Soviet oil exploration in the Caspian region, variations on this model have been used," and characterizing the region's first HGA as a PSA).

minimizing the legal exposure of their investments. One obstacle stemmed from the fact that most states, even developing and newly formed states (such as Georgia and Azerbaijan), have municipal health, safety, and environmental ("HSE") laws as well as international human rights obligations with which foreign developers must comply. The second obstacle stemmed from the aforementioned *Unocal* challenge: local communities harmed by megadevelopment projects had begun using international human rights law through the Alien Tort Claims Act ("ATCA") to sue the corporations for their alleged role in the violations.[61] The transnational lawyers crafting the BTC deal amply addressed these, and other, obstacles to investment, as Part III explains.

III.
SEEKING "UNIFORM" APPLICATION OF INTERNATIONAL LAW: BTC OVERCOMES LOCAL REGULATORY REGIMES

The IGA is the BTC pipeline's umbrella legal document, a treaty among Georgia, Azerbaijan, and Turkey that is intended to be the "prevailing legal regime" for the pipeline project in each host country.[62] In addition to the IGA, the host states each entered into an HGA with the BTC Company, made enforceable by incorporation into the IGA. The IGA and HGAs are accompanied by other project agreements developed over time as needed.[63]

Whereas a typical investment treaty articulates the *general* terms of foreign investment by nationals of one country in a second, host country, the IGA governs only terms related to this specific megadevelopment project.[64] The U.S. and U.K., the countries from which most of the project's investors hail, each have BITs with Georgia,[65] Azerbaijan,[66] and Turkey.[67] The IGA invokes the applicability of these BITs in its preamble.[68] The only parties to the IGA, in turn, are the three countries through which the pipeline will run, not the

61. *See* Part I, *supra* (discussing *Doe v. Unocal*).

62. IGA, *supra* note 9, art. II (4)(i).

63. The IGA defines "other project agreements" as "all written agreements and documented commitments, other than [the IGA and HGAs], entered into by a State and/or any State Authority, on the one hand, and any Project Investors, on the other hand, with respect to the MEP Project, as any or all of the foregoing agreements may be hereafter entered into, amended, modified or extended in accordance with their terms." IGA, *supra* note 9, art I, definitions. As noted above, many project agreements are available at http://www.bp.com/subsection.do?categoryId= 9006628&contentId= 7013420.

64. *See, e.g.*, Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 385 n.176 (2004) (observing that the subrogation and arbitration provisions in an IGA governing construction of an off-shore oil development in the Republic of the Congo "are usually contained in . . . BITs[ ]").

65. *See* U.S.-Georgia BIT, http://www.unctad.org/sections/dite/iia/docs/bits/us_georgia.pdf; *See also* U.K.-Georgia BIT, http://www.unctad.org/sections/dite/iia/docs/bits/uk_georgia.pdf.

66. *See* U.S.-Azeri BIT, http://www.unctad.org/sections/dite/iia/docs/bits/us_azerbaijan.pdf; *See also* U.K.-Azeri BIT, http://www.unctad.org/sections/dite/iia/docs/bits/uk_azerbaijan.pdf.

67. *See* U.S.-Turkey BIT, http://www.unctad.org/sections/dite/iia/docs/bits/us_turkey.pdf; *See also* U.K.-Turkey BIT, http://www.unctad.org/sections/dite/iia/docs/bits/uk_turkey.pdf.

68. IGA, *supra* note 9, pmbl., para. 5.

investors' countries at all. In other words, the IGA is similar to a BIT because its provisions pertain to definitions and rules of investment, but it is unlike a typical BIT because it is specific to a single investment project and only the host countries are party to and bound by it. The IGA also differs from a typical megadevelopment project agreement by its very structure–it is a treaty rather than a mere contract. George Goolsby, head of Baker Botts's BTC project, explained the firm's choice: "Without having to amend local laws, we went above or around them by using a treaty."[69]

The BTC project agreements are also notable for how they were formed. In the domestic setting, it is common for interest groups—both public and private—to lobby states to employ international agreements instead of domestic legislation.[70] Interest groups often seize upon a treaty's ability to facilitate entrenchment past the sitting administration[71] and to circumvent the established legislative process,[72] two aims arguably met by the IGA. Here, however, the oil consortium's role in forming the IGA was not limited to lobbying. In fact, the oil consortium and the state seem to have swapped their traditional roles. Whereas a typical investment treaty between an investor country and a host country would be substantially negotiated by the foreign ministries of each country, in this case, Baker Botts, representing both BP–the project's principal investor–and the government of Azerbaijan, substantially drafted the IGA and led the instrument's negotiation.[73] With former Secretary of State James Baker at its helm, Baker Botts positioned itself well for this blurred role. The U.S. executive branch, in turn, performed the lobbying.

A special U.S. ambassador for Caspian energy issues frequently ran shuttle diplomacy among the host governments to facilitate the states' assent.[74] Through the U.S. Trade and Development Administration ("TDA"), an executive agency that "promotes American private sector participation by helping U.S. companies pursue business opportunities in developing and middle income countries,"[75] the executive branch also funded a grant to pay the Washington-based firm Dickstein Shapiro to sit across the table from Baker Botts to represent the interests of Georgia and Turkey during the negotiations.[76] President Clinton himself was present among fifty-five European, Central Asian and North American heads of state at the IGA signing ceremony in Bosporus in 1999.[77]

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69. Eviatar, *supra* note 4, at 83-84.

70. *See* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 512-13 (2004).

71. *See id.*

72. *See id.* at 543.

73. *See* Eviatar, *supra* note 4, at 99.

74. *See* Eviatar, *supra* note 4, at 101; MICHAEL T. KLARE, RESOURCE WARS 51-68 (2001).

75. Press Release, Trade & Development Administration, TDA, Ex-Im and OPIC Extend Caspian Finance Center Thru FY 2003 (Oct. 5, 2001), http://www.ustda.gov (follow "Press Releases" hyperlink; then follow "2001" hyperlink).

76. *See* Eviatar, *supra* note 4, at 83-84.

77. *See id.* at 99; Michael T. Klare, *Symposium: Oil and the International Law: The*

A. Becoming the "Prevailing Legal Regime"

The purpose of the IGA is "to give the Project's legal and commercial terms the support and framework of international law"[78] in order to "ensure principles of freedom of transit of Petroleum."[79] To establish its binding nature under international law, the IGA also obligates each state to make the IGA "effective under its Constitution as the prevailing legal regime of such state respecting the MEP Project under its domestic law."[80] The host states also have warranted that "the State is not a party to any domestic or international agreement or commitment or lawfully bound to observe or enforce any domestic law or regulation, or international agreement or treaty, that conflicts with, impairs or interferes with this Agreement or limits, abridges or adversely affects the State's ability to implement this Agreement or enter into and implement any other applicable Project Agreement."[81] While the BTC pipeline does not mark the first time the Caspian states have agreed to such terms, the agreements are nonetheless emblematic of a trend emerging only in the post-Soviet era.[82] Dana Clark, a U.S.-based megadevelopment project analyst, notes, "[b]y making this warranty, the States are basically providing insurance to the consortium. It doesn't actually matter whether or not the above language is accurate—rather, the states are agreeing to subsume any such domestic or international agreements to the terms of the deal, and to indemnify the other parties to the contract if the above statement proves to be untrue."[83] Such insurance comes via the HGAs' economic equilibrium clause.

Geopolitical Significance of Petroleum Corporations: Essay: The Bush/Cheney Energy Strategy: Implications for U.S. Foreign and Military Policy, 36 N.Y.U. J. INT'L L. & POL. 395, 413 (2004). Blurring, or even inverting, the traditional roles played by the state and the private sector in megadevelopment negotiation is certainly not new. Articulating this dynamic, however, continues to aid understanding of the human agency involved in pulling together an arrangement like the BTC, and how policy priorities of donor countries bolster that work, while leaving entire sectors of the public that may have an equal, if not more, legitimate stake in the outcome unrepresented and under-capacitated in the process. Articulating this dynamic also provides a baseline for re-imagining what the role of the state vis-à-vis the private sector could be.

78. Host Government Agreement between and among the Government of the Republic of Turkey and the MEP Participants, pmbl., para. 5, http://subsites.bp.com/caspian/BTC/Eng/agmt3/agmt3.PDF [hereinafter Turkish HGA]; Host Governement Agreement between and among the Government of the Azerbaijan Republic and [the MEP Participants], pmbl., para. 5, http://subsites.bp.com/caspian/BTC/Eng/agmt1/agmt1.PDF [hereinafter Azerbaijan HGA]; *see, e.g.*, Host Government Agreement between and among the Government of Georgia and the MEP Participants, pmbl., para. 4, http://subsites.bp.com/caspian/BTC/Eng/agmt2/agmt2.PDF [hereinafter Georgia HGA].

79. IGA, *supra* note 9, pmbl., para. 4; *see infra* Part IV (discussing the "principle of freedom of transit of petroleum")

80. IGA, *supra* note 9, art. II (4)(i).

81. *Id.* art. II (6).

82. *See* Waters, *supra* note 2, at 405 (citing a past PSA of Azerbaijan as taking "precedence over domestic legislation, essentially constituting an opt-out for large oil interests from some aspects of the standard legislative regime").

83. Memorandum from Dana Clark, President, Int'l Accountability Project, to Doug Norlen, Pol. Dir., Pac. Env't 6 (Aug. 4, 2003) (on file with author) (conducting preliminary analysis of BTC pipeline HGAs and IGA).

1. Maintaining the Economic Equilibrium

The HGAs obligate the states to compensate project participants for failing to maintain the "economic equilibrium." Economic equilibrium refers to "the economic value . . . of the relative balance established under the Project Agreements at the applicable date between the rights, interest, exemptions, privileges, protections and other similar benefits provided or granted to a Project Participant and the concomitant burdens, costs, obligations, liabilities, restrictions, conditions and limitations agreed to be borne by that Project Participant under the applicable Project Agreement(s)."[84] Each host state agrees to "provide monetary compensation . . . for any Loss or Damage which is caused or arises from:. . . (iii) any failure by the State Authorities, whether as a result of action or inaction, to maintain Economic Equilibrium."[85]

Like any stabilization clause, an economic equilibrium clause is "usually inserted into contracts to boost the investor's confidence and ensure that the long-term investment will yield the expected results, by shielding the contract from some of the many risks associated with the investment."[86] It does not immunize the IOCs from change in the law, fiscal regime, or other acts of the state, "but guarantees the investor compensatory benefit, should such change or act affect the economies or financial premises of the project."[87] A stabilization clause typically seeks to avoid the risks of nationalization or the effects of changes in tax rates. Here, in contrast, "the intention is much wider" because the host states have undertaken to compensate the consortium for any changes affecting the economic equilibrium, "includ[ing] measures having their origin in international treaties to which [the host state] is a party and measures aimed at improvements in environmental and social protection, except [when the intervention is justified by 'imminent, material threats' to health, safety, and environment]."[88] In addition, this stabilization clause is anticipated to stay in effect for the next forty to sixty years—double the average duration,[89] and does not provide for reciprocal compensation to the state, as a typical economic equilibrium clause would.[90] As Clark summarizes:

[a]ny changes to the status quo of laws that [adversely economically] affect the

84. *See, e.g.*, Azeri HGA app. 1, Certain Definitions. The economic equilibrium clause is found in the Georgian and Azeri HGAs arts. 7.1(x); and in theTurkish HGA art. 7.2(xi).

85. The clause requiring states to compensate the consortium for failure to maintain the economic equilibrium is found in the Georgian and Azeri HGAs arts. 9.1(iii); and in the Turkish HGA art. 10.1(iii).

86. Nwete, *supra* note 8, at 118.

87. *Id.* at 12.

88. AMNESTY INTERNATIONAL , HUMAN RIGHTS ON THE LINE, *supra* note 20, at 10.

89. *See* Rutledge, *supra* note 17, at 13 (noting that duration of typical PSA is twenty-five years); Waters, *supra* note 2, at 407 (observing that "the HGAs have the potential effect of freezing present-day standards for a minimum of forty years").

90. *See* Nwete, *supra* note 8, at 131 (citing economic equilibrium clause of the Equatorial Guinea model petroleum production sharing contract of 1998, which "obligates the parties to agree to the adjustment, whenever the income of either party is materially altered as a result of any change in law, orders or regulations").

> pipeline project, including those designed to protect local people, workers, the environment, or provide revenue to the government, will cost the host governments money. If the governments choose to change—and dare to enforce—the law in their countries in a way that [adversely economically] affects this project, they could be required to compensate the consortium for any alteration in the 'economic equilibrium.'[91]

The economic equilibrium clause is thus a powerful stabilization clause that effectively trumps conflicting local regulation and international obligations that the host states may otherwise call upon or develop to oversee project matters.

To establish this kind of economic equilibrium provision, the consortium lawyers drew upon public international law's right to the protection of property,[92] which is usually applied in the commercial context to protect project participants from wholesale loss resulting from expropriation, abandonment, and the like, and extended it out to require compensation for a broad range of normal state regulatory activity. In so doing, it appears that "the consortium has been given a higher level of legal protection for its investment than human rights standards would normally afford, while employees, villagers, and others affected by the project might well find that they have less protection than human rights standards afford."[93]

2. Obscuring Standards in the Code of Practice

In contrast to the HGAs' economic equilibrium clauses, other provisions in the HGAs seem to acknowledge the applicability of evolving regulatory standards. The Code of Practice,[94] included as an appendix to each HGA,[95] gives the impression of setting a floor below which technical, environmental, health, safety, and social standards and practices shall not fall.

a. The Code of Practice on Health and Safety

The Code of Practice specifies that the health and safety standards to be applied "shall conform to the health and safety standards and practices generally

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91. Memorandum from Dana Clark, President, Int'l Accountability Project, to Doug Norlen, Pol. Dir., Pac. Env't 4-5 (Aug. 4, 2003) (on file with author) (offering preliminary analysis of BTC pipeline HGAs and IGA). Of course, as HSE technologies improve and the costs of implementing them decline, it is entirely plausible that over the next forty years a host state could implement a new HSE regulation that would not adversely affect the economic equilibrium established in 1999.

92. *See* AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, n.13 (citing European Convention on Human Rights, First Protocol, art. 1, which states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest.").

93. *Id.* at 11.

94. Although calling it a Code of Practice gives the impression that the BTC Project has adopted some consensual industrial standards, the Code of Practice is merely an invention of the project lawyers, specific to the BTC Project; it is not a code from an external industrial body. It sporadically references standards of the American Petroleum Institute and E.U. directives, though not coherently. *See* Waters, *supra* note 2, at 405 (making similar observations about the Code of Practice).

95. *See, e.g.*, Georgia HGA, *supra* note 78, app. 3.

observed by the international community with respect to Petroleum pipeline projects comparable to the Project."[96] The Code of Practice's reference to "international community" standards makes it conceivable that these standards are dynamic and public (as opposed to frozen at the time of contract and private). However, the only health and safety standards the Code deems relevant are those that the international community observes with respect to comparable oil projects. Aside from describing what a comparable project would consist of (in terms of diameter of the pipeline and daily oil output),[97] the Code of Practice refers to no mutually agreed upon and specific comparable projects to which a host state or local community could look in order to monitor compliance by the consortium partners. In fact, BP has represented to Amnesty International that these standards and practices have never been formulated.[98]

b. The Code of Practice on Environmental Regulation

The Code of Practice defines the applicable environmental standards in a slightly more comprehensive way than it does health and safety standards. Although the environmental standards, like the health and safety standards, mainly derive from the ambiguously defined practices internationally observed on comparable pipeline projects, here the oil consortium agrees to refrain from using environmental standards that are "less stringent than the relevant standards and practices applied in the Netherlands (and, with respect to mountainous and earthquake-prone terrain as well as whenever the Netherlands has no relevant standard or practice . . . [those of] Austria) in respect of comparable projects."[99] Notably, this environmental provision adopts the substantive standards set in these two European countries, but explicitly refrains from adopting liability standards that those countries use to ensure compliance with the substantive standards, and instead adopts the HGAs' limitation of liability provisions which, *inter alia*, prohibit the consortium from being liable for punitive or exemplary damages.[100]

Further, the Code's Article 3.1(iv) underscores that the environmental standards "do not include [any] beyond those applicable to Petroleum pipelines and pipeline operations."[101] This provision would potentially complicate a challenge by a host state based on the Dutch or Austrian standards because the

96. *Id.* app. 3, paras. 3.1, 4.1. The environmental standards are more specific than the health and safety standards and are treated below. Other megadevelopment project agreements have used similar language to describe applicable technical, safety, and environmental standards. *See, e.g.*, AMNESTY INTERNATIONAL, CONTRACTING OUT OF HUMAN RIGHTS, *supra* note 17, at 24 (describing similar terms in the Chad-Cameroon pipeline project agreements); Waters, *supra* note 2, at 405 (describing same in 1994 Azeri-Chriag-Guneshli PSA).

97. Georgia HGA, *supra* note 78, app. 3, Definitions.

98. AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, at 10.

99. Georgia HGA, *supra* note 78, app. 3, para. 3.1; *see also* IGA, *supra* note 9, art. IV (representing that the technical, safety, and environmental standards "shall in no event be less stringent than those generally applied within member states of the European Union").

100. Georgia HGA, *supra* note 78, app. 3, paras. 3.1(i), 3.1(ii); *id.* arts. 10.1, 12.3.

101. *Id.* apps. 3, para. 3.1(iv).

consortium could argue that this clause means that while the consortium is required to follow the Dutch or Austrian environmental standards, they are only required to follow them to the extent that the Dutch or Austrian statutes specify their application to pipeline projects. For example, say the Dutch have a statute regulating deforestation. In application, the Dutch may enforce the statute's standards in pipeline-affected areas, even if the statutory language makes no direct reference to its intended application over such areas. Nonetheless, in arbitration, BTC counsel could invoke Art. 3.1(iv) to contest the deforestation grievance by interpreting the Code of Practice to exempt BTC from compliance with the Dutch deforestation statute's substantive provisions based on the statute text's silence regarding pipeline areas. Such a strictly textual reading may go against the spirit of the Code of Practice, but the host states nonetheless face the risk that an arbitrator would read the Code in this way, given the Code of Practice's narrow language invoking the Dutch and Austrian environmental regimes.

c. The Code of Practice's Elusive Standards

As stated above, the Code of Practice remains vague about what the environmental, health, safety, and social standards and practices "generally observed by the international community with respect to Petroleum pipeline projects comparable to the Project"[102] are. The objective standards are illusory. The host states' range of autonomous regulatory actions is thereby seriously diminished. As a result, the Code of Practice creates the potential for what would otherwise be seen as unexceptional regulatory behavior in other megadevelopment contexts to become contestable. Because the project agreements require international arbitration, any dispute arising out of the Code's vagueness would have to be resolved in arbitration, an arduous and expensive process. The host states' covenant to compensate the consortium for disturbance to the economic equilibrium similarly chills state enforcement actions under the Code by decreasing the likelihood that a state would attempt to enforce any norms that may exceed the practices vaguely laid out there for fear of upsetting the economic equilibrium. In effect, the Code of Practice places its elusive standards above municipal and international law's reach and chills the host states' regulatory impulses, even if those impulses are toward protecting pipeline workers or the health or environment of neighboring communities.

3. Further Obscuring Standards in the Human Rights Undertaking

It seems that the economic equilibrium clause chills—if not freezes—development of local regulatory laws (by requiring compensation) while the Code of Practice acknowledges the applicability of evolving standards of the international community. When pressed by international environmental and

102. *Id.* apps. 3, 4.1.

human rights advocates for clarification,[103] the consortium responded by publishing two additional instruments. In May 2003, the consortium and host states issued the Joint Statement on Human Rights and Security,[104] a project agreement[105] that acknowledges the applicability of evolving human rights and environmental standards, notwithstanding the HGAs' language to the contrary.[106] Four months later, the BTC published another instrument, the BTC Human Rights Undertaking ("HRU"),[107] which affirmatively states that the consortium will not assert claims against the host governments under IGA and HGA provisions in a manner "inconsistent with regulation by the relevant Host Government of the human rights or health, safety and environmental ('HSE') aspects of the project."[108] The consortium undertakes this promise to the extent that such local regulation is required by applicable international and domestic law and "is no more stringent than the highest of European Union standards," select World Bank standards, and standards under applicable international labor and human rights treaties. [109] The consortium also undertakes not to dispute an interpretation of the project agreements which would hold the applicable human rights and HSE standards to be dynamic and evolving in accordance with the "highest of international standards."[110] In essence, BTC undertook *not* to invoke the IGA/HGAs' compensation clauses when faced with a host state's new laws on human rights or HSE. The HRU "clarification" may, at first blush, seem to mitigate some of the NGO advocates' concerns. However, the stabilization clauses remain problematic for at least three reasons.

To begin with, although BTC warrants that the HRU constitutes a legal, valid, and binding obligation,[111] the consortium stops short of characterizing the instrument as a project agreement, thus potentially removing the document from the bundle of project instruments that a dispute resolution body would consult.[112] In addition, BTC made the HRU as a deed poll, which is, by

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103. *See* Press Release, Baku Ceyhan Campaign, Groups File Claim Against BP and Pipeline Partners in Five Countries: "Green" Company Violating International Norms in Controversial Caspian Oil Pipeline (Apr. 29, 2003), http://www.baku.org.uk/press_releases/news.03.htm; *see also* AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20 (representing one of the most comprehensive international NGO reviews of the BTC project agreements calling for clarification).

104. Joint Statement on the Baku-Tbilisi-Ceyhan Pipeline Project (May 16, 2003), http://subsites.bp.com/caspian/Joint%20Statement.pdf. [hereinafter Joint Statement].

105. *Id.* para. 9.

106. *Id.* paras. 7, 8.

107. BTC Human Rights Undertaking (Sept. 22, 2003), http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf.

108. *Id.* para. 2(a).

109. *Id.*

110. *Id.* para. 2(b).

111. *Id.* para. 3(a).

112. The IGA defines a project agreement, other than the IGA and HGAs as one that is "entered into by a State and/or any State Authority, on the one hand, and any Project Investors, on the other hand." IGA, *supra* note 9, Definitions. Because the HRU is a representation made by only one party, it is not a project agreement by this definition. The IGA is unclear about the effect of a document that is not characterized as a project agreement. *See id.* (definition of "Other Project

definition,[113] unilateral. Only BTC signed the instrument; the host states are therefore not bound by its terms. As a result, although the consortium undertakes not to construe the IGA and HGAs in the manners feared by pipeline opponents, nothing in the HRU prevents the host states from reverting to a different interpretation of the IGA and HGA stabilization provisions.[114] A host state might find it advantageous to override its own regulations if doing so would help the state meet its economic goals or circumvent otherwise burdensome human rights or HSE obligations.[115] Given the political and economic power of the consortium over the host states, if the consortium genuinely sought to protect human rights along the BTC pipeline, it could have used the HRU to create binding contractual commitments with the states as a way to influence the host states to honor their already existing municipal and international human rights obligations.

Next, third party rights under the HRU and the Joint Statement remain unclear. On one hand, under Art. 2(c) of the HRU, BTC agrees not to "make" third party claimants comply with the project agreements' arbitration clauses.[116] On the other hand, because BTC has crossover rights against the host states, if a third party, such as members of an adversely affected pipeline community, were to sue BTC in local municipal courts under, say, tort, BTC could swiftly bring the dispute directly to international arbitration in order to seek compensation for the disturbance to the economic equilibrium caused by the tort suit. Depending on how the arbitrator reads the HGA dispute resolution clauses,[117] this move also could push the third party claimant's dispute out of the courts and into arbitration.[118]

Lastly, the HRU adds another layer of confusion to the labyrinth of instruments comprising the BTC pipeline's prevailing legal regime. As the NGO advocates observe,

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Agreements").

113. A deed poll is a deed made and executed by only one party. BLACK'S LAW DICTIONARY 339 (2000).

114. *See* Waters, *supra* note 2, at 407 (noting this concern of pipeline critics).

115. *See* Baku Ceyhan Campaign, Statement in response to the BTC Human Rights Undertaking 2 (Nov. 6, 2003), http://www.baku.org.uk/statementondeedpoll.doc. To counter a host state's argument that the deed poll created no obligations for the state, one could argue that because the state did not contest the HRU when BTC signed it, that the state agrees with the limitations and interpretations therein.

116. This promise is without substance since, even without this assurance, the HGAs' arbitration clauses, cannot bind third parties who are not party to the contract to mandatory arbitration. *See, e.g.*, Turkish HGA, *supra* note 78, art. 18. Nonetheless, it must be noted that it is unlikely any third party could raise claims directly against BTC arising directly out of the project agreements, since courts usually uphold that kind of third party claim only when the third party is a clearly discernable beneficiary to the contract predictable at contract formation. Instead, anticipated third party claims directly against BTC would more likely arise out of tort.

117. See discussion *infra* Part IIID.

118. There are other contexts in which third parties have been indirectly pulled into arbitration. *See, e.g.*, E.I. Dupont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, 269 F.3d 187 (3d Cir. 2001) (limiting the doctrine requiring non-signatories to go to arbitration).

> the existence of one set of agreements which gives the consortium powers, followed by another which commits not to use some of them, inevitably creates more ambiguity over how they are to be applied than would a single set of agreements. It would have given all parties much greater clarity to have amended the original agreements, rather than appending the Deed Poll.[119]

The legal labyrinth, exacerbated by the HRU, actually undermines the stated rationale of BP in creating the IGA/HGA project agreement structure in the first place, which was to replace what the oil company characterized as cumbersome, confusing, and potentially "discriminatory" domestic regulatory frameworks.[120] The effect of this confusing governing structure is that different project instruments (whether project agreements or not) refer to alternative, possibly applicable standards to which the consortium and/or host states shall be held.[121] Because of the asymmetrical rights between the states and the consortium with respect to dispute resolution,[122] the question of which standards ultimately apply is largely in the hands of the BTC consortium.

4. Complicating Matters by Severing State Compensation Obligations

As explained above, the economic equilibrium clause, Code of Practice, and HRU contain contradictory provisions. Which instrument would prevail in resolving a dispute remains unclear. To complicate matters further, the host states have agreed to compensation provisions in the HGAs that apparently commit them to compensating the consortium for failure to maintain economic equilibrium even if the economic equilibrium compensation obligations were to prove unenforceable. As discussed above, Article 9 of the Georgian and Azeri HGAs and Art. 10 of the Turkish HGA obligate the host states to provide monetary compensation for loss or damage arising from:

> any failure of the State Authorities, whether as a result of action or inaction, to fully satisfy or perform all of their obligations under all Project Agreements;
>
> any misrepresentation by the State Authorities. . .;
>
> any failure by the State Authorities, whether as a result of action or inaction, to

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119. Baku Ceyhan Campaign, *supra* note 8, at 2.

120. Telephone interview with Nick Hildyard, Dir., The Corner House (June 29, 2005). *See also* IGA, *supra* note 9, pmbl., para. 5 (evoking the need for "uniform, nondiscriminatory application of international law standards protecting investment and nondiscriminatory treatment of investors").

121. In light of this confusion, and under pressure from NGOs, the public finance institutions insisted the consortium name which standards will apply. Telephone interview with Nick Hildyard, Dir., The Corner House (June 29, 2005). Despite this demand, the standards applicable to each entity remain unaligned. See, for example, the Environmental Standards Table annexed to the Environmental and Social Action Plan (a plan required by the international financial institutions funding the pipeline). This matrix delineates the land, air, water, and noise standards applicable to the pipeline. In eighteen pages, the table reveals that, despite Baker Botts's effort to create an overarching supranational legal regime, each state is bound to different local and lender standards. BTC Pipeline – Matrix of Environmental Standards and Guidelines, Annex B, Part I, of Operations Phase Environmental and Social Action Plan (Mar. 2003), http://www.bp.com/liveassets/bp_internet/bp_caspian/bp_caspian_en/STAGING/local_assets/downloads_pdfs/xyz/BTC_English_Operation_Plan_ESAP_Content_FINAL_BTC_Operations_ESAP.pdf.

122. *See* IGA, *supra* note 9, art. 18; *infra* Part IID(1) (discussing asymmetrical rights).

maintain Economic Equilibrium. . .;

. . .

any act of Expropriation. . . .[123]

This state obligation is a central concern to pipeline critics—the concern BTC attempted to quell in the HRU, reassuring advocates that the consortium will not apply the economic equilibrium clause to assert the right to compensation for measures taken by host states to fulfill obligations under international treaties on human rights, labor, or HSE. The HRU, however, leaves untouched other provisions in Articles 9 and 10 that, if enforced, could undermine the host states' ability to critique the consortium under the Code of Practice's HSE standards. Art. 10.5 of the Turkish HGA, for example, reads:

> The Government's obligation to provide monetary compensation to the MEP Participants under this Article 10: (i) is several, independent, absolute, irrevocable and unconditional and constitutes an independent covenant and principal obligation of the Government, separately enforceable from all other obligations (including monetary compensation obligations) of the State Authorities under the Project Agreements, *without regard to the invalidity or unenforceability of any such other obligations.*[124]

In other words, suppose that Azerbaijan halted oil transit because of a violation of the Code of Practice's environmental standards, and the consortium responded by demanding compensation for the state's disruption of the economic equilibrium. Azerbaijan might then argue that the Code of Practice should trump the economic equilibrium clause and that the HRU indirectly affirms this interpretation. Under HGA Arts. 10.1 and 10.5(i), the consortium could counter-argue that Azerbaijan agreed to compensate for the disruption regardless of the validity or enforceability of the economic equilibrium clause in light of the Code of Practice and HRU.

B. Hypothetical Application of the Economic Equilibrium Clause, Code of Practice, and Human Rights Undertaking

Suppose Georgia had a gorge famous for its mineral waters. Also suppose that the BTC pipeline ran through this region, that during pipeline construction advocates both within and outside of Georgia expressed concern over mineral water contamination, and that pipeline construction nonetheless proceeded apace in accord with then-existing environmental and safety guidelines.

Now imagine it is ten years later. The pipeline is fully operating. The environmental impact on the mineral water region is both better understood and more grave than anyone knew when the pipeline was constructed. The affected community demands relocation of the pipeline. The government of Georgia agrees with the community and brings the environmental grievance to the consortium. Georgia argues that the consortium is not maintaining the pipeline

123. Turkish HGA, *supra* note 78, art. 10.1 (i)-(v).
124. *Id.* art. 10.5(i) (emphasis added).

in accordance with Dutch environmental law pertaining to oil pipelines and has therefore breached the Code of Practice.

The IGA allows the consortium to bring the dispute to international private arbitration without exhausting any Georgian fora.[125] The arbitrator would then make all factual and legal determinations, including: 1) whether and to what extent the cited Dutch environmental laws were truly applicable to the BTC pipeline (interpreting the vague language of the Code of Practice); 2) if so, whether there factually existed a violation of the Code of Practice; and 3) whether Georgian state authorities contributed to the violation.[126] If the arbitrator found for Georgia, the consortium would undoubtedly seek to resolve whether, despite a violation of the Code of Practice, the project agreements' compensation provisions required Georgia to compensate the consortium for any change in the economic equilibrium that would be caused by implementing Georgia's request. Georgia, in turn, would seek to resolve whether the consortium's promises in the HRU would estop the consortium from making its compensation claims. How an arbitrator would interpret these conflicting project instruments would most likely turn not on any astute textual reading, but rather on the strength and preparedness of the disputants, and the degree of investor-friendliness of the forum. These latter considerations lead our hypothetical into the more likely realities of how a host state's dispute with the consortium would be resolved.

We need not look too far for a real test case. In July 2004, Georgia's Environment Ministry suspended construction on a seventeen-mile stretch of pipeline, citing environmental safety concerns that had emerged over water contamination in the Borzhomi gorge, a Georgian region known for its mineral water.[127] With the suspension, Georgia sought a new and independent safety inspection. However, within two weeks of the stop, construction resumed after a surprise visit to Georgia by the U.S. Assistant Secretary of State, Elizabeth Jones, and simultaneous talks in Washington, D.C. between Georgian leaders and U.S. Secretary of Defense Donald Rumsfeld.[128] The project agreements do not address the role diplomatic pressure should play in disputes between the host states and the consortium. In the Borzhomi gorge case, diplomatic resolution prior to formal arbitration might be considered a favorable outcome. However, it raises questions about whether or to what extent the host states truly retain power under the project agreements. The next article in this series explores this question in the context of colonial treaties between trading companies and the colonized, where what is written is rarely considered the most salient guide to dispute resolution in conflicts over natural resource development.

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125. *See infra* Part VI(A) (discussing exhaustion).

126. State contributory liability would limit BTC's liability as discussed *infra* Part V.

127. *See Georgia Suspends Construction of BTC Pipe on its Territory*, PRIME-TASS BUS. NEWS AGENCY, July 23, 2004; *see also* Waters, *supra* note 2, at 415-17 (tracing the controversy surrounding how the Borzhomi region was chosen for the pipeline path).

128. *See* Saeed Shah, *Rumsfeld Intervention Rescues $3BN BP Pipeline*, THE INDEPENDENT (London), Aug. 9, 2004.

IV.
MAKING UP INTERNATIONAL LAW: BTC INVENTS THE PRINCIPLE OF FREEDOM OF TRANSIT OF PETROLEUM

The project agreements use rights language to describe the host states' obligations, not only to the consortium, but seemingly to the "petroleum" itself. The project is guided by the IGA Preamble's commitment among the states to "ensure the principles of freedom of transit of Petroleum."[129] The IGA also creates a peculiar obligation of the states to ensure the safety and security not only of all personnel associated with the project, but also the security of "all Petroleum in transit."[130] The provision reads as though the oil were in need of the kind of protection under international law that, for example, a displaced person in transit requires. Further, each state agrees that if its actions interrupt or otherwise impede the flow of petroleum, the state shall use "all lawful and reasonable endeavors, taking into account democratic, economic, and commercial principles, to eliminate the threat and rectify any interruption or impediment."[131] This language reifies petroleum as though it were a rights and duties bearing subject under international law.

Evoking rights language to establish protections for commerce is not a new move for U.S. industry. During the *Lochner* era, capitalists and the pro-industry Supreme Court routinely invoked the "freedom of contract" to strike down state and federal congressional attempts at health and safety regulation.[132] Since the New Deal, courts have largely rejected corporate attempts to "borrow [the] armor" [133] of the Commerce Clause to restrict governmental regulation of industry practices. However, some legal scholars are today reviving the notion with vigor and success.[134] Significantly, they do so by cloaking the doctrine with a natural law pedigree, arguing for the protection of "the fundamental natural right of freedom of contract."[135] Drawing authority from natural law mimics international law's traditional articulation of human rights. It may come as no surprise, then, that the conservative doctrinal trend away from social regulation of industry in the United States finds its international parallel in treaty language treating protection of the transit of oil as a natural right.

Although evoking rights language to establish protections for commerce is

129. IGA, *supra* note 9, pmbl., para. 4.

130. *Id.* art. III (2) (note capitalization of "Petroleum").

131. *Id.* art. VII (4).

132. Lochner v. New York, 198 U.S. 45, 57 (1905) (striking down New York regulation of the ten hour workday and articulating the general right to make a contract in relation to one's business); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1923) (striking down Nebraska state regulation of bread loaf size as arbitrary interference with private business).

133. RICHARD M. BUXBAUM & KLAUS J. HOPT, INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 44 (1988).

134. See Adam Cohen, Editorial, What's New in the Legal World? A Growing Campaign to Undo the New Deal, N.Y. TIMES, Dec. 14, 2004, at A30.

135. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

nothing new, attempts to assert standing on behalf of inanimate natural objects have been rejected by the United States Supreme Court.[136] The seminal case, *Sierra Club v. Morton*, rejected the notion that conservationists should be able to enjoin commercial development of a river valley when they had not shown themselves to be "adversely affected" by the proposed development.[137] The conservationists were improper plaintiffs and the river valley did not enjoy its own standing to sue. In his dissent, Justice Douglas suggested simplifying the standing issue by "conferring standing on environmental objects to sue for their own preservation."[138] He would have conferred that standing on "valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life."[139] Justice Douglas reasoned that "[t]he river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction."[140] Though "petroleum in transit" is an environmental object, it is unlikely that Justice Douglas would accord it the same status. The cultural relationship between communities living on a river contrasts sharply with most conceivable cultural relationships communities are likely to have with flowing petroleum.[141] Protecting the mobility of petroleum by engendering the substance with legal personality strays far afield from even the outer limits of the Court's treatment of standing for inanimate objects of nature.

More significantly, while there exists a freedom of transit of persons, baggage, and goods,[142] there is no principle of the freedom of transit of petroleum in international law. The Texas team of transnational lawyers made

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136. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (rejecting Sierra Club's attempt to assert standing to seek declaratory judgment against proposed ski resort based on anticipated aesthetic and environmental harm to "scenery, natural and historic objects, and wildlife" of the Sequoia National Park).

137. *Id.* at 739.

138. *Id.* at 742 (Douglas, J., dissenting); *see also* Christopher Stone, *Do Trees Have Standing*?, 45 S. CAL. L. REV. 450 (1972) (positing the theory Justice Douglas took up in his dissent in *Sierra Club v. Morton*). The author would like to thank Professor Mary Dudziak for suggesting this comparison.

139. *Sierra Club*, 405 U.S. at 743 (Douglas, J., dissenting).

140. *Id.*

141. First, so-called "pipeline communities" are usually *adversely* affected by the flowing of petroleum through their territory and would therefore not be likely spokespersons for the oil. Second, the community of oil investors who have an interest in the unfettered flow of petroleum cannot be said to have a meaningful cultural relationship to the petroleum. A variation that could conceivably fit within the vision of Justice Douglas's dissent, however, would be the case of the indigenous U'wa community of Colombia, to whom the oil is considered sacred, and the flowing of the oil *under the ground* is considered the healthy flowing of the "blood of the mother earth." PROJECT UNDERGROUND, BLOOD OF OUR MOTHER: THE U'WA PEOPLE, OCCIDENTAL PETROLEUM, AND THE COLOMBIAN OIL INDUSTRY 1(1998).

142. *See* U.N. Convention on the Law of the Sea arts. 124, 125, Apr. 30, 1982, 1833 U.N.T.S. 397; General Agreement on Tariffs and Trade, Oct. 30, 197, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. V.

the doctrinal leap without reference to plausible precedential roots. One danger of Baker Botts's use of a treaty is that by incorporating a principle of the freedom of transit of petroleum therein, it begins the process of making international law, since one source of international law looked to by international jurists is the extant body of international treaties and conventions.[143] Customary international law is made incrementally over time as state practice and the sense of state obligation to conform to given practices emerge.

The move to protect the freedom of transit of petroleum is a tricky one. To be sure, human rights advocates also seek to elevate rights not heretofore universally recognized under international law. For the most part, however, they do so through public fora involving representatives from many states, whether through the statements issued at periodic international conferences of treaty-based organs of the United Nations, or the decisions of the several regional human rights courts. The Inuit, for example, are currently petitioning the Inter-American Commission on Human Rights to declare that the United States violates the Inuits' human right to a stable climate through the U.S.'s disproportionate contribution to and intractability on global warming.[144] In contrast, Baker Botts surely did not float the principle of the freedom of transit of petroleum to an intergovernmental panel meeting in a public forum. After all, it did not need to do so. Instead, Baker Botts could lean on the private international law legacy of the PSA to keep only certain actors in the negotiating room while simultaneously borrowing from public international law both its historical protection of the right to property and its flagship form, the treaty. In this protective framework, very little could prevent these transnational lawyers from getting creative with international law.

V.
DODGING THE *UNOCAL* CHALLENGE: BTC ATTEMPTS TO OVERCOME LIABILITY FOR SECURITY-RELATED HUMAN RIGHTS ABUSES

In addition to its surprising treatment of the local regulatory regimes and international law, the BTC's legal architecture also goes beyond the typical megadevelopment investment arrangement through its agreements concerning liability for security-related human rights abuses. Both the IGA and individual HGAs set the general framework for pipeline security: Each state's public forces will provide pipeline security personnel and services during all stages of the project, including during land acquisition (in some cases involving resettlement of local people).[145] They are charged with securing "the Rights to Land, the

143. *See* Statute of the International Court of Justice art. 38(I)(a), June 26 1945, 59 Stat. 1055.

144. *See* Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, http://www.earthjustice.org/news/documents/12-05/FINALPetitionICC.pdf.

145. The land acquisition process caused both physical and economic displacement impacts

Facilities and all Persons. . .involved in Project Activities" against any loss or damage "resulting from civil war, sabotage, vandalism, blockade, revolution, riot, insurrection, civil disturbance, terrorism, kidnapping, commercial extortion, organized crime or other destructive events."[146] In addition to the security provided by state public forces ("government security"), the project agreements leave room for the consortium to utilize its own private security forces ("private security").[147]

The states assume full responsibility for the provision of government security. Each HGA provides that

> the Government shall be solely liable for the conduct of all operations of the security forces of the State and neither the MEP Participants nor any other Project Participants shall have any liability or obligation to any Person for any acts or activities of the security forces of the State or be obligated to reimburse the Government for the cost and expense of providing security.[148]

On its face, this clause basically states that the host states will not ask the consortium to pay for government security. However, the language of this clause also appears to insulate the oil companies from any potential liability resulting from the abusive actions of public forces. It would not be unthinkable for one of the host states, for example, to use its expansive pipeline security mandate as a way to justify use of public forces against insurgents present in the pipeline path, and against civilians suspected of being sympathetic to the insurgents. Oil companies often have turned a blind eye to this kind of abuse by militaries assigned to pipeline security in other regions, but have not always remained immune to suit.[149] This clause seems to attempt to preclude consortium liability for such abuses by public forces. However, it is important to note that the clause cannot bind the rights of third parties to claim against the oil consortium under secondary liability theories. At most, this clause may open the door to the argument that, should the BTC Company be found liable to third parties for the acts of public forces, the states have agreed to indemnify the company against any damage claims arising from this liability.

In addition to the HGAs' general security provisions described above, at

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on local people. *See* Green Alternatives, Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts 4-7, http://www.baku.org.uk/missions.htm (follow "Georgia & Turkey, September 2005" hyperlink).

146. Azerbaijan HGA, *supra* note 78, art. 11, 11.1.

147. Protocol between the Government of Georgia and BP Exploration (Caspian Sea) Limited on the Provision of Security for the BTC Pipeline Project, art 1.2 [hereinafter Georgian Security Protocol], http://subsites.bp.com/caspian/Security/HR/Georgia%20BTC%20 Security%20 Protocol%20EN.pdf.

148. Turkish HGA, *supra* note 78, art. 12; Georgia HGA, *supra* note 78, art. 11; Azerbaijan HGA, *supra* note 78, art. 11.

149. See, for example, the case of the Colombian public forces security detail for Occidental Petroleum's Canon Limon pipeline in northeastern Colombia, Mujica v. Occidental Petroleum, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (plaintiff victims alleged, *inter alia*, crimes against humanity by Occidental Petroleum for secondary liability in the dropping of a cluster bomb on a civilian village in 1998 by Colombian public forces assigned to pipeline security who were allegedly targeting insurgents).

least one state, Georgia, has also completed an additional security protocol with the consortium. This Protocol delineates government security procedures for, among other things, the use of force, hiring and training of security personnel, monitoring, and communicating about security issues with the consortium. The Protocol stresses the goal of "promoting respect for and compliance with internationally-recognized human rights principles" as set forth in a bundle of international human rights instruments dubbed the "Security Principles."[150] It invokes the Universal Declaration of Human Rights, the European Convention on Human Rights ("ECHR"), the United Nations Code of Conduct for Law Enforcement Officials, the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials, and the U.S. State Department and Foreign and Commonwealth Office's "Voluntary Principles on Security and Human Rights," as well as applicable domestic legislation and the other relevant intergovernmental agreements among the three BTC host countries related to security.[151] In article 3.1 of the Protocol, Georgia covenants to follow security procedures regarding, *inter alia*, use of force, hiring and training in a manner consistent with national legislation and the "specific guidelines set out in the Security Principles."

That the consortium compiled and acknowledged the existence of this bundle of potentially applicable human rights norms in a binding project document could reflect megadevelopment's increasing concern over allegations that link security of their projects to human rights abuses against local communities. Indeed, the Protocol reads like a textbook example of the U.S. Department of State's new Voluntary Principles on Security and Human Rights, a code developed by the energy sector, Department of State, and human rights advocates delineating voluntary best practices for public and private security forces protecting energy development projects.[152] Acknowledging human rights norms in the security provisions of a megadevelopment project of the BTC's magnitude and profile is a positive step toward actualizing the human rights aspirations contained therein. However, when one reads the security provisions in the broader context of the other project agreements, it appears the consortium and host states stopped short of fully utilizing the security provisions to create meaningful and actionable protections of human rights on the pipeline path.

Other than the ECHR, none of the instruments that delineate the Security Principles create enforceable rights or state obligations.[153] Taking even this one duties-creating instrument, if government security operated in *compliance* with the rights respected in the ECHR and in so doing interfered with the economic

150. Georgian Security Protocol, *supra* note 147, pmbl., para. 2.

151. *Id.*

152. Voluntary Principles on Security and Human Rights, http://www.state.gov/g/ drl/ rls/2931. htm (last visited Feb. 15, 2006).

153. *See* Georgian Security Protocol, *supra* note 147, pmbl., para. 2. The other instruments are voluntary principles and U.N. General Assembly resolutions.

equilibrium clause, the consortium would have the right under the terms of the IGA and HGAs to seek compensation from the state for the economic disturbance.[154] In contrast, if government security *violated* the rights respected in the ECHR, even if the economic benefit of doing so accrued to the consortium, theoretically, only the state would stand responsible for the violation.

Indeed, the overriding thrust of the Protocol is not its treatment of international human rights instruments. It is the Protocol's clear reiteration of the consortium's abdication of responsibility for the behavior of host government security forces. This arrangement stands even though the security exists for the private benefit of the consortium's project and the consortium is partially paying the Georgian state for it. The same day the consortium announced the Protocol, it also announced an agreement to provide the state with "a range of necessary and non-lethal items, including vehicles and accommodation for government security personnel. . .as well as maintenance support" to the tune of 6 million USD now and 40 million USD more over the expected project lifetime.[155] The Protocol ends by re-invoking the IGA and HGAs' provisions on state responsibility for security: "For the avoidance of doubt, the Parties confirm that the Government is solely responsible for the provision of Government Security."[156]

In sum, security agreements such as the Georgian Security Protocol represent a positive step toward discouraging pipeline security measures that would lead to human rights abuses. To this extent, such measures should be encouraged. The BTC's overall security agreements, however, reflect that the consortium and host states have so far stopped short of using such agreements to take more affirmative and substantive steps to prevent and take responsibility for pipeline-related abuses.[157]

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154. The Human Rights Undertaking, discussed *supra* Part III(A)(3), could be construed by a court to estop BTC from seeking this kind of compensation, but whether the instrument is a true project agreement binding the consortium and/or the host states remains unclear.

155. Press Release, BTC, BTC Announces New Protocols (Oct. 21, 2004), *available at* http://subsites.bp.com/caspian/Security/HR/Georgia%20BTC%20Security%20Provision%20Protocol%20EN.pdf.

156. Georgian Security Protocol, *supra* note 147, art. 12.8. Further, it delineates a process for generating reports about alleged human rights abuses, but specifies that such reports will not necessarily be made available to the public. *Id.* art. 9.1.

157. *See, e.g.*, AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, at 27 (recommending that the consortium use project agreements to ensure that pipeline security personal "pose minimal risk to the human rights of local populations" through mechanisms that include penalties for non-compliance).

VI.
SELECTIVELY APPLYING INTERNATIONAL LAW'S CENTRAL TENET: BTC EVOKES AND EVISCERATES STATE SOVEREIGNTY

The BTC project undermines the two traditional theories of state sovereignty. The first theory, prevailing at the turn of the eighteenth century, is one of internal state sovereignty, which defines "law as the general commands of a sovereign, supported by the threat of sanctions."[158] In other words, with respect to the relationship of the rulers to their subjects within a state, the rulers are identified by their rules as backed by enforcement.

This first theory of state sovereignty falls away in most discussions of international law since it regards intrastate power relationships. Nonetheless, it is still helpful in explaining the positivist notion of the primacy of the state in international law, "that states are the principal actors of international law and they are bound only by that to which they have consented."[159] The idea that sovereign states rule because they have the means to enforce their rules and that, as such, the sovereign is the entity with whom other states should engage in order to fashion international rules is a basic premise of the international legal system. As explained below, the BTC project agreements undermine this premise.

The second theory of state sovereignty describes the external relationship of a ruler or the state itself toward other states. It is the key international law principle that each state is on equal footing with other states. A sovereign state is not a dependent of another state:[160] "The doctrine of sovereign equality of states makes not only small states the juridical equal of larger ones, but also reduces the ambit of community power and influence of a larger state to the presumptive global reach of a single small state."[161] This second theory regarding how states interact with one another, as opposed to with their subjects, describes international law and discourse's central reliance on the fiction of formal equality among the states.[162] The BTC pipeline's legal architecture used this doctrine of external state sovereignty as the foundation for the Intergovernmental Agreement. Under this theory, Turkey, Azerbaijan, and Georgia are merely three sovereign states freely contracting with one another.

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158. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 17 (2000) (7th ed.).

159. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 3 (1999).

160. *See generally* MALANCZUK, *supra* note 160; Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT'L BLACK L.J. 1, 2 n.23 (2003) (citing Stephen A. Kocs, Explaining the Strategic Behavior of States: International Law as System Structure, 38 INT'L STUD. Q. 535, 539 (1994) (describing "sovereign equality of States as one of three central principles of Westphalian legal order")).

161. Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27, 39 (2003).

162. *See* Gordon, *Racing U.S. Foreign Policy*, *supra* note 160, at 6.

Yet allowing state sovereignty to coexist with the BTC project also posed challenges to the consortium.

The project agreements overcome barriers presented by state sovereignty in two principle ways: 1) by building in radically asymmetrical rights, and 2) by transferring powers related to land and property rights to the consortium.

A. The Project Agreements' Asymmetry of Rights

The project agreements allocate radically asymmetrical rights. The asymmetry is most prevalent not in the IGA, to which only the host governments are parties, but rather in the HGAs, to which the consortium is also party. The HGA provisions regarding cancellation, for example, provide that "under no circumstances whatsoever"[163] shall the host government cancel or terminate the project agreements "as a result of *any breach by the MEP Participants* or any other Project Participants."[164] This highly unusual provision is matched in its peculiarity only by the HGAs' provision that the agreement "may be terminated at any time by the MEP Participants giving their written notice of termination to the Government and shall be of no further force or effect for any purpose as of the date specified by the MEP Participants in said notice."[165] The consortium can terminate immediately with written notice, but the host governments cannot terminate even if the consortium breaches its duties under the project agreements. This asymmetrical arrangement enfeebles any sense of sovereignty these host states may have had going in.

The other provisions delineating liability for breach also demonstrate severe asymmetry. Article 11 of the Turkish HGA, for example, provides for consortium liability to state authorities[166] and third parties[167] for loss or damage caused by consortium breach of the project agreements or applicable law to the extent that such loss or damage is not caused by state authorities.[168]

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163. Turkish HGA, *supra* note 78, art. 11.4.

164. *Id.* (emphasis added).

165. *Id.* art. 3.2.

166. "The MEP Participants shall be liable to the State Authorities for Loss or Damage caused by or arising from (i) any breach by them of any Project Agreement or (ii) any breach by them of any applicable law; provided, however, that the MEP Participants shall have no liability hereunder if and to the extent the Loss or Damage is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority." Turkish HGA, *supra* note 78, art. 11.1.

167. "The MEP Participants shall be liable to a third party (other than the State Authorities and any Project Participant) for Loss or Damage suffered by such third party as a result of the MEP Participants' breach of the standards of conduct set forth in the Project Agreements; provided, however, that the MEP Participants shall have no liability hereunder if and to the extent the Loss or Damage is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority." Turkish HGA, *supra* note 78, art. 11.2.

168. Article 11.2's limited liability clause appears an attempt to bind third parties from bringing suit. However, this clause, in and of itself, cannot do so. To prevent third parties from bringing suit against the consortium for loss or damage suffered as a result of a consortium participant's breach, the host states would have to fulfill their obligation under the IGA to make domestic implementing legislation to effectuate these provisions. In that case, third parties could find themselves prevented from suit.

Article 11's exception for contributory liability seems, at first glance, fairly standard. The provisions' asymmetry comes into focus when one plays out how a host state's claim for breach would look: the state's likelihood of prevailing on its claim would turn in large part on who would make the factual determination of contributory liability. Normally, an agreement subject to the ICSID Convention's rules for arbitration requires the parties to exhaust local remedies before bringing disputes to the ICSID arbitration.[169] The HGAs, however, supersede ICSID's exhaustion requirement.[170] Whether a state judicial entity or the investment-friendly ICSID arbitrator would determine contributory harm would depend on the enforceability of this provision.[171] Under this provision, if, for example, a state sought to hold the consortium liable for breach through its own municipal apparatus, and the consortium defended against the claim by pointing to state contribution to the harm, the HGA provides that any contracting party could forego the municipal adjudication of the claim and initiate the ICSID arbitration process.[172] Leaping from a municipal judicial system to arbitration in Geneva[173] may be unconventional in a matter such as this, but the HGAs do not make clear what other process would be respected.

If a dispute were to go through ICSID, some observers worry an arbitration tribunal would not likely be independent of the consortium.[174] The exclusion from arbitration of any language other than English places the states at a disadvantage, as does the fact that only English law binds the Tribunal.[175] These rules raise the bar for states' effective participation; not only do the state representatives need to be fluent in the English language, but also English commercial law.[176] Further, with each side bearing its own costs, the ICSID process is often prohibitively expensive for developing states.

Moreover, the HGA also grants contractors and any other project participants[177] working for the BTC rights under the HGA, including arbitral

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169. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, art. 26, 17 U.S.T. 1270, 29.

170. *See, e.g.*, Turkish HGA, *supra* note 78, art. 18.1.

171. The enforceability of the provision superseding the exhaustion requirement is questionable under the Vienna Convention on the Law of Treaties, which provides that a party to a treaty, such as ICSID, cannot later make another treaty that purports to abrogate the earlier treaty's provisions without being in breach of the earlier treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 30(2), 1155 U.N.T.S. 331 ("When a treaty specifies that it is subject to . . . an earlier or later treaty, the provisions of that other treaty prevail."). A state could argue that the provision superseding exhaustion is unenforceable because no sovereign would have agreed to be subject to the power of the ICSID without the exhaustion of local remedies requirement.

172. Turkish HGA, *supra* note 78, art. 18.1.

173. *Id.* art. 18 (designating Geneva as the place of arbitration).

174. *See* Campagna per la Riforma della Banca Mondiale, International Fact-Finding Mission Preliminary Report 24 (Aug. 2002), http://www.baku.org.uk/missions.htm (follow "Turkey, August 2002" hyperlink).

175. *See, e.g.*, Turkish HGA, *supra* note 78, art. 18; Georgian Security Protocol, *supra* note 149, art. 12.7.

176. *See* International Fact-Finding Mission Preliminary Report, *supra* note 174.

177. Project participants are defined as "any and all of the MEP Participants and any Affiliates thereof, the Interest Holders, the Operating Companies, the Contractors, the Shippers, the

dispute rights.[178] Contractors, like affected communities along the pipeline route, are third parties to the project agreements. Yet only the third parties working for the consortium are granted rights under the HGA. In contrast to the HGA Article 4.2's clear grant of rights to contractors, the project agreements are either utterly silent about or eschew third party community rights through oblique and partial references.[179] The contractors' arbitral dispute rights are thus an additional example of the asymmetry of rights between the consortium and the public interests the host states *should* represent.

The host states also have given away their sovereignty through asymmetrical terms by agreeing to allow the consortium to view any project agreement breach by any state agency as a breach by the sovereign itself, regardless of which agency actually breached. In the HGAs, the governments guarantee that if their agencies fail to carry out the project agreement provisions, the consortium may hold the state itself liable, regardless of which agency failed.[180] The host governments have, in essence, agreed to an exorbitant concept of alter ego, a theory against which other sovereigns have fought in the courts in both the U.S. and Britain.[181]

B. The Consortium's Exclusive Use of the Land and Other Property Rights

The pipeline corridor stretches from the Caspian to the Mediterranean Sea over a thousand miles of mountains, desert, and agricultural land, criss-crossing numerous rural villages and at least seven zones of armed conflict. In Turkey alone, the project is estimated to have so far displaced approximately 20,000 families. The families are displaced because each host state agreed to exercise "such powers of taking, compulsory acquisition, eminent domain, or other similar sovereign powers"[182] needed over private lands in order to transfer the "exclusive rights to the land"[183] to the consortium. In Azerbaijan and Turkey, these rights include the "unrestricted property right (other than ownership) to use, possess, control, and construct" on or under the state and private land designated for the pipeline corridor and to restrict or allow such actions by others.[184] The comparable provision in the Georgian HGA appears to allow for consortium ownership of private land and does not specifically prohibit the consortium from gaining ownership rights to the public land there.[185]

Lenders, and the Insurers." Turkish HGA, *supra* note 79, app. 1, Certain Definitions.

178. *See, e.g., id.* art. 4(2) (granting project participants "the benefit of all rights, exemptions and privileges as are provided under any Project Agreement.").

179. *See, e.g.*, Human Rights Undertaking, *supra* note 108, art. 2(c) (discussed *supra* Part III(A)(3)).

180. *See, e.g.*, Turkish HGA, *supra* note 78, art. 5.3(ii).

181. *See, e.g.*, First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611 (1983); C. Czarnikow, Ltd. v. Rolimpex, [1979] A.C. 351.

182. Turkish HGA, *supra* note 78, art. 7(2)(vii)(4).

183. IGA, *supra* note 9, art. II(4)(iv).

184. Azerbaijan HGA, *supra* note 78, art. 4.1(iii); Turkish HGA, *supra* note 78, art. 4.1(iii).

185. Georgia HGA, *supra* note 78, art. 4.1(iv).

Georgia also granted each project participant "such status and powers of taking, compulsory acquisition, eminent domain, expropriation or other similar delegated powers of the State" to enable each project participant to manage its own interactions with local private land owners in the pipeline's path.[186] These "rights to land" provisions require Georgia not only to exercise eminent domain but also to turn over that fundamentally sovereign power to the consortium.[187]

In addition to the rights to land provisions in the individual country contracts, the overarching Intergovernmental Agreement also contains provisions that seem to grant the consortium property rights. Article II(8) of the IGA declares that the project agreements "shall not be characterized or treated. . .as a concession contract or a special administrative contract granting a concession." In the same article, the states unambiguously represent and warrant that the BTC pipeline project is not being executed in the public interest.[188] This article raises sovereignty concerns.

By agreeing to refrain from characterizing the project agreements as a special administrative contract, the states have potentially given up the prerogative that states retain under that particular species of contract to alter their commitments for the benefit of the public interest.[189] When pressed to clarify whether this provision would, indeed, prevent the host states from regulating human rights or HSE aspects of the project by invoking the public interest, BTC responded in the HRU that the consortium would not interpret this section of the IGA (Section II(8)) inconsistently with relevant host state regulations as long as the regulations were "no more stringent than [*inter alia*] the EU standards. . .referred to in the Project Agreements."[190] This clarification only mitigates the sovereignty concern to the extent that the E.U. standards referred to in the project agreements, namely those referred to in the Code of Practice found attached to the HGAs, are discernable and agreed to by both the BTC and the host states. That such agreement could be found is far from certain.[191]

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186. *Id.* art. 4.1(iii).

187. In the domestic state sovereign immunity setting, the Supreme Court has refused to allow a state to contract out of its core sovereign power of eminent domain, even if the state's intent to do so was unmistakable. *See* Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924); *see also* Michael D. Ramsey, *Acts of state and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 91 (1998); Campagna per la Riforma della Banca Mondiale, International Fact-Finding Mission 60-84 (June 2003), http://www.baku.org.uk/missions.htm (follow "Turkey-March 2003 Report" hyperlink) (indicating that the compensation regime designated in the project agreements was not being followed for most displaced land owners and users and raising concern generally over the exercise of eminent domain in that country).

188. IGA, *supra* note 9, art. 11(8).

189. *SEE* AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE, *supra* note 20, at 11 n.18 (citing CANE, INTRODUCTION TO ADMINISTRATIVE LAW 145 (3d ed. 1996) (explaining that the state retains ability to alter commitments under "special administrative contracts granting a concession")).

190. Human Rights Undertaking, *supra* note 107, 2(a).

191. *See supra* Part III(A)(3) (discussing Human Rights Undertaking); Part III(A)(2) (discussing Code of Practice).

C. Squaring the BTC Legal Architecture with the Doctrine of Sovereignty

The IGA evokes international law as the foundation for the project agreements. Yet, it is doctrinally difficult to square the BTC legal architecture with the international law concepts of state sovereignty given the manner in which the project agreements strip the host states of most traditional roles of the sovereign. To do so, it becomes important to remember that the theory of formal equality among sovereign states, along with international law more generally, developed in the context of colonization and its aftermath. Through this historical lens, post-colonial legal scholars show how the sovereignty doctrine—the idea that each state is independent of and equal to every other state—has been selectively applied by international lawyers and jurists as a way to rationalize continued power by colonizing forces even after the end of formal colonialism.[192] The traditional idea of sovereignty (independence and equality) has never really been borne out for those from the non-colonizing countries: "strategies from two centuries ago that developed to support colonial domination. . .have carried forward into present international legal process."[193] The colonizing states that built the international law framework guiding the BTC project agreements drew from their geopolitical and intellectual roots in the colonialist discourse. This perspective aids in understanding how the consortium's counsel may doctrinally reconcile the BTC legal architecture with the concept of sovereignty.[194]

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192. The three host countries to the BTC pipeline were not colonized, but they were not colonizers, either. The former Soviet Republics and the transitional economies of Europe are rarely viewed as members of the developing world, but rather as belonging in a different global category. Ruth Gordon explains this liminal treatment: "International law divided the world into European and non-European realms with rights accorded only to the former; thus, duties were owed only to those of the same race—to other Europeans." Gordon, *Racing U.S. Foreign Policy*, *supra* note 160, at 15; *see* Antony Anghie, *Civilization and Commerce: the Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 887-93 (2000) (explaining role of white supremacy in international law). The development project, arising in the aftermath of post-colonial failures, "confirms and validates racial hierarchy, which explains in part why after the disintegration of the USSR, Eastern Europe and the former Soviet Republics—whether industrialized or not—were immediately understood to be in a different global category than the developing third world." Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 5 n.13 (2004); *see also* Gordon, *Racing U.S. Foreign Policy*, *supra* note 160, at 15. Whether or not Georgia, Azerbaijan, and Turkey actually escape categorization as third world, and regardless of the historical fact that these three states are not former colonies of the West, the economic policies (and their attendant regulatory regimes) that the states' seated leaderships embrace today nonetheless place the Caspian states within the ambit of the development project's language, rules, and awkward distribution of power. *See* UMA KOTHARI & MARTIN MINOGUE, *Critical Perspectives on Development: an Introduction*, *in* DEVELOPMENT THEORY AND PRACTICE CRITICAL PERSPECTIVES: CRITICAL PERSPECTIVES 4-5 (Uma Kothari & Martin Minogue eds., 2002); Gordon and Sylvester, *supra*, at 5 n.13 (arguing that the development project expanded into the transitional economies of Europe and the former Soviet Republics).

193. Henry J. Richardson, III, *supra* note 161, at 50; *see* Anghie, *Civilization and Commerce*, *supra* note 192, at 909.

194. The next article further explores the implications of this attempted doctrinal reconciliation by explaining how traditional notions of sovereignty and formalism serve as the theoretical entry for the consortium's transnational lawyers to utilize an international treaty as the governing pipeline document. Through this lens, it becomes possible to nuance the critique of the

The project agreements accomplish several shifts of power over land from the states and their citizens to the consortium. They bind the hand of the state to cancel or terminate. They shift the project from concession to property. They first grant an exclusive use of property and then also the power of eminent domain itself. In these ways, the pipeline route belongs to the oil consortium. Along that route, more so than Georgia, Azerbaijan, and Turkey, BP can lay claim as the sovereign power. The PSAs employ international law to create a thousand mile swath of militarized corporate sovereignty.[195]

VII.
CONCLUSION: MEGADEVELOPMENT'S LAWYERS AS "HANDMAIDENS OF GLOBALIZATION"

In light of the increasingly visible (though certainly not new) influence of transnational corporations, their mercenaries, and contractors in international conflicts over natural resource control and exploitation, this article analyzed the Caspian region's BTC pipeline project agreements to demonstrate the extreme to which today's megadevelopment consortia have taken this influence. The analysis has necessarily included a peek into the changing role of the state. International law's agility (or lack thereof) in shaping and responding to the course of economic globalization in the "twilight" of state sovereignty depends on the savvy (or lack thereof) of transnational lawyers.[196] Philip Alston agues that "[i]nternational lawyers have, in many respects, served as the handmaidens of the changes wrought by globalization. Indeed, the characteristics of sovereignty have changed so much partly because of the role they have played in facilitating many of those changes."[197] Anne Marie Slaughter adds that economic globalization is being implemented less by any "disappearing" hierarchical state institutions than by "bankers, lawyers, businesspeople, public-interest activists, and criminals" who interact with the "disaggregate[ed]" state institutions of the first world as represented by "securities regulators, antitrust or environmental officials, judges[,] legislators," or the like.[198] While Slaughter views the disaggregated first world state as flexible and effective at meeting economic globalization's challenges,[199] during this period of flux in the role of

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transnational lawyers who put such deals together: Yes, they have innovated their means of undermining most forms of societal regulation of their industrial activity, but the fact that the innovation draws its form from international law is nothing surprising. It is, in fact, very much in step with the way industry and international law have danced from the beginning.

195. *Cf.* Waters, *supra* note 2, at 406 (citing one pipeline opponent in the Turkish context as observing the pipeline as "a strip running the entire length of the country, where BP is the effective government.").

196. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435, 435 n.4 (citing Walter B. Wriston, THE TWILIGHT OF SOVEREIGNTY (1995)).

197. *Id.* at 435.

198. Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997).

199. *Id.*

the state, transnational lawyers representing megadevelopment concerns often have operated in weakened, facilitative host states without due critical attention. The legal architecture of the BTC pipeline, for example, was designed over the better part of the last decade fairly quietly, utilizing concepts and authority from international law where convenient and discarding others where not.

To better comprehend the extent and gravity of this handiwork, it will be important to tease out further the implications of the changing role of the state vis-à-vis megadevelopment and the narratives of public international law by which the transnational lawyers who craft such arrangements must abide. Understanding these narratives might help us question and ultimately renegotiate allegiance to the discourses in public international law from which human rights advocates have traditionally drawn (namely human rights, development, and more recently good governance) in order to imagine anew how to be better allies to communities on the frontlines.

BP's handmaidens crafted the BTC pipeline's legal architecture in the late 1990s. While some may herald it as a worthy continuation of "the contract of the century," they must mean the last century; the oil consortium's outmoded reliance on and manipulation of an unsustainably inequitable international legal regime surely cannot represent any kind of tenable vision for just transnational lawyering into the twenty-first century. Transnational lawyers can do better than this.

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Rules, Gaps and Power: Assessing Reform of the U.N. Charter

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Rules, Gaps and Power: Assessing Reform of the U.N. Charter

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ABSTRACT

In light of several recent international legal and political crises, a wide spectrum of proposals has emerged to reform the rules of the United Nations Charter. These proposals range from broadening the right of states to use force in self-defense to allowing states to conduct humanitarian interventions without the approval of the Security Council. This article presents a framework for assessing such reform proposals that examines the ways in which states' decision-making processes interact with legal rules to cause certain uses of force to be undertaken while others are avoided. Using this framework, this article argues that, regardless of whether they are legally desirable, the most prevalent reform proposals are unlikely to alleviate the system's problems in a tangible way. Instead, the United Nations' member states must conduct a thorough analysis of how the organization can restructure itself to play a more productive role in ensuring international security.

[T]he UN must undergo the most sweeping overhaul of its 60-year history.
- Kofi Annan[1]

Why have this building? What is it all about?
- John Danforth[2]

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1. Kofi Annan, *"In Larger Freedom": Decision Time at the UN*, 84 FOREIGN AFF. 63, 66 (2005) [hereinafter *In Larger Freedom*].

2. Philip Gourevitch, *Power Plays*, NEW YORKER, Dec. 13, 2004, at 35 (reporting John Danforth's frustrations with the United Nations, which were expressed the day before he resigned as United States Ambassador to the United Nations).

I.
INTRODUCTION

Only the most ardent pacifist would argue that under no circumstance should a state use armed force against another state.[3] The assumption that some degree of force is imperative in the international system was fundamental in the creation of the United Nations Charter, which, while seeking to create a more peaceful world order, does so by limiting the use of force rather than outright prohibiting it. The Charter generally prohibits armed attacks by states, but provides two major exceptions: in self-defense and, otherwise, when authorized by the Security Council.[4] These rules are not only the core of the Charter but are arguably the most important legal rules in the international system.[5]

Member States have regularly and pervasively violated the Charter rules, demonstrating that the Charter system has not succeeded in effectively governing the use of force. In other words, the Charter has not resulted in an environment where uses of armed force are limited to the instances the Charter deems legal. Depending on the criteria used, studies have found that states used military force in interstate disputes several hundred times since the United Nations was created in 1945.[6] As a result of these and other problems facing the United Nations, "[o]ptimism yielded to renewed cynicism about the willingness of Member States to support the Organization."[7]

These problems are widely acknowledged, and many believe they can be fixed—or at least mitigated—by revising or re-interpreting the Charter rules in one way or another. Indeed, it seems talk of reforming the Charter, while always present in some form since 1945, has rarely been as prevalent. Secretary-General Kofi Annan recently commissioned a High-Level Panel on Threats, Challenges and Change ("High-Level Panel") to examine whether and how the U.N. system should be reformed, including the rules governing the use of force. The High-Level Panel, which released its findings in December 2004,

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3. *See generally* Duane L. Cady, *Pacifist Perspectives on Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM 31, 42 (Robert L. Phillips & Duane L. Cady eds., 1996) (noting that absolute pacifism "has very few if any adherents").

4. U.N. Charter art. 2, para. 4; arts. 39-51.

5. *See, e.g.*, MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 3 (2001) ("It is widely agreed that the most important rules are rules governing use of force; the most important obligation is the obligation not to use force unless in self-defense or pursuant to approval by the United Nations Security Council.") (citation omitted) [hereinafter LIMITS OF LAW].

6. *See, e.g.*, The Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 140 n.104, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report3.pdf ("By one count, force was employed 200 times, and by another count, 680 times.") [hereinafter PANEL REPORT]; GLENNON, LIMITS OF LAW, *supra* note 5, at 67-69 (listing various counts of the uses of force since 1945); ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 181 (1993) (providing a "representative sampling" of uses of military force since 1945).

7. PANEL REPORT, *supra* note 6, at 13.

found that no reform of the rules was needed. "Article 51 needs neither extension nor restriction of its long-understood scope," it concluded, "and Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront."[8] Shortly afterward, Annan strongly endorsed the High-Level Panel's findings.[9]

Yet the High-Level Panel's report and Annan's support of it were poorly received by many. *Washington Post* columnist Jim Hoagland called it "incremental tinkering on the edges of a hurricane of change."[10] Richard Haass, President of the Council on Foreign Relations, argued that the flaws in the High-Level Panel's recommendations resulted from equating "process" with "legitimacy."[11] Likewise, Professor Michael Glennon wrote that "the core recommendations of the panel's report, concerning the use of armed force, rest upon wishful thinking rather than empirical evidence. The report evinces a view of a world governed by objective, universal morality rather than by competition for power and shifting national interests."[12]

Were the High-Level Panel and the Secretary-General correct that Charter reform is not necessary? Or should the rules governing when states may use armed force be revised—and, if so, how? This article will attempt to address these questions by stepping back and examining how these legal rules interact with other forces in the international system. Part II reviews three recent crises—Iraq, Rwanda, and Kosovo—where the Charter regime has been accused of failing. The discussion of these situations will shed light on the different flaws in the Charter system and how these flaws manifest themselves in practical terms. Part II asserts that the problems run deeper than the frequent violations of the Charter rules and also include occasions where force was not employed but should have been. With these observations in mind, Part III presents a framework to be used to analyze proposals for reforming the Charter and addressing its flaws. This framework aims to examine the use of force in a broad sense, looking both at occasions where force has been used as well as occasions where it was not. In addition, this framework demonstrates the interaction between the Charter rules and the national interests of member states

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8. *Id.* at 61.

9. The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005); Kofi Annan, *A Way Forward on Global Security*, INT'L HERALD TRIB., Dec. 3, 2004, *available at* http://www.un.org/secureworld/oped.html; Kofi Annan, *Courage to Fulfill Our Responsibilities*, ECONOMIST, Dec. 2, 2004, *available at* http://www.economist.com opinion /displayStory.cfm?story_id=3445764.

10. Jim Hoagland, *Failure of Nerve in U.N. Reform*, WASH. POST, Dec. 5, 2004, at B7. *See also* Max Boot, *Why U.N. Stays Mired in Its Defects*, L.A. TIMES, Dec. 9, 2004, at B17 ("The reality is that most of the U.N.'s 191-member states, to say nothing of its 49,000 employees, aren't terribly interested in making it work better.").

11. RICHARD HAASS, THE OPPORTUNITY: AMERICA'S MOMENT TO ALTER HISTORY'S COURSE 176-77 (2005).

12. Michael Glennon, *Idealism at the U.N.*, 129 POL'Y REV. 3, 3-4 (2005).

in the decisions by member states to use force. Utilizing this framework, Part IV reviews some of the most prevalent proposals to reform or reinterpret the Charter, including suggestions for revising the standard for the use of force in self-defense and those allowing states to intervene during humanitarian crises. This article argues that using the framework provided in this article as an analytical tool demonstrates that such proposals are generally impractical because they focus too narrowly on rules as ends within themselves rather than on the political, economic, and social interests that drive state behavior. Finally, the conclusion argues that, alternatively, the more effective way to reshape the United Nations is not by reforming the Charter rules but by exploring ways in which the system can better focus on member states' national interests.

II.
THREE RECENT CRISES

In 1932, Reinhold Niebuhr observed:

> [T]here is not yet a political force capable of bringing effective social restraint upon the self-will of nations, at least not upon the powerful nations. Even if it should be possible to maintain peace on the basis of the international *status quo*, there is no evidence that an unjust peace can be adjusted by pacific means. A society of nations has not really proved itself until it is able to grant justice to those who have been worsted in battle without requiring them to engage in new wars to redress their wrongs.[13]

This statement, of course, was made years before the creation of the United Nations, which attempted to provide the type of restraint described by Niebuhr. Nonetheless, if he were alive today, Niebuhr could rightly make the same observation.[14] Indeed, states of every sort continue using armed force against each other—often as if the Charter had never existed and at other times offering half-hearted and questionable justifications for finding their actions legal under its rules.[15] During the Cold War, uses of force in violation of the Charter—such as the Soviet invasion of Afghanistan and the U.S. campaign against Nicaragua—were often perceived as temporary symptoms of the geopolitical climate rather than results of inherent flaws in the Charter rules.[16] Shortly after

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13. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS 111 (1932).

14. *See, e.g.*, GLENNON, *supra* note 5, at 2 ("[N]o rule—neither the prohibition against nondefensive forced prescribed by the UN Charter, nor an alleged customary rule prohibiting or permitting humanitarian intervention or some other use of force—has succeeded in obliging states to refrain from intervention.").

15. *See, e.g.*, Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 530 (2005) (noting that "states routinely resort to expanded conceptions of self-defense in attempts to justify unilateral uses of force"); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 147-48 (1992) ("Obviously, not all states that invoke the doctrine of self-defense, a legal right, to justify their use of force, do so truthfully.").

16. *See* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI.

the Cold War ended, however, events such as the First Gulf War, celebrated at the time as a model for international collective security, reintroduced the notion that the Charter and Security Council could effectively govern the use of armed force. The New World Order heralded after the First Gulf War was supposed to be a new era of cooperation among nations and respect for international law.[17] Events since then, however, demonstrate that this moment was short-lived. As the High-Level Panel laments:

> It quickly became apparent that the United Nations had exchanged the shackles of the cold war for the straitjacket of Member State complacency and great Power indifference. Although the United Nations gave birth to the notion of human security, it proved poorly equipped to provide it. Long-standing regional conflicts, such as those involving Israel/Palestine and Kashmir, remained unresolved. Failures to act in the face of ethnic cleansing and genocide in Rwanda and Bosnia eroded international support. Optimism yielded to renewed cynicism about the willingness of Member States to support the Organization.[18]

This Part discusses three situations that have occurred since the end of the Cold War that demonstrate, in varying ways, the limitations of the Charter system, the complexity of its flaws, and the reasons for this cynicism: (1) the 2003 U.S.-led invasion of Iraq (often called the Second Gulf War); (2) the 1994 Rwandan genocide and the failure of the outside world to sufficiently intervene; and (3) the 1999 NATO Kosovo campaign. Despite their factual and legal differences, the discussion will demonstrate that these problems have more in common than first impressions suggest.

A. The Second Gulf War

Although there may be a passionate few who would argue otherwise,[19]

L. REV. 113, 118 (1986) (noting that the United States justified its invasion of Grenada in part because "its nationals [were] facing imminent danger of death" and how the Soviet Union justified its 1968 invasion of Czechoslovakia by claiming it was responding to "that government's 'urgent' request for assistance").

17. *See* George H. Bush, *Toward a New World Order*, 1 U.S. DEP'T ST. DISPATCH 91 (Sept. 17, 1990) (predicting greater cooperation between states on economic, military and political matters); MARY ELLEN O'CONNELL, AM. SOC'Y OF INT'L LAW TASK FORCE ON TERRORISM, THE MYTH OF PREEMPTIVE SELF-DEFENSE 17 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf ("President George Bush led the United States in the Gulf War coalition proclaiming, at the war's end, a 'new world order under the rule of law.' The exemplary conduct of that coalition war reinvigorated the Charter rules and the role of the Security Council.").

18. PANEL REPORT, *supra* note 6, at 13. *See also* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 742 (2004).

19. *See, e.g.*, William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003) ("Both the United States and the international community had a firm basis for using preemptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time. Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated—without question—by the opponent and where, as here, it is consistent with the resolutions of the Security Council."); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 575 (2003) ("International law permitted the use of force against Iraq on two independent grounds. First, the Security Council

most now agree that the Second Gulf War was conducted in violation of the U.N. Charter.[20] The Security Council had passed Resolution 1441 late in 2002, threatening Iraq with "serious consequences" if it did not cooperate with weapons inspectors.[21] Yet the United States and its allies failed in their efforts in early 2003 to generate support for the so-called "second resolution" that would have explicitly authorized the use of force against Iraq. Nonetheless, the Bush administration argued that Resolution 1441 and other resolutions passed by the Security Council regarding Iraq provided sufficient authorization.[22] Annan later cited this fact for his conclusion that "[f]rom our point of view and the U.N. charter point of view, [the invasion] was illegal."[23] Indeed, as Thomas Franck wrote shortly after the invasion, "[w]hile a few government lawyers still go through the motions of asserting that the invasion of Iraq was justified by our inherent right of self-defense, or represented a collective measure authorized by the Security Council under Chapter VII of the Charter, the leaders of America no longer much bother with such legal niceties. Instead, they boldly proclaim a new policy that openly repudiates the Article 2(4) obligation."[24] Nonetheless, the question of whether the Second Gulf War was legal is secondary to this article. What is most important is the recognition that the United States and its allies conducted the war despite a general perception of its illegality. This was explored poignantly by Pierre D'Argent:

> The war was illegal. Yes. And, so what? Is the illegality to be taken that seriously when one knows what it is made of? To be serious, to oppose the war for such a legal reason is not really sufficient nor perfectly credible. Better reasons than this formal legal reason exist to oppose the war. And had the war been authorized, to be in favour of it just for legal reasons is a bit irresponsible, since it would have been waged probably along very similar lines and have created the same political turmoil. Soldiers and civilians would also have been killed, Al-Qaeda would also be rampant, and Saddam would also be in custody, the crimes of his reign

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authorized military action against Iraq to implement the terms of the cease-fire that suspended the hostilities of the 1991 Gulf war. Due to Iraq's material breaches of the cease-fire, established principles of international law—both treaty and armistice law—permitted the United States to suspend its terms and to use force to compel Iraqi compliance. Such a use of force was consistent with U.S. practice both with regard to Iraq and with regard to treaties and cease-fires. Second, international law permitted the use of force against Iraq in anticipatory self-defense because of the threat posed by an Iraq armed with WMD and in potential cooperation with international terrorist organizations.").

20. *See, e.g.*, Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) ("[T]he legal theory actually deployed by the United States is not persuasive."); Yoo, *supra* note 18, at 735 ("The consensus view among most international legal scholars is that the recent American interventions in Kosovo and Iraq, and the Bush administration's announced plans to use force preemptively against rogue nations and international terrorist organizations, violate core principles of international law.").

21. S.C. Res. 1441, ¶ 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

22. *See generally* Taft & Buchwald, *supra* note 19.

23. Colum Lynch, *U.S., Allies Dispute Annan on Iraq War*, WASH. POST, Sept. 17, 2004, at A18 (reporting answers Annan gave when the BBC questioned him about the war's legality).

24. Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 608 (2003).

revealed.[25]

Put another way, the most important lesson of the invasion is not the extent to which prior Security Council resolutions provided sufficient legal justification to launch an invasion; rather, it is that, whether or not this is reason enough, if powerful states are determined to launch such an invasion then, in practical terms, the legal technicalities become all but irrelevant.

B. Humanitarian Intervention and The Rwandan Genocide

As mentioned in the introduction, when assessing whether the U.N. Charter rules have succeeded in effectively governing the use of armed force, we must examine not only cases where force was used when it should not have been but also those where it was not used when it should have been. The most striking examples of such non-uses of force (or, in some cases, insufficient uses of force) are the failures of the world community to conduct certain humanitarian interventions. Yet not only is humanitarian intervention a controversial policy issue, the very definition of the term is subject to disagreement. In this article, I adopt the flexible definition provided by J. L. Holzgrefe: "[T]he threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied."[26]

Under a strict interpretation of the Charter, such uses of force are illegal unless authorized by the Security Council.[27] Making the problem still more

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25. Pierre d'Argent, *Which Law Through Which War?* Law Through War *Revisited*, 52 BUFF. L. REV. 635, 644 (2004). As I have argued elsewhere, Annan's insistence on the invasion's illegality merely "highlighted the irrelevance of that illegality." Yonatan Lupu, *Self Inflicted*, NEW REPUBLIC ONLINE, Sept. 22, 2004, http://www.tnr.com/doc.mhtml?i=express&s=lupu092204.

26. J. L. Holzgrefe, *The Humanitarian Intervention Debate*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 18 (J. L. Holzgrefe & Robert O. Keohane eds., 2003). A stricter definition has been provided by Fernando Tesón: "[T]he proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect." Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION, *supra* at 93, 94. A definition that, unlike Holzgrefe's and Tesón's, does not explicitly include threats, has been offered by Professors Franck and Rodley: "The theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control *by military force* over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity." Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 277 n.12 (1973).

27. *See* SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 129 (1996); Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, *in* 178 RECUEIL DES COURS 9, 143-44 (1982); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 121 (1991) ("The nub of the matter . . . is that if one deems the original intention of the founding members to be controlling with respect to the legitimate occasions for the use of force, humanitarian intervention is illegal."); Louis Henkin, Editorial Comments, *NATO's Kosovo Intervention: Kosovo and the Law of*

complex, even a well-intentioned intervention can lead to unforeseen, negative consequences. As Robert L. Phillips has argued, "there is often a very large gap between the (sometimes) good intentions of the interveners and the carrying out of an operation."[28] Yet even the United Nations has expressed its support for humanitarian intervention in general terms. The High-Level Panel, for example, wrote: "[w]e endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[29]

While there seems to be widespread agreement that when humanitarian crises arise the world should intervene, when actual crises do occur the outside world's response is either slow or non-existent.[30] Indeed, for various reasons, there have been few examples of humanitarian intervention. Michael Walzer wrote in 1977 that he had "not found any, but only mixed cases where the humanitarian motive is one among several."[31] But Walzer wrote this comment prior to certain recent examples and may have used a stricter definition than that adopted in this article. On a micro level, Israel's 1976 raid on the airport in Entebbe, Uganda to rescue Israeli citizens held there by Palestinian terrorists is a relatively non-controversial and morally justifiable example.[32] Large-scale operations often cited as humanitarian intervention include India's 1971 invasion of East Pakistan/Bangladesh, Vietnam's 1978 invasion of Cambodia to oust the genocidal Khmer Rouge and Tanzania's 1979 invasion of Uganda.[33]

"Humanitarian Intervention", 93 AM. J. INT'L L. 824 (1999) [hereinafter Henkin, *NATO's Kosovo Intervention*].

28. Robert L. Phillips, *The Ethics of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM, *supra* note 3, at 1, 3.

29. PANEL REPORT, *supra* note 6, at 66.

30. *See generally* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 508-16 (2002) (analyzing U.S. reluctance to intervene to stop acts of genocide). *But see* Tesón, *supra* note 26, at 112 ("Humanitarian intervention undermines . . . stability both by the very act of intervening, and by creating a dangerous precedent that lends itself to abuse of aggressive states. The use of the doctrine of humanitarian intervention rationale by even well-intentioned governments will contribute to generalized chaos, and an unjust order is preferable to chaos. Injustice should be remedied in ways that do not undermine the stability of the state system, that is by 'peaceful' means.") (citation omitted).

31. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 101 (1977).

32. *See* Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41 (2d ed. 1991) [hereinafter Henkin, *Use of Force*] (referring to the Israeli action as a "paradigmatic case" of humanitarian intervention).

33. *See* Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION, *supra* note 26, at 130, 130. *See also* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 179-223 (2d ed. 1997) (citing the following examples: (1) Tanzania's 1979 invasion of Uganda; (2) France's 1979 intervention in the Central African Republic; (3) India's 1971 invasion of East Pakistan/Bangladesh; and (4) the United States's 1983 campaign against Grenada); James P. Terry, *Rethinking*

Yet it seems that recent history is characterized more by failures to prevent or end humanitarian crises than successes (or even partial successes) in doing so.

Perhaps the most tragic recent example of this failure is the Rwandan genocide of 1994. In October 1993, the United Nations established a peacekeeping mission in the country to monitor the implementation of a peace accord between the Rwandan government and Tutsi rebels. But the unstable peace collapsed on April 7 of the following year after the death of the Rwandan president in a plane crash. Immediately, the military and Hutu militia began rounding up and murdering Tutsi and moderate Hutu civilians. Meanwhile, the peacekeepers attempted to coordinate peace talks but, by the terms of the U.N. mandate, could not engage the killers—even to defend unarmed civilians—except in self-defense. The killers were able to freely carry out their agenda. By the end of June, more than 800,000 people had been killed.[34]

Almost as appalling as the murders themselves was the world's response to them. After the outbreak of violence, Roméo Dallaire, commander of U.N. forces in Rwanda, pleaded with the United Nations for reinforcements and a revised mandate that would allow his troops to use force against the *genocidaires*. The Security Council refused his early requests, opting instead to withdraw most of the peacekeepers.[35] Finally, in mid-May, the Security Council approved the deployment of 5,500 troops, but reinforcements did not arrive until late June, by which time most of the fighting had already ended.[36] Furthermore, these reinforcements were supplied by France, which Samantha Power argued was "probably the least appropriate country to intervene because of its warm relationship with the genocidal Hutu regime."[37] Explaining how

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Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism, 2004 ARMY LAW. 36, 41 (citing the Stanleyville intervention, an operation conducted by the United States, Belgium and Great Britain to rescue civilians held hostage by Congolese rebels). *But see* GLENNON, LIMITS OF LAW, *supra* note 5, at 72-75 (pointing out possible alternate justifications for several examples of interventions often regarded as humanitarian).

34. *See generally* Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998), *aff'd* Kambanda v. Prosecutor, Case No. ICTR 97-23-A, Judgment (Oct. 19, 2000); ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2004); Jose E. Alvarez, *Crimes of States/ Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

35. *See generally* DALLAIRE, *supra* note 34, at 263-91. Dallaire believed that "[i]f we were given a new mandate and the necessary force, we might be able to get the two parties back to the negotiating table." *Id.* at 276. *But see* Alan J. Kuperman, *Rwanda in Retrospect*, 79 FOREIGN AFF. 94, 94 (2000) ("A close examination of what a realistic U.S. military intervention could have achieved . . . finds insupportable the oft-repeated claim that 5,000 troops deployed at the outset of the killing in April 1994 could have prevented the genocide.").

36. *See* S.C. Res. 918, ¶ 5, U.N. Doc. S/RES/918 (May 17, 1994); S.C. Res. 925, ¶ 2, U.N. Doc. S/RES/925 (June 8, 1994). *See generally* DALLAIRE, *supra* note 34, at 374-420; Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 100 (2002) ("[I]n Somalia in 1993, Rwanda in 1994, and Bosnia in 1995, the UN action taken (if taken at all) was widely perceived as too little too late, misconceived, poorly resourced, poorly executed, or all of the above.").

37. POWER, *supra* note 30, at 380.

and why the genocide was allowed to occur, Dallaire later wrote:

> The international community, of which the UN is only a symbol, failed to move beyond self-interest for the sake of Rwanda. While most nations agreed that something should be done, they all had an excuse why they should not be the ones to do it. As a result, the UN was denied the political will and material means to prevent the tragedy.[38]

C. The NATO Kosovo Campaign

In certain ways, NATO's campaign against Kosovo is the most complex of the three situations highlighted in this article. In March 1999, without explicit authorization from the Security Council, NATO began a military campaign against Serbian forces in Yugoslavia (now Serbia and Montenegro) aimed at protecting the Albanian population in Yugoslavia's southern province of Kosovo. Fighting between Kosovar rebels and the Serb-controlled government, which had broken out in large scale in 1998, resulted in hundreds of thousands of Kosovar Albanians fleeing their homes by the time NATO began its operations. Fearing a repeat of the mass murders that had taken place in Bosnia several years earlier, European and American leaders sought to intervene, but knew that Russia would veto a Security Council resolution authorizing force. Rather than taking the matter to the Security Council, they opted instead to use NATO.[39]

NATO's intervention in Kosovo was far from perfect. Immediately after the bombing campaign began, the fighting on the ground intensified significantly. On June 9, 1999, Yugoslav President Slobodan Milosevic agreed to withdraw Serb forces from Kosovo and to permit NATO peacekeepers to enter. By then, however, more than 1.3 million Kosovars had been driven from their homes.[40] Despite the deep flaws of the NATO campaign, the Independent International Commission on Kosovo (the "Kosovo Commission") found that "[a]lthough the intervention produced a temporary and severe worsening of the ordeal faced by the Kosovar Albanians, over time it averted their worst fears of ethnic cleansing, and had the emancipatory effect for them of dismantling the oppressive Serb police and paramilitary structure."[41]

Regardless of what some consider a noble purpose,[42] the NATO campaign

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38. DALLAIRE, *supra* note 34, at 516.

39. *See generally* INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 67-87 (2000) [hereinafter KOSOVO REPORT]; POWER, *supra* note 30, at 443-48; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 167-70 (1999).

40. *See* POWER, *supra* note 30, at 450.

41. KOSOVO REPORT, *supra* note 39, at 163.

42. *See* Tony Blair, *A Military Alliance, and More*, N.Y. TIMES, Apr. 24, 1999, at A19; Tony Blair, *A New Moral Crusade*, NEWSWEEK, June 14, 1999, at 35; William J. Clinton, *A Just and Necessary War*, N.Y. TIMES, May 23, 1999, at 17. *But see* Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, *in* LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN

is generally viewed as being in violation of the Charter.[43] Not only were the attacks not authorized by the Security Council, but NATO could not reasonably claim that the campaign was conducted in self-defense. Thus, as Michael Byers and Simon Chesterman recently wrote, "[u]nder traditional understandings of international law, the only way the Kosovo intervention could have been legal was if a right of unilateral humanitarian intervention had somehow achieved the status of *jus cogens* and thus overridden conflicting treaty obligations."[44] The question of the legality of the Kosovo intervention was complicated, however, by the fact that the Security Council established a U.N. peacekeeping mission in the region only a day after the NATO campaign concluded, thereby giving the intervention an air of legitimacy.[45] In addition, the Kosovo Commission later said "the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule."[46] As a result, there has been much debate over the legality of the Kosovo intervention, including analysis of the potential effects of this retroactive legitimization.[47] As Annan wrote shortly after Kosovo:

INTERVENTION (Aleksandar Jokic ed., 2003) (arguing that the campaign in Kosovo was driven by U.S. political and economic interests).

43. *See, e.g.*, KOSOVO REPORT, *supra* note 39, at 4; Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 25 (1999) ("[T]his moral action is *contrary to current international law.*") (emphasis in original); Yoo, *Using Force*, *supra* note 18. *But see* Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1751 (2000) ("[E]xisting law offers ample support for assessing the legality of the NATO intervention in Serbia proper and Kosovo.").

44. Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, *in* HUMANITARIAN INTERVENTION, *supra* note 26, at 177, 181. *See also* Richard Falk, *Humanitarian Intervention after Kosovo*, *in* LESSONS OF KOSOVO, *supra* note 42, at 31, 40 ("In essence, the textual level of analysis, upon which legalists rely, cannot give a satisfactory basis for the NATO intervention, nor can it provide a suitable rationale for rejecting the humanitarian imperative to rescue the potential victims of genocidal policies in Kosovo.").

45. S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999).

46. KOSOVO REPORT, *supra* note 39, at 4. Addressing a possible counter-argument, the Commission wrote: "It is, however, possible to argue that, running parallel to the Charter's limitations on the use of force, is Charter support for the international promotion and protection of human rights . . . . The main difficulty with such a line of argument is that Charter restrictions on the use of force represented a core commitment when the United Nations was established in 1945—a commitment which has reshaped general international law. In contrast, the Charter provisions relating to human rights were left deliberately vague, and were clearly not intended when written to provide a legal rationale for any kind of enforcement, much less a free-standing mandate for military intervention without UNSC approval." *Id.* at 167-68 (citation omitted).

47. *See, e.g.*, Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION, *supra* note 26, at 232, 232 ("[T]he legal basis for NATO's intervention in Kosovo remains contested."); Richard B. Bilder, *Kosovo and 'The New Interventionism': Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153 (1999); Thomas M. Franck, *Break It, Don't Fake It*, 78 FOREIGN AFF. 116 (1999); Michael Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2 (1999); Yoo, *Using Force*, *supra* note 18.

> The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority .... On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?[48]

These questions of permissibility and legitimacy, while legally significant and complex, are not, however, the only issues involved. Like the Second Gulf War, Kosovo happened—legal or not—and the Security Council could do nothing to stop it. In addition, if it was illegal, those who executed it are hardly the worse for that illegality. As a result, like Iraq, Kosovo reinforced notions of Security Council weakness and—more importantly—the weakness of the Charter rules.[49]

Read together, the crises in Iraq, Rwanda and Kosovo point to two critical and recurring flaws in the Charter system. First, as they did regularly during the Cold War, states continue to use force in violation of the Charter, offering dubious claims as to their actions' legality. Second, when humanitarian crises arise, the Security Council is often unable to form the consensus, and the will, necessary to prevent or end them. As John Yoo wrote, "[w]e appear to be returning to an era of Security Council paralysis, as demonstrated by the threatened vetoes of authorizations for the Kosovo intervention by Russia and the Iraq war by France and Russia."[50] Some argue well beyond this conclusion, stating that the pervasive nature of the recent Charter violations indicates that the general prohibition on the use of force in Article 2(4) is no longer a rule at all. Anthony Arend, for example, has argued that through their consistent disregard of Article 2(4), "states have effectively withdrawn their consent from this provision."[51] In broader terms, Glennon has written that "[t]he scholastic international law rules purporting to govern intervention neither describe accurately what nations do, nor predict reliably what they will do, nor prescribe what they will do, nor prescribe intelligently what they should do."[52] Even

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48. Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49.

49. *See, e.g.*, Richard Perle, *Thank God for the Death of the UN*, GUARDIAN (U.K.), Mar. 21, 2003, *available at* http://www.guardian.co.uk/Iraq/Story/0,2763,918812,00.html (arguing that the U.N. system has resulted in "anarchy" and "abject failure").

50. Yoo, *Using Force*, *supra* note 18, at 742.

51. ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 75 (1999). Arend goes on to write that "[i]f there are frequent and widespread violations of a particular 'rule,' it is very difficult to conclude that the rule is truly controlling of state behavior." *Id.* at 94.

52. GLENNON, *supra* note 5, at 204. Glennon also noted: "What lesson is to be drawn from this sorry record? It is impossible to avoid the conclusion that use of force among states simply is no longer subject—if it ever was subject—to the rule of law. The rules of the Charter do not today constitute binding restraints on intervention by states. Their words cannot realistically be given effect in the face of widespread and numerous contrary deeds." *Id.* at 84. *See also* Michael Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16, 16 (2003) ("By 2003, the main question facing countries considering whether to use force was not whether it was lawful. Instead, as in the nineteenth century, they simply questioned whether it was wise.").

Louis Henkin, a long-time supporter of the Charter system, has acknowledged that "[t]here is doubt if not cynicism as to the efficacy of law in deterring, preventing, or terminating the use of force, as to whether its prescriptions are relevant and material to the policies of nations."[53]

III.
A FRAMEWORK FOR EVALUATING THE USE OF FORCE

As the discussion in Part II demonstrates, the problems facing the U.N. system are grave and, some have argued, threaten the continued viability and relevance of the body. It should be no surprise, then, that proposals for dealing with these problems are far-ranging. Some advocate a bottom-up reconsideration of the Charter rules; others favor tweaks, either by revising or re-interpreting the rules. Still others assert that the rules should remain as written. Yet what methodology can be used to assess whether and how the system should be reformed? This Part addresses this question by providing an analytical framework that examines the ways in which legal rules interact with political realities in generating certain uses of force while preventing others.

Quite often, the analysis regarding a particular use of force focuses largely on the question of whether the action was legal.[54] Such an analysis is vital, but, as suggested in Part II, it does not tell the whole story. To assess reform, a taxonomy different from legal/illegal is more instructive. An analysis could begin instead by forming a category consisting simply of all the interstate uses of armed force that have taken place. This category of "Actual" uses of force includes those that have been conducted both in accordance with and in violation of international law. Second, we may form a category of the "Legal" uses of force; that is, those in compliance with international law.

This taxonomy of "Legal" and "Actual" is not alone sufficient to provide a complete analysis of the ways in which states use force against each other. Let us assume for the sake of argument that the majority view is correct and that both the Second Gulf War and the Kosovo campaign were illegal. Under our taxonomy, this would put both interventions into the "Actual" category but not the "Legal." But can they accurately be categorized in the same way? Kosovo, most believe, was to some extent motivated by humanitarian concerns. By contrast, the United States largely justified its invasion of Iraq on other grounds.[55] In addition, how do the categories already described account for

53. Henkin, *Use of Force*, *supra* note 32, at 37. *But see* Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33 ("What is most important here is that the contending sides continue to regard United Nations approval as a necessary component of the use of force.").

54. *See, e.g.*, Murphy, *supra* note 20.

55. Although Saddam Hussein had committed human rights violations in the past, because

Rwanda? An individual state or group of states could have intervened early in the crisis; in other words, a non-use of force allowed a humanitarian disaster to continue. This non-use of force plainly does not fall into the "Actual" category. Also, a unilateral intervention in this situation could not have been characterized as "Legal" under most readings of international law because the Security Council did not authorize it.

To address these issues, it is helpful to consider a third category of uses and non-uses of force that includes only those which, objectively speaking, are "Ideal." That is, this category consists only of situations that, on balance, foster international stability, promote long-term peaceful coexistence between states, and protect human rights. Needless to say, the "Ideal" category is highly theoretical. It is virtually impossible to agree to place a particular situation in this category, be it an historical event or a contemplated future action. Nonetheless, this category is a useful analytical tool because, regardless of how one conceives of the "Ideal," it is, by definition, a category toward which the international system should strive.

We can think of the three categories as concentric circles, each partially overlapping the other two, as Figure A illustrates. This conclusion is based on three observations regarding the interaction between these categories. First, not all "Ideal" uses of force are "Legal"—and vice versa.[56] An example of such a situation might be the Kosovo campaign, if we take the view that it was both successful and illegal. Second, some "Actual" uses of force are not "Legal"—and vice versa.[57] An example would be the 2003 invasion of Iraq, if we take the majority view. Third, not all "Ideal" uses of force are "Actual"—and vice versa. For example, if a state had taken unilateral action to intervene in Rwanda in the early days of the genocide and had succeeded in saving hundreds of thousands of lives, such a use of force would probably have been "Ideal."[58]

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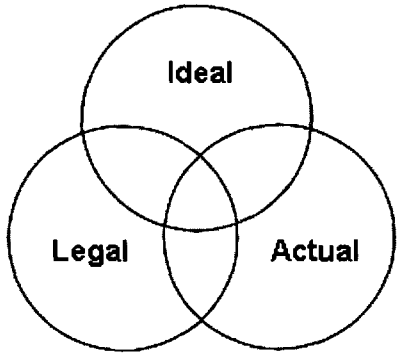
the invasion was not justified on the basis of preventing or ending human rights violations, it does not qualify as a humanitarian intervention under the definition adopted in this article. *See* Part II.B, *supra*.

56. A minority of commentators, however, have argued that an illegal act cannot be moral. *See, e.g.*, J.S. Watson, *A Realistic Jurisprudence of International Law*, 34 Y.B. WORLD AFF. 265 (1980); ALFRED RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 70-206 (1997).

57. That is, there have been occasions when a state would have been legally justified in taking military action against one of its neighbors but refrained from doing so. A recent example of such a non-use of force is Israel's decision during the First Gulf War not to retaliate against Iraq for attacking it with SCUD missiles, an action that, under Article 51, could have been taken in self-defense following an armed attack.

58. As Richard Haass recently noted, "[i]f there had been an outside intervention to prevent the genocide, hundreds of thousands of innocent lives would have been spared. It would have been the right thing to do. It would have been legitimate because of what it was, not because it was approved by the UN." HAASS, *supra* note 11, at 176.

Figure A



Viewing the use of force under this framework allows us to detect the ways in which the international system—and, by correlation, the U.N. Charter system—has ineffectively governed the use of force. Criticism often focuses exclusively on the problem of the frequent and illegal use of force by states. [59] Such an analysis is, of course, necessary and beneficial, particularly if it aids in identifying potential legal flaws. But to examine whether the Charter system has been ineffective based on how often it has been violated only looks at half of the picture. Indeed, such an analysis may lose sight of the fundamental goal of the system.[60] Would the system have been successful if states only used force in accordance with the law? This article argues that, as the world's failures to intervene in humanitarian crises such as Rwanda demonstrate, we must answer this question in the negative. The assumption that the goal of the system is to ensure compliance with the rules is not entirely accurate. One must look not only at the occasions where force was used when it should not have been, but also at the occasions where force was *not* used when it *should* have been. Put another way, the system works when it not only prevents uses of force that are

59. Jack Goldsmith and Eric Posner have recently argued a similar point: "International law scholars spend too much time proclaiming the value of international law and bemoaning its many 'violations,' and too little time understanding how international law actually works. In our view the latter inquiry is more fruitful, and international law scholarship would do well to follow the example of international relations theory in political science and focus on positive rather than normative inquiries." Jack Goldsmith & Eric Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 663 (2000).

60. As Professor Posner has written, "[i]nternational law scholars confuse two separate ideas: (1) a moral obligation on the part of states to promote the good of all individuals in the world, regardless of their citizenship; and (2) a moral obligation to comply with international law. The two are not the same; indeed, they are in tension as long as governments focus their efforts on helping their own citizens (or their own supporters or officers)." Eric Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1914-15 (2003).

undesirable, but when it also fosters the uses of force that are desirable, i.e., when the "Actual" and "Ideal" uses of force are aligned. We can think of the misalignment between the "Actual" and "Ideal" uses of force as the "Behavioral Gap."

To fully understand the weaknesses of the Charter system, it is instructive to consider the causes of this Behavioral Gap. That is, why do states use (or not use) force in ways that are harmful to the international system? As a fundamental tenet of international relations theory holds, such behavior results when a state perceives such actions (or inactions) to be in its national interest.[61] Simply put, the interests of a particular state (or group of states) often do not align with the interests of the world as a whole, causing that state to behave in ways that are not "Ideal."[62] As Stephen Krasner recently argued, "[o]utcomes in the international system are determined by rulers whose violation of, or adherence to, international principles or rules is based on calculations of material and ideational interests, not taken-for-granted practices derived from some overarching institutional structures or deeply embedded generative grammars."[63] In terms of the framework provided in this article, we can think of national interests as being a force that pulls apart the "Ideal" and "Actual" categories, as Figure B illustrates below. While the observation that state interests drive state behavior in ways that may not be in the world's best interest may seem elementary, it will be a useful consideration when we assess potential reform of the U.N. Charter. Indeed, as will be discussed in greater detail below, the problems identified in Part II—the use of force in violation of the Charter and the failure to intervene—are closely related to this observation.

IV.
POTENTIAL REFORMS TO THE CHARTER SYSTEM

Many have suggested that the problems identified in Part II can be mitigated by reforming the Charter rules themselves. Part IV briefly discusses the most prevalent of these proposals and, using the framework provided above as an analytical tool, identifies the extent to which these proposals are likely to be effective. In other words, this Part asks whether these potential reforms are likely to reduce (or eliminate) the Behavioral Gap.

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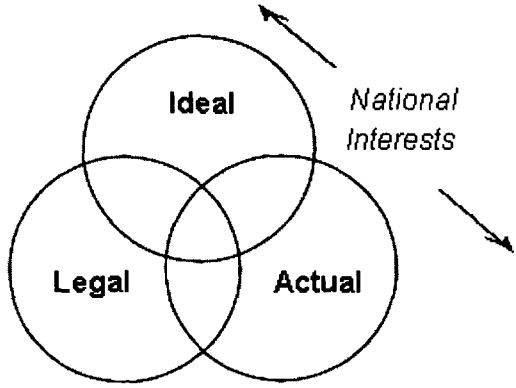
61. *See, e.g.*, HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (5th ed. 1973); HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (2d ed. 1995). The term "national interest" has many possible interpretations, and Professors Goldsmith and Posner have recently provided a useful definition: "The concept of a national interest refers to the sum of the interests of domestic individuals and institutions." Goldsmith & Posner, *supra* note 59, at 654.

62. As Niebuhr put it, "[p]erhaps the most significant moral characteristic of a nation is its hypocrisy." NIEBUHR, *supra* note 13, at 95.

63. STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9 (1999).

Figure B



A. A Broader Meaning of Self-Defense

As Christine Gray has argued, Article 51 of the U.N. Charter "is an exception to the prohibition of the use of force in Article 2(4) and therefore should be narrowly construed."[64] Indeed, the definitive ruling interpreting Article 51 provided by the International Court of Justice in *Nicaragua v. United States* did narrowly construe the provision, requiring that self-defense be used only in response to an armed attack.[65] Whereas some have argued that Article 51 therefore requires a state to wait until it is attacked before it resorts to force, many have countered that it would be irrational for a state to do so.[66] Following the September 11, 2001 attacks, the Bush administration adopted the position that, in an age where rogue states and international organizations could potentially use weapons of mass destruction, the United States should use force preemptively against imminent threats.[67] Crucial to the administration's

64. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 86-87 (2000).

65. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 51, 176 (June 27). For a critique of the Nicaragua case, see Robert Bork, *The Limits of 'International Law'*, 18 NAT'L INT. 3 (Winter 1989-1990).

66. *See generally* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 97-108 (2002); GRAY, *supra* note 64, at 111-15.

67. *See* THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf ("The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's

position was the contention that the use of preemptive force was valid under customary international law. Indeed, customary international law has long recognized a right to anticipatory self-defense, famously articulated in the *Caroline* affair of 1837-1842.[68] The *Caroline* test has been generally interpreted as requiring that an armed attack be "imminent" in order for a state to use force legally in anticipatory self-defense.[69] The Bush administration argued that this test should be read as superseding the Charter rules.[70] Others have echoed the Bush administration's position, calling for reform, either by means of a reinterpretation of the law or a formal codification of new rules. For example, John Yoo wrote that "a more flexible standard should govern the use of force in self-defense, one that focuses less on temporal imminence and more on the magnitude of the potential harm and the probability of an attack."[71]

As mentioned in the introduction to this article, the United Nations has endorsed neither a re-interpretation nor a revision of Article 51. The High-Level Panel recognized both the *Caroline* test and the basis for the U.S. argument for a broad interpretation of it: "The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability."[72] But it concluded that addressing these concerns does not require a change in the rules. "[I]f there are good arguments for preventive military action," it wrote, "with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."[73] Therefore, the High-Level Panel concluded,

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attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."). *See also* Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, on Old Rules, New Threats to Members of the Am. Soc'y of Int'l Law-Council on Foreign Relations Roundtable (Nov. 18, 2002), *available at* http://www.cfr.org/publication.php?id=5250 ("[I]n the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm."). For a general assessment of the Bush administration's arguments, see the essays collected in *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003) and *Agora (Continued): Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 803 (2003).

68. *See* Letter from Daniel Webster, U.S. Sec'y of State, to Henry Fox, British Minister in Washington (Apr. 28, 1841), *reprinted in* 29 BRITISH AND FOREIGN STATE PAPERS 1840-1841, at 1138 (1937) (discussing the circumstances of the *Caroline* affair and rejecting the British government's claims that the act of destroying the *Caroline* was one of self-defense). A summary of the *Caroline* affair is provided in Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 214-20 (2003).

69. *See, e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 212 (3d ed. 2001).

70. For an assessment of the Bush administration's argument on this point, see Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89 (2003).

71. Yoo, *Using Force*, *supra* note 18, at 730. Richard Gardner, however, advocates less drastic reform, consisting of a re-interpretation of the Charter that extends self-defense only "to permit a state to rescue its citizens (and others) faced with a clear and present threat to their security." Richard N. Gardner, *Neither Bush Nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585, 590 (2003).

72. PANEL REPORT, *supra* note 6, at 63.

73. *Id.*

"Article 51 needs neither extension nor restriction."[74] The Secretary-General has since adopted the High-Level Panel's position: "Most lawyers recognize that the provision [Article 51] includes the right to take pre-emptive action against an imminent threat; it needs no reinterpretation or rewriting. Yet today we also face dangers that are not imminent but that could materialize with little or no warning and might culminate in nightmare scenarios if left unaddressed. The Security Council is fully empowered by the UN Charter to deal with such threats, and it must be ready to do so."[75]

Regardless of whether reform should, as a matter of policy, be implemented, it is not likely to solve the underlying problem. In terms of the framework provided in this article, rather than focusing on the Behavioral Gap, proposals to revise or reinterpret the rules on self-defense are aimed at aligning the "Legal" and "Ideal" categories, the misalignment of which might be called the "Legal Gap." The underlying logic of revising Article 51 to allow the preemptive use of force in self-defense explicitly is that, if it is desirable for states to use force in such a way, then it should be legal for them to do so. What is missing from this analysis, however, is a consideration of state practice (i.e., the "Actual" category). Clearly, the fact that (by most interpretations) the invasion of Iraq was illegal did not prevent the United States from conducting it. The reason for this situation is that, legal or not, the Bush administration perceived the invasion as being in the best interests of the United States. The same logic can be applied to the various "abuses" of the law of self-defense that have occurred since 1945; in all such cases, the illegality of the offending state's behavior was outweighed by political or economic concerns. As Jack Goldsmith and Eric Posner recently wrote, "[e]fforts to improve international cooperation must bow to the logic of state self-interest and state power."[76]

This conclusion is not to be interpreted as saying the law is meaningless. As many have suggested, international law may have a certain "normative pull" or "compliance pull"; in a sense, the very existence of the law makes states more

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74. *Id.* at 61. Instead of formal reform, the High-Level Panel suggested that, when the Security Council considers authorizing a use of force, it keep the following factors in mind: (1) the seriousness of the threat; (2) whether the use of force has a proper purpose; (3) whether force is used as a last resort (i.e., all diplomatic options have been exhausted); (4) whether the force would be used in proportional means to the threat; and (5) whether the balance of consequences justifies the use of force. *Id.* at 67. Interestingly, these criteria are hardly original but rather, as Professor Glennon has suggested, a "resurrection of the medieval just war doctrine." Glennon, *supra* note 12, at 14. *See also* David J. Scheffer, *Use of Force after the Cold War: Panama, Iraq, and the New World Order*, *in* RIGHT V. MIGHT, *supra* note 32, at 109, 137-39 (noting that the following factors have often been thought to constitute a "just war": (1) just cause; (2) a lawful authority must decide to resort to force; (3) the intention must be right; (4) force is used as last resort; (5) the cost-benefit ratio must be convincing; (6) a reasonable expectation of victory for just aims; and (7) legitimate and proportionate methods).

75. Annan, *In Larger Freedom*, *supra* note 1, at 69.

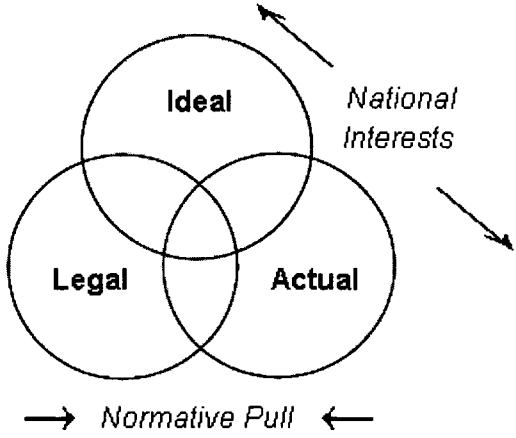
76. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 203 (2005).

likely to comply with it.[77] The normative pull can be thought of as pulling the "Actual" uses of force toward the "Legal," as illustrated in Figure C. Nonetheless, it is implausible to suggest that the problem of states using force in violation of international law and in a manner that goes against the best interests of the world as a whole can be solved by simply 'fixing' the law. Closing the Legal Gap would not eliminate the Behavioral Gap because state interests would continue to pull state actions away from the "Ideal" use of force. As Richard Falk has written, "[i]nternational law in the area of the use of force cannot by itself induce consistent compliance because of sovereignty-oriented political attitudes."[78] Similarly, Professor Yoo has noted that "[b]ecause of the lack of any enforcement mechanism, international law can place no restraint on the United States or other countries that make decisions concerning the use of force. Constraints, if any, come only from the costs of undertaking military action and the countervailing power of other nations."[79]

77. *See, e.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990) (noting that four factors determine the extent to which a particular law affects behavior: (1) "determinacy," or the clarity of the rule's message; (2) "symbolic validation," or the extent to which historical rules have influenced the rule-making process; (3) "coherence," or the connection between the rule and rational principles; and (4) "adherence," or the breadth and depth of the system created to interpret the rule. *See also* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 44 (2d ed. 1979) ("The ways in which international norms affect governmental behavior are also less than simple. International law obviously influences behavior when it helps to deter violations. It may keep nations from doing what they may otherwise deem to be in their interests, say, from overflying foreign territory in search of intelligence or seizing valuable foreign property. Or obligations may impel nations to do what they might otherwise not do—say, come to assistance of an ally or adopt sanctions at the behest of an international organization."). *See generally* GOLDSMITH & POSNER, *supra* note 76, at 134-35. For a critique of Professor Franck's thesis, see Anne L. Herbert, *Cooperation in International Relations: A Comparison of Keohane, Haas and Franck*, 14 BERKELEY J. INT'L L. 222, 233-36 (1996).

78. Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 594 (2003). *See also* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1622 (1984) ("In sum, the UN political organs provide an institutional mechanism for authoritative judgments on the use of force, but only under some circumstances can they obtain the requisite authority and consequential behavior to endow their decisions with effective

Figure C



B. An Exception for Humanitarian Intervention

Many accurately view the Security Council's failure to reach consensus as contributing to the international community's failures to intervene during humanitarian crises. To address this problem, some commentators have called for a reform of the Charter—and/or international law more broadly—to allow an individual state or coalition to conduct such an intervention. J. L. Holzgrefe, for example, has pointed out three possible arguments for reconciling a right to humanitarian intervention with the Charter as written. First, a true humanitarian intervention does not result in territorial conquest. Second, a powerful argument can be made that such interventions are consistent with the purposes of the United Nations.[80] Both arguments attempt to place such actions outside the scope of the Article 2(4) prohibition on the use of armed force. Similarly, James Terry has argued that "[w]hen a force carefully defines the parameters of their intervention—as in Kosovo—and the force limits its intervention to redressing widespread human rights abuses, the intervention supports the principles of the

power.").

79. Yoo, *Using Force*, *supra* note 18, at 795.

80. Holzgrefe, *supra* note 26, at 37-40.

U.N. Charter addressing human dignity."[81] Finally, Holzgrefe points out that a broad interpretation of Article 39, which permits the Security Council to authorize the use of force in response to "any threat to the peace, breach of the peace or act of aggression," may be read to permit interventions aimed at ending humanitarian crises. [82]

Others believe a right to humanitarian intervention does not exist under current law, but that the law should be reformed to allow it.[83] Allan Buchanan suggests three ways to create a legal rule allowing humanitarian intervention without Security Council authorization. First, a new exception to Article 2(4)—similar to the Article 51 exception for self-defense—could be created.[84] Second, states could agree to a stand-alone treaty that would bypass the U.N. system altogether. [85] Finally, Buchanan suggests that a "gradualist, case-by-case process" could eventually result in a new rule of customary international law that will not require Security Council authorization in all cases. [86]

Yet, under either of these approaches, how should we determine if the newly created norm applies to a particular situation? To guide such a discussion, several sets of criteria or principles have been suggested. The Kosovo Commission suggested the following: (1) "the suffering of civilians owing to severe patterns of human rights violations or the breakdown of government;" (2) "the overriding commitment to the direct protection of the civilian population;" and (3) "the calculation that the intervention has a reasonable chance of ending the humanitarian catastrophe."[87] Richard Lillich wrote that we must consider: (1) the immediacy of the violation of human rights; (2) the extent of the violation of human rights; (3) the existence of an invitation by appropriate authority; (4) the degree of coercive measures employed; and (5) the relative disinterestedness of the state or states invoking the coercive measures.[88] Finally, Ved Nanda advocated a slightly revised set of factors: (1) the purpose of the intervention must be limited; (2) the intervention must be conducted by the recognized government of the intervening state; (3) the duration of the intervention must be limited; (4) the intervention must involve a limited use of coercive measures; and (5) there must be a lack of any other recourse.[89]

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81. Terry, *supra* note 33, at 36.
82. Holzgrefe, *supra* note 26, at 40-43.
83. *See, e.g.*, KOSOVO REPORT, *supra* note 39, at 10-12; Gardner, *supra* note 71, at 590.
84. Buchanan, *supra* note 33, at 138-40.
85. *Id.*
86. *Id.*
87. KOSOVO REPORT, *supra* note 39, at 10.
88. Richard Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plan for Constructive Alternatives, in* LAW AND CIVIL WAR IN THE MODERN WORLD, 229 (John N. Moore ed., 1974), *reprinted in* NATIONAL SECURITY LAW 152-53 (John N. Moore et al. eds., 1990).
89. Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti: Revisiting the Validity of Humanitarian Intervention under International Law, Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 311 (1992).

Each set of criteria seems reasonable and appropriate, and it is beyond the scope of this article to determine which factors should or should not be considered. The key to observe, however, is that under any set of factors (and either of the approaches suggested by Buchanan) a certain degree of consensus would be necessary regarding when an intervention truly qualifies as humanitarian. Yet the decision is likely to be fraught with difficulties and political wrangling, as both the Rwanda and Kosovo situations demonstrate.[90] Thus, as Holzgrefe wrote, "much theorizing about the justice of humanitarian intervention takes place in a state of vincible ignorance . . . . To be sure, the task of testing a claim that this or that humanitarian intervention will (or would) affect human well-being in this or that way is fraught with methodological and practical difficulties."[91]

Based to some extent on these challenges, there is a vocal opposition to codifying a rule allowing humanitarian intervention. Many fear that such a rule, particularly because it would be relatively vague by necessity, would be abused for political aims and might undermine a state system based on national sovereignty and territorial integrity.[92] One of the most notable opponents of such reform, Louis Henkin, has argued:

> If 'humanitarian intervention' is to be permissible it should be sharply limited to actions the purpose of which is unambiguous and limited, for example, to release hostages or execute other emergency evacuations. Even those might better be left to collective (not unilateral) action, for example by special U.N. 'humanitarian evacuation forces' (akin to the various U.N. peace-keeping forces), created in advance for that purpose and immunized so far as possible from larger international political tensions.[93]

While there are convincing arguments regarding the risk and benefits of a rule allowing humanitarian intervention, a complete analysis of whether and how the law should be reformed does not end there. As an initial step,

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90. As Professor Glennon has written, "[d]efining *which* criteria count is of course the problem. The history of Western philosophy has in large part been an effort to get away from the subjectivity of that definitional process and to identify objective means for assessing what is just. Alas, a cursory glimpse at that history discloses that the Holy Grail of objectivity has never been found; justice continues to mean different things to different people." GLENNON, *supra* note 5, at 169.

91. Holzgrefe, *supra* note 26, at 50.

92. *See, e.g.*, IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 301 (1963); Schachter, *supra* note 78, at 1628-33. *But see* Tesón, *supra* note 26, at 113 ("[T]he empirical claim that a rule allowing humanitarian intervention will trigger unjustified interventions and will thus threaten world order is implausible. The claim can now be tested, because there have been a number of humanitarian interventions since 1990 or so.").

93. HENKIN, *supra* note 77, at 145. Following the Kosovo campaign, Henkin maintained this position: "[U]nilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful. But the principles of law, and the interpretations of the Charter, that prohibit humanitarian intervention do not reflect a conclusion that the 'sovereignty' of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity." Henkin, *NATO's Kosovo Intervention*, *supra* note 27, at 824-25.

Holzgrefe has written, we must consider questions such as, "[d]oes the international community have a moral duty to intervene to end massive human rights violations like the Rwandan genocide?"[94] Indeed, before any legal reform can be agreed to, a certain degree of consensus is required regarding such philosophical issues. Yet, while his question is no doubt imperative, if we answer it in the positive, we must also consider the more difficult question of how to turn moral duty into action. That is, a complete analysis must look not only at whether a particular reform would create sound law, but also at whether such a rule would influence state practice in a desirable way. In terms of the framework presented in this article, would such a rule reduce or eliminate the Behavioral Gap?

Like the potential reforms discussed in Part IV.B., the proposals to create a new rule allowing humanitarian intervention focus primarily on the Legal Gap rather than the Behavioral Gap. Such a rule, regardless of the manner in which it is implemented, would, by itself, be unlikely to cause states to undertake humanitarian interventions that they would not otherwise have undertaken. To analyze the potential effects of a rule allowing humanitarian intervention, we must first look at the underlying problem. Why do states fail to intervene during humanitarian crises? The answer lies primarily in political, social, and economic concerns, not legal ones. As discussed above, if a state perceives that, on balance, it can gain from an armed attack against a neighbor, then that state is prone to ignore the illegality of such an attack; likewise, if a state does not perceive that, on balance, it will gain from responding to a humanitarian crisis abroad, then it is not likely to do so, even if such response is legally justifiable and morally imperative. As Walzer wrote, "[s]tates don't send their soldiers into other states, it seems, only in order to save lives."[95] Humanitarian interventions, even when well-intentioned, can be expensive, complex, and controversial—as Kosovo demonstrated. Indeed, what is lacking is not a legal right to conduct such operations but the political will to do so. Thus, as Professor Yoo wrote, "few if any nations will fully internalize the costs and benefits of using force in situations that go beyond self-defense. Nations have shown great reluctance to use force to stop purely humanitarian disasters, as occurred with the hundreds of thousands killed in Rwanda, even when the commitment of troops required is relatively low."[96] In Rwanda, the likelihood

94. Holzgrefe, *supra* note 26, at 18.

95. WALZER, *supra* note 31, at 101. *See also* Glennon, *supra* note 12, at 11 ("The reason that Rwanda, Darfur, Kosovo and other human tragedies generate mainly yawns within the United Nations is not that states fail to respond to genuine threats to their own security. The reason that states often do not respond to such humanitarian catastrophes is that they do not believe that such events really *are* threats to their own security.") (emphasis in original); Yoo, *Using Force*, *supra* note 18, at 793 ("Somalia and Rwanda demonstrated that the great powers were willing to risk little, if anything, to stop humanitarian abuses when doing so would not benefit international stability and other strategic goals.").

96. Yoo, *Using Force*, *supra* note 18, at 792. Ironically, Joseph Nye wrote, "Americans are

that intervention was illegal was not the reason why the U.S. and others stood by. As Samantha Power wrote:

> The real reason the United States did not do what it could and should have done to stop genocide was not a lack of knowledge or influence but a lack of will. Simply put, American leaders did not act because they did not want to. They believed that genocide was wrong, but they were not prepared to invest the military, financial, diplomatic or domestic political capital needed to stop it.[97]

V.
CONCLUSION

This article has thus far offered a bleak assessment of the potential efficacy of U.N. Charter reform. Yet this is not to suggest that the problems in the international system cannot be alleviated nor that the Charter should not be reformed. Rather, this article suggests that the Charter system should be viewed as a tool for promoting desired behavior instead of an end within itself. It would be well and good to revise the Charter so that it perfectly reflects the ways in which states should behave, but such reform would be hollow if not accompanied by an analysis regarding how to effectuate such behavior. Indeed, what is needed is a foundational re-thinking of the United Nations's role in promoting the proper use of armed force by member-states.

In terms of preventing uses of force by powerful states without Security Council approval, there is probably little that can be done to improve the role of the United Nations. When a state such as the United States deems it to be in its national interest to use force without the consent of the Security Council, then, as the Second Gulf War demonstrates, U.N. opposition will not deter such action. Short of the wholly unrealistic recourse of providing the Security Council with a powerful means of enforcing its decisions, deterrence for such violations of the Charter will continue to be found in the geopolitical, economic, and social costs of waging war. It may even be constructive for the Security Council to reduce its involvement in such situations. As evidenced by the aftermath of the Second Gulf War, the Secretary General's inability to prevent powerful states from using force without its approval causes the United Nations to appear weak and ineffectual, eroding international confidence in the system as a whole.

The United Nations and its members should instead seek ways to use its political capital, efforts, and resources on preventing situations such as Rwanda

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reluctant to accept casualties only in cases where their *only* foreign policy goals are unreciprocated humanitarian interests." Joseph S. Nye, *Redefining the National Interest*, 78 FOREIGN AFF. 22, 32 (1999) (emphasis in original).

97. POWER, *supra* note 30, at 508. *See also* Phillips, *supra* note 28, at 86 ("The problem is political will, which especially concerns the United States."); Gourevitch, *supra* note 2, at 35 ("[T]he U.N.'s withdrawal from Rwanda during the slaughter was due not to insufficient laws but to a complete lack of will among the member states to deal with it. No law can change that.").

from recurring. This would involve focusing not just on the moral grounds for conducting humanitarian interventions, but appealing directly to the interests that often dissuade member states from participating in such operations. Often, while states consider human rights to be secondary (at best) to their economic and political security, this perception is uninformed. A potential direction of U.N. activities could be a greater focus on educational activities aimed at exposing to member states and their citizens that the protection of human rights is not as remote an interest as it might appear. Thus, as Professor Yoo has argued:

> Whether the international legal system ultimately will accept humanitarian intervention . . . will depend on several factors. One is whether gross human rights violations create a negative externality that itself imposes harms on others. A second factor is whether intervention to stop human rights abuses, if widely used, would prove destabilizing to the international system because of the fears of nation-states that they would no longer control their internal affairs. A third consideration would be the additional systemic benefits of ending regimes that oppress their citizens.[98]

Such efforts could involve attempts to exert influence on the private and personal interests that can generate domestic support for humanitarian operations in powerful states, a factor that is particularly important in democratic countries.[99] Gareth Evans and Mohamed Sahnoun have written that "[t]oo often more time is spent lamenting the absence of political will than on analyzing its ingredients and how to mobilize them. The key to mobilizing international support for intervention is to mobilize domestic support, or at least to neutralize domestic opposition."[100] Evans and Sahnoun have suggested that generating such support should involve the following activities: (1) moral appeals; (2) financial arguments, such as that preventing disasters is cheaper than recovering from them; (3) security-based arguments, focusing on the international destabilizing effects of human rights crises; and (4) the generally accepted notion that peace is better for business.[101] Professor Goldsmith has also suggested several factors that, if emphasized, could nurture a "more realistic cosmopolitanism": (1) the inherent limitations of governmental

98. Yoo, *Using Force*, *supra* note 18, at 793-94. *See also* Nye, *supra* note 96, at 27-28 ("[T]he United States has to recognize a basic proposition of public-goods theory: if the largest beneficiary of a public good (such as international order) does not provide disproportionate resources toward its maintenance, the smaller beneficiaries are unlikely to do so.").

99. *See* David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS 85, 86 (Pablo De Greiff & Ciaran Cronin eds., 2002) ("In a democracy, the political support of citizens is a morally necessary condition for humanitarian intervention, not just a regrettable fact of life. If the folks back home reject the idea of altruistic wars, and think that wars should be fought only to promote a nation's own self-interest, rather narrowly conceived, then an otherwise-moral intervention may be politically illegitimate. If the folks back home will not tolerate even a single casualty in an altruistic war, then avoiding all casualties becomes a moral necessity.").

100. Evans & Sahnoun, *supra* note 36, at 109.

101. *Id.*

institutions; (2) rigorous cost-benefit analysis; (3) the potential role of non-governmental associations and networks; and (4) national strategic and security interests.[102]

For the United Nations to incorporate such suggestions into its endeavors would be anything but simple; it would require a fundamental reconsideration of the body's role in the world. There would surely be controversy regarding which methods, tools, and finances should be used to better impact state action. Yet, as recent history demonstrates, the recognition that the system's underlying flaws are primarily political, not legal, is vital if the United Nations is to play a consequential role in international collective security and live up to its founding mission.

102. Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1693-94 (2003). Even so, Goldsmith continues, "[t]he best we can hope for is uneven humanitarian intervention that comports with the strategic and security interests that would be furthered by the potentially intervening nations." *Id.* at 1694.

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A New Geography of Abuse - The Contested Scope of U.S. Cruel, Inhuman, and Degrading Treatment Obligations

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A New Geography of Abuse? The Contested Scope of U.S. Cruel, Inhuman, and Degrading Treatment Obligations

By
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I. INTRODUCTION

On January 6, 2005, the current Attorney General of the United States, Alberto Gonzales, was asked by Senators during his confirmation hearing whether "it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture."[1] The question was directed specifically to U.S. obligations under Article 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").[2] Article 16 supplements the treaty's bar on torture by calling on states to curb cruel, inhuman, or degrading treatment and punishment ("CID treatment").[3]

In response, Gonzales noted the reservation entered by the United States upon its ratification of the treaty in 1994: "the United States considers itself

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1. *Confirmation Hearing on the Nomination of Alberto R. Gonzales To Be Attorney General of the United States: Hearings Before the S. Judiciary Comm.*, 109th Cong. 121 (2005) [hereinafter *Nomination Hearing*].

2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988) (entered into force on June 26, 1987, ratified on Oct. 21, 1994) [hereinafter Torture Convention], *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

3. *Id.*

bound by the obligation under article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the [U.S. Constitution's] Fifth, Eighth, and/or Fourteenth Amendments."[4] Aliens "interrogated by the U.S. *outside the United States*," he observed "enjoy no substantive rights under the Fifth, Eighth and 14th Amendment."[5] The U.S. reservation to the Torture Convention, therefore, had the effect of incorporating these U.S. constitutional geographic limiters into U.S. obligations under the treaty. In a follow-up letter to U.S. Senator Feinstein, Gonzales asserted squarely that "[t]here is no legal prohibition under the 'Convention Against Torture' on cruel, inhuman or degrading treatment with respect to aliens overseas."[6]

The position taken by the Attorney General has important ramifications that extend beyond the Torture Convention. The United States' reservation to that instrument was replicated during U.S. ratification of the International Covenant on Civil and Political Rights ("International Covenant" or "Covenant"), in relation to that treaty's CID treatment provision. Given the parallel reservations, the Attorney General's approach to the Torture Convention would presumably also inform his interpretation of U.S. obligations under the International Covenant.

For these reasons, Gonzales appears to believe that, as a matter of international law, U.S. personnel may engage in CID treatment not amounting to torture, so long as it is only foreigners who are ill-treated and everyone is out of the country when it happens. Put another way, the Attorney General proposed a new geography of abuse, a patch-work quilt of circumstances in which, as a matter of international law, the United States may commit acts it readily acknowledges may not be done on its own soil.

The Gonzales interpretation provoked a vigorous response from critics. In 2005, Senator McCain sponsored an amendment to the 2006 Department of Defense Appropriations Bill prohibiting cruel, inhuman, and degrading treatment of persons detained by the U.S. government.[7] In so doing, he complained of the Bush administration's "strange legal determination . . . that

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4. Declarations and Reservations by the United States of America to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Reservation I(1)), *in* 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2004, at 283, 286-87, U.N. Doc. ST/LEG/SER.E/23, U.N. Sales No. E.05.V.3 (2005) [hereinafter CID Reservation]; *see also* Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, http://www.ohchr.org/english/countries/ratification/9.htm#reservations (last visited Mar. 19, 2006).

5. *Nomination Hearing*, *supra* note 1 (emphasis added).

6. 151 CONG. REC. S699 (daily ed. Feb. 1, 2005) (statement of Sen. Feinstein, quoting Gonzales letter), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all &page=S699&dbname=2005_record.

7. Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. (2005) (enacted).

the prohibition in the Convention Against Torture against cruel, inhuman, or degrading treatment does not legally apply to foreigners held outside the United States."[8]

Human rights groups echo this objection. Human Rights First—the former Lawyers Committee for Human Rights—declared that the Attorney General's interpretation "flies in the face of the [torture] treaty's ratification history and would remove serious human rights violations from legal prohibition."[9] For its part, Human Rights Watch labeled the Gonzales interpretation "as unprecedented as it is implausible: the [torture] treaty unambiguously calls on governments to stamp out torture and ill-treatment to the fullest extent of their authority. This clearly covers acts by U.S. agents anywhere in the world."[10] In a speech delivered at Canada's foreign ministry in April 2005, Human Rights Watch Director Kenneth Roth argued that the U.S. position constituted an illicit supplemental reservation to its existing obligations under the Torture Convention and urged Canada to object vigorously to this action.[11] Underlying these complaints from human rights groups are concerns that the U.S. government is prepared to abuse prisoners and detainees as part of its war on terror.[12]

This article takes up the question raised by these events and probes the legal merits of the Gonzales position. Part II examines the scope of U.S. CID treatment treaty obligations contained not only in the Torture Convention, but also in the International Covenant. It juxtaposes these requirements with the substantive standards existing under the Eighth, Fifth, and Fourteenth Amendments. It also contrasts the geographic reach of the U.S. Constitution and the two treaties. Part III analyzes the ratification history of the two international conventions to determine the extent to which U.S. constitutional geographic limiters are incorporated into this treaty law. It also examines the

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8. 128 CONG. REC. S11063 (daily ed. Oct. 5, 2005) (statement of Sen. McCain).

9. Press Release, Human Rights First, Human Rights First Opposes Alberto Gonzales To Be Attorney General (Jan. 24, 2005), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/hrf-opp-gonz-full-012405.pdf.

10. Press Release, Human Rights Watch, U.S.: Justifying Abuse of Detainees (Jan. 25, 2005), *available at* http://hrw.org/english/docs/2005/01/25/usint10072.htm.

11. The author summarizes Mr. Roth's position from notes taken at the talk.

12. *Id.* Human Rights Watch, for instance, noted immediately after its condemnation of the Gonzales position that the "CIA is believed to hold a number of detainees in multiple secret locations around the world. The U.S. government has denied these detainees access to international monitors such as the International Committee of the Red Cross." *Id.* In an October 2004 report, it discussed the human rights implications of these "disappearances," and the prospect that detention *incommunicado*—a human rights abuse—will lead to other forms of mistreatment. HUMAN RIGHTS WATCH, THE UNITED STATES' "DISAPPEARED:" THE CIA'S LONG-TERM "GHOST DETAINEES" (2004), *available at* http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf. Press reports, meanwhile, point to use of extreme interrogation techniques at places like Bagram, Afghanistan and Guantanamo Bay, Cuba. *See, e.g.*, Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1; David Johnston, *More of F.B.I. Memo Criticizing Guantánamo Methods Is Released*, N.Y. TIMES, Mar. 22, 2005, at A17. *See also* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

international law of reservations to assess the likelihood of the international community accepting the interpretation proffered by the Attorney General.

This article concludes that the Gonzales position is largely a fiction if considered with an eye to the sum of U.S. international obligations. Geographic limitations on U.S. obligations under the Torture Convention clearly exist, but flow from the express terms of the convention itself, not from the U.S. reservation. A review of the ratification history surrounding the U.S. reservations to the Torture Convention and the International Covenant lends little support to the Gonzales concept of implied geographic limitations. The reservations therefore do not constrain the limited geographic reach of the Torture Convention or the more expansive extraterritorial scope of the International Covenant. Moreover, even if they were intended to have this effect, there is good reason to believe that the U.S. derogations are inconsistent with the international law of reservations. Not least, the treaty reservations cannot be treated as a derogation of customary international law principles banning CID treatment.

II.
POTENTIAL SCOPE OF U.S. OBLIGATIONS IN RELATION TO CID TREATMENT

The International Covenant and the Torture Convention are both broadly ratified international treaties that include a prohibition on CID treatment.[13] Article 16 of the Torture Convention specifies that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[14] Likewise, Article 7 of the International Covenant provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[15] Article 10 contains a complementary obligation: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[16]

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13. The International Covenant had 154 parties as of May 2005. Multilateral Treaties Deposited with the Secretary-General, International Covenant on Civil and Political Rights, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp (last visited Mar. 19, 2006). The Torture Convention had 139. Multilateral Treaties Deposited with the Secretary-General, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp (last visited Mar. 19, 2006).

14. Torture Convention, *supra* note 2, art. 16.

15. International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Oct. 5, 1977, ratified June 8, 1992) [hereinafter ICCPR], *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

16. *See* U.N. Human Rights Comm., *General Comment No. 20*, ¶ 2, U.N. Doc. A/47/40 (1994) [hereinafter *General Comment No. 20*] (noting that Article 10 "complements" the obligations in Article 7).

The United States is a party to these treaties.[17] In both cases, however, it entered reservations upon ratification. As noted, the United States reservation to Article 16 of the Torture Convention reads: "'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[18] The United States entered an identical reservation with respect to Article 7—though not Article 10—of the International Covenant.[19]

The connotation of the word "means" in these reservations is clear. "Means," used as a verb, is defined as: "to serve or intend to convey, show, or indicate."[20] Used in the reservations, "means" connects CID treatment with the cruel and unusual treatment barred by constitutional norms. In so doing, the reservation clearly ties CID treatment to the *sort* of treatment that is also outlawed by the constitutional provisions. Looked at this way, the reservation is purely substantive. As noted above, however, Attorney General Gonzales proffered a second, more "procedural" interpretation at his Senate confirmation: the ban on CID treatment exists only *where* the Fifth, Eighth, or Fourteenth Amendments of the Constitution would also apply. But, this second interpretation is neither mandated nor excluded by the plain meaning of the words in the reservations.

The U.S. reservations therefore must be assessed by asking two important questions. First, what exactly is the substantive and geographic scope of the CID treatment treaty obligations and does it truly vary from that of the Eighth, Fifth, and Fourteenth Amendments? Second, given the reach of the constitutional provisions, to what extent do the reservations actually incorporate this geography into U.S. international obligations? The first question is addressed in this Part and the second in Part III.

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17. The ICCPR entered into force for the United States on September 8, 1992 and the Torture Convention on November 20, 1994. *See* OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2005, at 429, 513 (2005), *available at* http:// www .state.gov/documents/organization/53678.pdf.

18. CID Reservation, *supra* note 4, at 286-87.

19. *See id.* The United States did lodge an understanding of Article 10's subsections on imprisonment of accused persons with convicts and on the purposes of imprisonment being rehabilitation. Neither of these understandings have a bearing on the core Article 10 obligation to treat persons deprived of their liberty humanely.

20. Merriam-Webster Online, http://www.m-w.com/dictionary.htm (last visited Mar. 19, 2006).

A. Potential Substantive Scope of U.S. CID Treatment Obligations

1. Substantive Content of CID Treatment Standard in International Law

a) General Principles

Exactly what constitutes CID treatment in international law is uncertain. CID treatment is not defined in either the Torture Convention or the International Covenant. Whatever else it may be, CID treatment is clearly something other than torture. "Torture" is defined by the Torture Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for certain enumerated purposes, such as punishment or interrogation.[21] CID treatment is commonly viewed as egregious treatment that falls short of outright torture.[22]

No clear standard determines, however, how outrageous this conduct must be to constitute CID treatment. The U.N. General Assembly has urged that the term be "interpreted so as to extend the widest possible protection against abuses, whether physical or mental."[23] However, the U.N. Human Rights Committee—the treaty body established by the International Covenant—has declined to "draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment [barred by Article 7 of the International Covenant]; the distinctions depend on the nature, purpose and severity of the treatment applied."[24] It has further observed that "what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."[25]

In at least one instance, the Committee has accepted that the rationale for the treatment may be relevant in determining its legal character. In a case against Australia, it held that a state's legitimate fear of the flight risk posed by prisoners warranted the shackling of those individuals and rendered this act

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21. Torture Convention, *supra* note 2, art. 1.

22. *See, e.g.*, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 2, U.N. Doc. A/10034 (Dec. 15, 1975) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt., at 5 (1987) (citing Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) ¶ 167 (1978) for the proposition that "[t]he difference between torture and cruel, inhuman, or degrading treatment or punishment 'derives principally from a difference in the intensity of the suffering inflicted").

23. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, art. 5, cmt. c, U.N. Doc. A/34/46 (Dec. 17, 1979).

24. *See General Comment No. 20*, *supra* note 16, ¶ 4.

25. Vuolanne v. Finland, U.N. Human Rights Comm., Communication No. 265/1987, ¶ 9.2, U.N. Doc. CCPR/C/35/D/265/1987 (1989), *available at* http://www.unhchr.ch/ tbs/doc.nsf/0/19ab b6c5558b2fbbc1256abd002fd613?Opendocument.

something other than CID treatment.[26] The Committee has been reluctant, however, to extend this line of reasoning too far. It appears, therefore, to reject state justifications for certain forms of treatment, including corporal punishment,[27] a state action the Committee readily declares to be CID treatment.[28] It has also indicated that where an act does, in fact, constitute CID treatment, no justification exonerates the injuring state. Article 4 of the International Covenant precludes derogation from Article 7 even in times of national emergencies, presumably the most potent public interest motivation imaginable.[29]

b) Specific Examples

Despite an unwillingness to define *ex ante* the exact contours of the CID treatment standard, both the Human Rights Committee and its counterpart under the Torture Convention, the U.N. Committee Against Torture, have identified specific state practices that they view as constituting CID treatment.

For instance, the Committee Against Torture has declared all of the following forms of CID treatment: substandard detention facilities lacking basic amenities such as water, electricity and heating in cold temperatures;[30] long periods of pre-trial detention and delays in judicial procedure coupled with incarceration in facilities ill-equipped for prolonged detention;[31] the beating of prisoners who are also denied medical treatment and are deprived of food and proper places of detention;[32] virtual isolation of detainees for a period of a

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26. Bertran v. Australia, U.N. Human Rights Comm., Communication No. 1020/2001, ¶ 8.2, U.N. Doc. CCPR/C/78/D/1020/2001 (2003), *available at* http://www.unhchr.ch/tbs/doc.ns f/0/e9d 23042 cfec8e86c1256dad00535a94?Opendocument.

27. Osbourne v. Jamaica, U.N. Human Rights Comm., Communication No. 759/1997, ¶ 9.1, U.N. Doc. CCPR/C/68/D/759/1997 (2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/33 9e324bcf148a04c125690c00359dd6?Opendocument ("Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.").

28. *General Comment No. 20*, *supra* note 16, ¶ 5.

29. *Id.* ¶ 3 ("The text of article 7 allows no limitation. The Committee reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provision must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."). *See also* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 150 (1988) ("Unlike in the definition of torture . . . the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment."); SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 212 (2d ed. 2004).

30. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 183, U.N. Doc. A/56/44 (Oct. 12, 2001).

31. *Id.* ¶ 119(c).

32. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 175, U.N.

year;[33] use of electro-shock belts and restraint chairs as means of constraint;[34] acts of police brutality that may lead to serious injury or death;[35] and deliberate torching of houses.[36]

Commenting specifically on interrogation techniques, the Committee Against Torture has also identified the following as CID treatment: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill . . . ."[37]

Specific acts identified by the Human Rights Committee as constituting CID treatment do not differ greatly from those invoked by the Committee Against Torture. The latter include abduction of an individual followed by detention without contact with family members;[38] denial of food and water;[39] denial of medical assistance after ill-treatment;[40] death threats;[41] mock executions;[42] whipping and corporal punishment;[43] failure to notify a family of

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Doc. A/53/44 (Sept. 16, 1998) [hereinafter *1998 Report of the Committee Against Torture*].

33. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶¶ 58(e), 61(c), U.N. Doc. A/55/44 (Jan. 1, 2000).

34. *Id.* ¶¶ 179(e), 180(c).

35. *1998 Report of the Committee against Torture, supra* note 32, ¶ 64.

36. Dzemajl v. Yugoslavia, U.N. Human Rights Comm., Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002), *available at* http://www.unhchr.ch/tbs/doc.nsf/ (Symbol) /b5238fc275369719c1256c95002fca4f?Opendocument.

37. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 257, U.N. Doc. A/52/44 (Jan. 1, 1997).

38. N'Goya v. Zaire, U.N. Human Rights Comm., Communication No. 542/1993, ¶ 5.5, U.N. Doc. CCPR/C/56/D/542/1993 (1996), *available at* http://www.unhchr.ch/tbs/doc.nsf/ MasterFrameView/aaaaa7610e02b4ea8025670b0041e2c3?Opendocument; Atachahua v. Peru, U.N. Human Rights Comm., Communication No. 540/1993, ¶ 8.5, U.N. Doc. CCPR/C/56/D/540/1993 (1996), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/1fa0463b1dc827dd8025670b0041986a? Opendocument.

39. Miha v. Equatorial Guinea, U.N. Human Rights Comm., Communication No. 414/1990, ¶ 6.4, U.N. Doc. CCPR/C/51/D/414/1990 (1994), *available at* http://www.unhchr.ch/tbs/ doc.nsf/(Symbol)/df4e3b9dad48924480256724005b7029?Opendocument.

40. *See id.*; *see also* Bailey v. Jamaica, U.N. Human Rights Comm., Communication No. 334/1988, ¶ 9.3, U.N. Doc. CCPR/C/47/D/334/1988 (1993), *available at* http://www.unhchr.ch/ tbs/doc.nsf/0/f005e1b6505911d78025678900523ffc?Opendocument.

41. Hylton v. Jamaica, U.N. Human Rights Comm., Communication No. 407/1990, ¶ 9.3, U.N. Doc CCPR/C/51/D/407/1990(1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/ MasterFrameView/21f4971b30964fc6802567240059b27d?Opendocument.

42. Linton v. Jamaica, U.N. Human Rights Comm., Communication No. 255/1987, ¶ 8.5, U.N. Doc CCPR/C/46/D/255/1987 (1992), *available at* http://www.unhchr.ch/tbs/doc .nsf/385c2add1632f4a8c12565a9004dc311/ec922b6b4f8a9fe280256730004f1c47?OpenDocumen& Highlight=0,CCPR%2FC%2F46%2FD%2F255%2F1987.

43. Higginson v. Jamaica, U.N. Human Rights Comm., Communication No. 792/1998, ¶ 4.6, U.N. Doc. CCPR/C/74/D/792/1998 (2002), *available at* http://www.unhchr.ch/ tbs/doc .nsf/0/40dc97b1 5fe67797c1256bed004ac91a?Opendocument; Sooklal v. Trinidad and Tobago, U.N. Human Rights Comm., Communication No. 928/2000, ¶ 4.6, U.N. Doc CCPR/C/73/D/928/2000 (2001), *available at* http://www.unhchr.ch/tbs/doc.nsf/ 385c2add1632f4a8c12 565a9004dc 311/0 60472c5f719c37cc1256b0c0037d251?OpenDocument&Highlight=0,CCPR%2FC%2F73%2FD%2F 928%2F2000.

the fate of an executed prisoner;[44] prolonged detention on death row when coupled with "further compelling circumstances relating to the detention;"[45] and detention in substandard facilities;[46] and conditions of incarceration.[47]

Examples of CID treatment stemming from the conditions of detention include: incarceration for fifty hours in an overcrowded facility, resulting in prisoners being soiled with excrement, coupled with denial of food and water for a day;[48] incarceration in circumstances falling below the standards set in the U.N. Standard Minimum Rules for the Treatment of Prisoners, coupled with detention *incommunicado*, death and torture threats, deprivation of food and water and denial of recreational relief;[49] solitary incarceration for ten years in a tiny cell, with minimal recreational opportunities;[50] solitary incarceration *incommunicado* for various periods;[51] and incarceration with limited recreational opportunities, no mattress or bedding, no adequate sanitation, no ventilation or electric lighting, in addition to denial of exercise, medical treatment, nutrition and clean drinking water.[52]

Detention in these and similar circumstances may also run afoul of Article 10 of the International Covenant, guaranteeing that states treat persons deprived of their liberty with humanity and dignity. In its General Comment 21, the

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44. Schedko v. Belarus, U.N. Human Rights Comm., Communication No. 886/1999, ¶ 10.2, U.N. Doc. CCPR/C/77/D/886/1999 (2003), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.77.D.886.1999.En?Opendocument.

45. Bickaroo v. Trinidad and Tobago, U.N. Human Rights Comm., Communication No. 555/1993, ¶ 5.6, U.N.Doc. CCPR/C/61/D/555/1993 (1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/9af6a8733b3fe740802566da003fa2ec?OpenDocument.

46. Adams v. Jamaica, U.N. Human Rights Comm., Communication No. 607/1994, ¶ 3.14, U.N.Doc CCPR/C/58/D/607/1994 (1996), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/ebc4844f722cb0db80256715005766c1?Opendocument.

47. Deidrick v. Jamaica, U.N. Human Rights Comm., Communication No. 619/1995, ¶ 9.3, U.N.Doc CCPR/C/62/D/619/1995 (1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/cef4724191a33b4f802566d4005588c8?Opendocument.

48. Portorreal v. Dominican Republic, U.N. Human Rights Comm., Communication No. 188/1984, ¶¶ 9.2, 11, U.N. Doc CCPR/C/31/D/188/1984 (1987), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/b967d6e3245a920ac1256abd00286766?Opendocument.

49. Mukong v. Cameroon, U.N. Human Rights Comm., Communication No. 458/1991, ¶¶ 9.3, 9.4, U.N. Doc CCPR/C/51/D/458/1991 (1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3eee540dcbeda7a580256727005a484b?Opendocument.

50. Edwards v. Jamaica, U.N. Human Rights Comm., Communication No. 529/1993, ¶ 8.3, U.N. Doc CCPR/C/60/D/529/1993 (1997), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f57f2c81c25f5479802566e100383c0c?Opendocument.

51. Campos v. Peru, U.N. Human Rights Comm., Communication No. 577/1994, ¶ 8.4, U.N. Doc CCPR/C/61/D/577/1994 (1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3c730ccb89509e8802566d7005d370d?Opendocument (discussing detention incommunicado for nine months); Shaw v. Jamaica, U.N. Human Rights Comm., Communication No. 704/1996, ¶ 7.1, U.N. Doc. CCPR/C/62/D/704/1996 (1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/a2a0a02cd480cb55802566d4005d0901?OpenDocument&Highlight=0,CCPR%2FC%2F62%2FD%2F704%2F1996 (discussing detention incommunicado for eight months in overcrowded and damp conditions).

52. Brown v. Jamaica, U.N. Human Rights Comm., Communication No. 775/1997, ¶ 6.13, U.N. Doc. CCPR/C/65/D/775/1997 (1999), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/02a9cd65e31d7fda8025679000466cba?Opendocument.

Human Rights Committee concluded that Article 10 rights attach to "any one deprived of liberty under the laws and authority of the State," including those who are held in prisons or "detention camps."[53] Article 10 has been interpreted as prohibiting acts less severe than outright CID treatment, particularly where a person has been detained in generally poor conditions but has not been singled out for particularly egregious treatment.[54] The Committee has also found violations of Article 10 when detainees are held *incommunicado* for periods of time shorter than those declared cruel, inhuman or degrading in other cases.[55] Compliance with the U.N. Standard Minimum Rules for the Treatment of Prisoners[56] may also be relevant in determining whether a state complies with Article 10.[57] These Rules establish detailed standards in such areas as hygiene, food, clothing and bedding, exercise and sport, medical services, discipline and punishment, and contact with the outside world.

2. Substantive Content of the Eighth, Fifth and Fourteenth Amendments

a) Eighth Amendment

Substantively, the core prohibition on cruel and unusual treatment in the U.S. Constitution—the Eighth Amendment—prohibits the infliction of "cruel and unusual punishments" without defining this expression further. Thus, like its international counterparts, the U.S. Constitution contains no definitive list of acts considered cruel or unusual. Nor have U.S. courts proposed a comprehensive category of such behaviors. In *Roper v. Simmons*, the U.S. Supreme Court recently reiterated its long-held view that the list of acts considered to violate the Eighth Amendment is not fixed. Instead, the validity of these acts is measured against "the evolving standards of decency that mark the progress of a maturing society."[58] Nevertheless, the Supreme Court has also

53. U.N. Human Rights Comm., *General Comment No. 21*, ¶ 2, U.N. Doc. A/47/40 (1994) [hereinafter *General Comment No. 21*].

54. Griffin v. Spain, U.N. Human Rights Comm., Communication No. 493/1992, ¶ 6.3, U.N. Doc. CCPR/C/53/D/493/1992 (1995), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/d5f8acdcc9bec684802566e30034a0b5?OpenDocument&Highlight=0,CCPR%2FC%2F53%2FD%2F493%2F1992 (concluding that Article 10 applied in relation to generally poor conditions of incarceration, even where Article 7 CID treatment was not established). *See* discussion in JOSEPH ET AL., *supra* note 29, at 277, ¶ 9.139.

55. Gilboa v. Uruguay, U.N. Human Rights Comm., Communication No. 147/1983, ¶ 14, U.N. Doc. CCPR/C/26/D/147/1983 (1985), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/90c4cedc1808aef2c1256ab9004b4fe0?OpenDocument (incommunicado detention for 15 days is a violation of Article 10).

56. Standard Minimum Rules for the Treatment of Prisoners, *adopted* Aug. 30, 1955 by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, annex I, A (1956), *approved* July 31, 1957, E.S.C. Res. 663(c), 24 U.N. ESCOR Supp. (No. 1), at 11, U.N. Doc. E/3048 (1957), *amended* May 13, 1977, E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1), at 35, U.N. Doc. E/5988 (1977), *available at* http://www.ohchr.org/english/law/pdf/treatmentprisoners.pdf.

57. *See General Comment No. 21*, *supra* note 53, ¶ 5.

58. Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (citing Trop v. Dulles, 356 U.S. 86,

said that the Eighth Amendment bars both "barbarous" acts and those actions "which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime."[59]

The Supreme Court has noted that acts "totally without penological justification" constitute "unnecessary and wanton infliction of pain."[60] Exactly when actions cross this threshold depends on the context. In practice, the Eighth Amendment has been confined to cases involving convicted prisoners, an approach mandated by the Supreme Court's interpretation of the word "punishment" in the Amendment.[61] Broadly speaking, the Supreme Court's cases on prisoner treatment by prison officials have examined two sorts of punishment issues: the conditions in which inmates are detained and excessive use of force by guards.[62] The different tests applied to these two scenarios in turn appear to reflect the exigencies of the circumstances in which prison officials act.

Thus, in *Hudson v. McMillan*,[63] the Court distinguished circumstances in which prison authorities are confronted with an urgent need to employ force to meet legitimate objectives, on the one hand, from situations where no such countervailing need exists, on the other. As an example of the latter situation, the Court offered that "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns."[64] In this instance, whether state officials act in a cruel and unusual fashion is judged by a standard of "deliberate indifference," a state of mind that may be inferred from the fact that "the risk of harm is obvious."[65] The Court has since implied

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100-01 (1958) (plurality opinion)).

59. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion) (citing Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)).

60. Hope v. Pelzer, 536 U.S. 730, 737 (2002) (citing Rhodes v. Chapman, 452 U.S. at 346).

61. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) (holding that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions"); Graham v. Connor, 490 U.S. 386, 395 (1989) (deciding that "the Due Process Clause [in the Fifth and Fourteenth Amendments] protects a pretrial detainee from the use of excessive force that amounts to punishment" and that "[a]fter conviction, the Eighth Amendment 'serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified'" (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986)).

62. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (holding that "[i]n its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners . . . . The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates'" (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)).

63. 503 U.S. 1, 5 (1992).

64. *Id.* at 6.

65. *See* Hope v. Pelzer, 536 U.S. at 738 (quoting *McMillan*, 503 U.S. at 8). *See also* Farmer v. Brennan, 511 U.S. at 842. Note, however, that the test is a subjective one. *Id.* at 837 (finding that deliberate indifference requires that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn

that the "deliberate indifference" standard extends to all cases involving non-emergency prison conditions.[66] For instance, the violation of the "deliberate indifference" standard was "obvious" where an already subdued prisoner was handcuffed to a "hitching post" in a non-emergency situation for a 7-hour period and exposed to "the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks."[67]

In comparison, *McMillan* held that guards employing force to quell a prison riot are evaluated against a different standard. In such circumstances, state officials "must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force" and must make decisions in haste and under pressure. In these circumstances, the test for cruel and unusual punishment is whether "force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[68]

In *McMillan*, the Court extended this approach to all allegations concerning use of excessive force by prison guards in dealing with inmates. Even where the injury is insignificant, "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated,"[69] and the Eighth Amendment is transgressed. Ultimately, whether force violates the Eighth Amendment hinges not only on the injury suffered, but also on "the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.'"[70]

b) Fifth and Fourteenth Amendments

For its part, the Fifth Amendment to the U.S. Constitution provides that no person shall be deprived "of life, liberty, or property, without due process of law." The Fourteenth Amendment makes this same guarantee applicable to the states. These guarantees include a substantive component, one designed to prevent the government "from abusing [its] power, or employing it as an

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that a substantial risk of serious harm exists, and he must also draw the inference"). Obviousness serves as evidence of whether this subjective knowledge existed or not. *Id.* at 842.

66. *Hope*, 536 U.S. at 737-38 (deciding that "[i]n making this determination [of whether there has been unnecessary and wanton inflictions of pain] in the context of prison conditions, we must ascertain whether the officials involved acted with 'deliberate indifference' to the inmates' health or safety" (citing *McMillan*, 503 U.S. at 8)).

67. *Id.* at 738.

68. *See McMillan*, 503 U.S. at 6 (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). *See also Whitley*, 475 U.S. at 320-21 ("Where a prison security measure is undertaken to resolve a disturbance, . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'").

69. *McMillan*, 503 U.S. at 9.

70. *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321).

instrument of oppression."[71] The traditional test applied by the court is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[72] The Supreme Court has suggested that a sufficient governmental interest in an aggressive interrogation may influence the outcome of this "shock the conscience" test.[73] Those same judgments imply, however, that interrogation by torture is capable of shocking the conscience and of constituting a violation of substantive due process,[74] an approach endorsed by the lower courts.[75]

The Supreme Court has also noted that "the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner."[76] The Fifth and Fourteenth Amendments may, however, include supplemental elements more restrictive of government use of force than the Eighth Amendment, at least for detainees not convicted of a crime. In its jurisprudence, the Supreme Court has emphasized that the "State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."[77] Substantive due process standards are offended when pre-trial conditions "amount to punishment of the detainee."[78] Consequently, the Due Process Clause protects "a pretrial detainee from the use of excessive force that amounts to punishment."[79] Whether a given act amounts to punishment depends on both its nature and its purpose.[80] Lower courts have held that "a restriction is 'punitive' where it is intended to punish, or where it is 'excessive

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71. Collins v. Harker Heights, 503 U.S. 115, 126 (1992) (quoting DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 196 (1989) (citing Davidson v. Cannon, 474 U.S. 344, 348 (1986))).

72. County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998).

73. Chavez v. Martinez, 538 U.S. 760, 775 (2003) (holding that "official conduct 'most likely to rise to the conscience-shocking level,' is the 'conduct intended to injure in some way unjustifiable by any government interest'" (citing *Lewis,* 523 U.S. at 849)).

74. *Id.* at 773 (suggesting that substantive due process makes unlawful certain government conduct, e.g. police torture or other abuse forcing a confession, regardless of whether the confession is then used at a defendant's trial).

75. Harbury v. Deutch, 233 F.3d 596, 602 (D.C. Cir. 2000); Martinez v. City of Oxnard, 337 F.3d 1091, 1092 (9th Cir. 2003) (holding that it would shock the conscience and thus violate the due process clause when police "brutally and incessantly questioned" a person "after he had been shot [during his altercation with police] in the face, back, and leg and would go on to suffer blindness and partial paralysis, and [when police] interfered with his medical treatment while he was 'screaming in pain . . . and going in and out of consciousness'"), *cert. denied,* 542 U.S. 953 (2004).

76. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

77. United States v. Lovett, 328 U.S. 303, 317-18 (1946); Bell v. Wolfish, 441 U.S. 520, 537 n.16 (1979).

78. *Bell,* 441 U.S. at 535.

79. Graham v. Connor, 490 U.S. 386, 395 (1989).

80. *See Bell,* 441 U.S. at 538 ("If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.").

in relation to [its non-punitive] purpose,' . . . or is 'employed to achieve objectives that could be accomplished [by] so many alternative and less harsh methods.'"[81]

3. Comparison of Constitutional and International CID Standards

Given this discussion, there are both similarities and differences between U.S. constitutional approaches to cruel and unusual punishment and those developed by U.N. bodies in relation to CID treatment under the Torture Convention and the International Covenant.

In terms of similarities, while the Human Rights Committee probably goes further than do U.S. courts in outright condemning behaviors like corporal punishment, the jurisprudence of both bodies typically focuses on egregious acts. In practice, the behaviors declared inappropriate both by the Committee against Torture and the Human Rights Committee are extreme. In many instances, prison officials are likely maltreating prisoners with deliberate indifference to the harm caused or using excessive force maliciously. In either instance, their actions would be clear violations of the Eighth Amendment.

On the other hand, some qualities of the Eighth Amendment's case law may affect its reach in a fashion alien to the CID treatment concept. First, preoccupied with both CID treatment and punishment, the U.N. Committee Against Torture has proposed a list of suspect interrogation tactics. In comparison, the Eighth Amendment's focus has been confined to post-conviction incarceration, not pre-trial detention. Likely for this reason, the Eighth Amendment is not rich in cases focused on custodial interrogation,[82] an activity provoking much controversy in the current "war on terror." For this reason, legitimate questions arise as to whether, substantively, the Eighth Amendment standards extend to the treatment of untried detainees in this conflict.

Furthermore, court interpretations of the Eighth Amendment are much more concerned with the motivation underlying suspect acts than are the international standards. Ironically, the Eighth Amendment's emphasis on motivation may produce requirements that are both more demanding and more forgiving than their international equivalents. For instance, under the Eighth

81. Jones v. Blanas, 393 F.3d 918, 933-34 (9th Cir. 2004) (citations omitted); Magluta v. Samples, 375 F.3d 1269, 1273 (11th Cir. 2004) ("The determination of whether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate government purpose."); Robles v. Prince George's County, 302 F.3d 262, 269 (4th Cir. 2002).

82. On this point, see an October 2002 memorandum on interrogation tactics at Guantanamo Bay drafted by the U.S. Department of Defense: "There is a lack of Eighth Amendment case law relating in the context of interrogations." Memorandum from Diane E. Beaver, Staff Judge Advocate, Dep't of the Army, to Commander, Joint Task Force 170 (Oct. 11, 2002), *reprinted in* KAREN GREENBURG & JOSHUA DRATEL, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 231 (2005).

Amendment, even insignificant injuries are precluded when inflicted out of malice. No similar doctrine has emerged in the deliberations of the international human rights bodies, which tend to turn on the nature of the injury suffered, not on the nastiness of the government official's motivation.

On the other hand, the Eighth Amendment excessive force cases suggest that good faith application of force for a good cause might survive Eighth Amendment scrutiny.[83] In an October 2002 memorandum on interrogation tactics at Guantanamo Bay, the U.S. Department of Defense extrapolated from these cases and urged that the Eighth Amendment is not violated "so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm."[84]

International law is probably less forgiving. Case law from the Human Rights Committee does suggest that the legal characterization of two identical acts—one done for a legitimate penological purpose, the other not—may vary.[85] Yet, the non-derogable nature of CID obligations makes it unlikely that a perceived broader public good, like detecting terrorists, would sanitize what might otherwise be considered CID treatment.

Read together, these two key differences between international and Eighth Amendment law—namely, questions as to the latter's application to untried detainees and its pliability based on the motivations behind the abuse—suggest that the U.S. CID reservations may relax the international obligations by which the United States would otherwise be bound, at least in relation to the controversial interrogations of terrorist suspects in the "war on terror." This conclusion is, however, suspect for at least three reasons.

First and most importantly, the constitutional doctrines incorporated into U.S. international obligations by the U.S. reservation extend beyond the Eighth Amendment. Also in play are the Fifth and Fourteenth Amendments, constitutional guarantees much more preoccupied than is the Eighth Amendment with pre-trial interrogations. The Supreme Court has implied that the "shock the conscience" test for a Fifth and Fourteenth Amendment due process violation may be influenced by the governmental interest served by an aggressive interrogation, a conclusion inconsistent with the international approach to torture.[86] On the other hand, the Fifth and Fourteenth Amendments bar any acts in relation to pre-trial detainees that are intended as punitive or are excessive in relation to a non-punitive purpose. Exactly what this would mean in relation to

83. *See* Hudson v. McMillan, 503 U.S. 1, 6 (1992), and discussion at *supra* note 63 and accompanying text.

84. Beaver, *supra* note 82, at 233.

85. *See* Bertran, U.N. Human Rights Comm., Communication No. 1020/2001, ¶ 8.2 and discussion at *supra* note 26 and accompanying text.

86. Chavez v. Martinez, 538 U.S. 760, 775 (2003).

interogees in the "war on terror" is unclear. However, the incorporation of Fifth and Fourteenth Amendment standards of treatment into U.S. treaty CID treatment obligations arguably imposes a very rigorous standard. Now *any* punitive motivation may suffice to render actions by U.S. actors inconsistent with U.S. international obligations.

Second, if a court were for some reason to apply the Eighth Amendment to pre-trial detainees, rather than rely on the Fifth and Fourteenth Amendments, it is a leap of logic to assume, as the Department of Defense has in its 2002 memo, that Eighth Amendment standards for the good faith and proportionate use of force used to maintain and restore *prison discipline* necessarily extends to the use of force as an *interrogation tactic*. As the Supreme Court held in *McMillan*, whether a given act constitutes the unnecessary and wanton infliction of pain transgressing the Eighth Amendment is very much a situational analysis.[87] A test developed in assessing the force reasonable to deal with unruly prisoners may be applied reluctantly by a court asked to evaluate a tactic employed to extract information in an interrogation of a subdued detainee undertaken in non-emergency conditions. Here, the standard applied is much more likely to be that of "deliberate indifference."[88] The Amendment would be offended where an official disregards an excessive risk to a person's health or safety.

Third, the U.S. reservations extend only to the formal CID treatment provisions in the Torture Convention and Article 7 of the International Covenant, but not to Article 10 of the Covenant. This latter provision clearly comes into play when persons are detained, obliging humane treatment. Article 10 might be violated by an aggressive interrogation regime, even if those acts were somehow sanitized from Article 7 review by the U.S. reservation.

In sum, the U.S. reservations to the International Covenant and the Torture Convention likely do not greatly debase the substantive international standards of behavior the United States must meet. In some situations, they may actually impose a higher bar of behavior. In this context, the more pressing concern truly is the relative geographic scope of international and U.S. constitutional laws, a matter discussed in the next section.

B. Potential Geographic Scope of U.S. Obligations

1. Geographic Scope of the Torture Convention and International Covenant

In relation to CID treatment, Article 7 of the International Covenant simply provides that "no one shall be subjected" to such acts. Likewise, Article 10 extends the entitlement of human treatment of detainees to "all persons." Article 16 of the Torture Convention, in comparison, obliges state efforts to prevent CID treatment "in any territory under its jurisdiction." On its face, it thus

87. *See McMillan*, 503 U.S. at 6 and discussion at *supra* note 63 and accompanying text.
88. *See Hope*, 536 U.S. at 737-38 and discussion at *supra* note 65 and accompanying text.

appears to contain a geographical limiter not found in the Covenant.[89] This first impression is somewhat misleading, as is discussed below. It is true, however, that the Torture Convention has a narrower geographic scope than does the Covenant.

This focus on territoriality runs through the Torture Convention. Thus, the phrase "in any territory under its jurisdiction" in Article 16 is also repeated in Article 2 of the treaty. The latter describes the obligation of a state to take all legal steps to stop torture "in any territory under its jurisdiction." This language evolved during the course of the treaty's drafting. The original draft of the Torture Convention employed the broader formulation "under its jurisdiction" in Article 2. France expressed concern, however, that the latter phrase was too sweeping and would oblige a state to regulate the conduct of its citizens residing in another state.[90] The inclusion of "in any territory" would instead confine the Article 2 obligation to the territorial bounds of a state, ships and aircraft registered to a state, and to any occupied territory.[91]

This view prevailed not only in Article 2 but also in Article 16. Subsequently, publicists have interpreted the repeated references in the Convention to the words "in any territory under its jurisdiction" as capturing a state's "land territory, its territorial sea and the airspace over its land and sea territory," as well as territories under military occupation, colonial territories, and "any other territories over which a State has factual control."[92]

It would be incorrect to assume, however, that the Torture Convention is alone in confining the reach of its provisions. Despite the absence of an express geographic modifier in Articles 7 and 10 of the International Covenant, the Covenant contains such a constraint in Article 2(1). Article 2(1) of the Covenant describes the precise scope of state duties under that treaty, tempering the reach of all Covenant rights, including those in Articles 7 and 10. Article 2(1) speaks of a state's obligations under the Covenant as extending to all individuals "within its territory and subject to its jurisdiction."

Notably, this phrasing does not link territory and jurisdiction in the manner employed in the Torture Convention. Whereas the Torture Convention speaks of territories subject to a state's jurisdiction, Article 2 of the Covenant talks about territory *and* jurisdiction, implying that the two concepts are alternative descriptions of the International Covenant's reach. This possibility is

89. Article 16 also specifies that states "undertake to prevent" CID treatment, a qualifier not found on the face of Article 7. This seemingly equivocal language does not truly debase the potency of the CID treatment obligation in the Torture Convention. Its tone does not differ greatly from that in Article 2(1) of the International Covenant, describing the scope of state obligations under that treaty. Notably, Article 2(1) contains language largely identical to that in the Torture Convention: each state "undertakes to respect and to ensure" the rights in the Covenant. *See* ICCPR, *supra* note 15, art. 2, para. 1.

90. *See* BURGERS & DANELIUS, *supra* note 25, at 48.

91. *Id.*

92. *Id.* at 131, 149 (discussing Article 5 and extending the Article 5 observations to Article 16).

accommodated by international law, which clearly views jurisdiction and territory as separate concepts. For instance, states may exercise prescriptive jurisdiction in relation to their nationals irrespective of their location.[93]

The Human Rights Committee has, in fact, read Article 2 of the Covenant as including a significant extraterritorial reach. In its recent General Comment 31, it noted that "a State party must respect and ensure the rights laid down in the Covenant to anyone within *the power or effective control* of that State Party, *even if not situated within the territory* of the State Party."[94] Rights are guaranteed "to those *within the power or effective control of the forces of a State Party acting outside its territory*, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[95] The Committee has applied this approach in its case law—for example, by allowing a complaint against Uruguay brought by an individual kidnapped in Argentina by the Uruguayan security forces.[96] In its review of state compliance reports, the Committee has also raised Covenant compliance concerns in relation to a state's armed forces stationed abroad.[97]

Recently, the International Court of Justice referred to this Committee jurisprudence in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In that advisory opinion, it concluded that a state's Covenant obligations had extraterritorial reach: "the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[98]

In sum, the CID treatment obligation under the Torture Convention

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93. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) (Generally, "a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.").

94. U.N. Human Rights Comm., *General Comment No. 31*, ¶ 10, U.N. Doc. A/59/40 (2004) (emphasis added).

95. *Id.* (emphasis added); *see also* Lilian Celiberti de Casariego v. Uruguay, U.N. Human Rights Comm., Communication No. 56/1979, ¶ 10.3, U.N. Doc. CCPR/C/13/D/56/1979 (1981), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/ac4353a8003bec76c1256ab2004c9b11?Open document (noting that Article 2(1)'s references to jurisdiction and territory "does not imply that the State party concerned cannot be held accountable for the violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it").

96. Lopez v. Uruguay, U.N. Human Rights Comm., Communication No. 52/1979, U. N. Doc. CCPR/C/13/D/52/1979 (1981), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/e3c603a54b129ca0c1256ab2004d70b2?OpenDocument.

97. *See, e.g.*, U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: New Zealand, ¶ 8, U.N. Doc CCPR/CO/72/NET (2001), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.72.NET.En?Opendocument (relating to the "alleged involvement of members of the [Netherlands] State party's peacekeeping forces in the events surrounding the fall of Srebrenica, Bosnia and Herzegovina, in July 1995").

98. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. General List No. 131, ¶ 11 (July 9, 2004), 43 I.L.M. 1009.

arises where a state exercises sufficient control over a territory. The reach of the International Covenant, however, is greater. It extends to those circumstances where the state controls the actors perpetrating the abuse, even on territories unlinked to that state.

2. Geographic Scope of the U.S. Constitutional Norms

The U.S. Constitution does not always "follow the flag." Its application to acts committed beyond the territory of the United States is limited. In *United States v. Verdugo-Urquidez*, a seminal case on the matter, the Supreme Court held that the Fourth Amendment governing search and seizure did not apply extraterritorially, except in relation to a U.S. citizen.[99] In dismissing an expansive geographic scope for the Fourth Amendment, the Court reasoned that:

> Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures that occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.[100]

The Court's broadly crafted language in *Verdugo-Urquidez* casts doubt on the extraterritorial reach of any constitutional provision. Indeed, the Court cited with approval a much earlier decision, *Johnson v. Eisentrager*,[101] in which the Court rejected the application of the Fifth Amendment to enemy aliens arrested in China and imprisoned at a U.S. administered prison in Germany after World War II. *Johnson* held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."[102]

Despite these holdings, U.S. jurisprudence on the extraterritorial reach of the Constitution is quite uncertain where a foreign territory is subject to some level of U.S. control. Even in *Johnson*, the Supreme Court emphasized that the plaintiff had never been within the "territorial jurisdiction" of the United States during the course of his captivity.[103] By implication, the outcome in *Johnson* might have varied had such territorial jurisdiction existed.

Meanwhile, in the venerable "Insular Cases,"[104] the Supreme Court

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99. 494 U.S. 259, 274-75 (1990).
100. *Id.* at 275.
101. 339 U.S. 763 (1950).
102. *Id.* at 785.
103. *Id.* at 768.
104. *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

distinguished between non-U.S. territories acquired for the purposes of potential statehood and those obtained with different ends in mind. In the former lands, the U.S. Constitution applied with full force. Even in the latter, however, the inhabitants were entitled at least to "fundamental" constitutional rights,[105] including due process.[106]

Lower courts relying on these Supreme Court decisions have concluded that constitutional principles may apply where the United States exercises sufficient control over a territory.[107] For instance, in *Gherebi v. Bush*,[108] the Ninth Circuit considered whether federal courts could exercise habeas corpus jurisdiction in relation to alien detainees held at the Guantanamo Bay military base. The court reasoned that at Guantanamo the United States exercised a "potentially permanent exercise of complete jurisdiction and control."[109] In these circumstances, the United States enjoyed "territorial jurisdiction" sufficient to empower the exercise of federal court habeas oversight.[110] The Court of Appeals distinguished Guantanamo from the facility at issue in *Johnson*, Landsberg Prison in Germany, explaining that at the latter, the United States exercised only a "limited and shared authority . . . on a temporary basis."[111]

Language in the Supreme Court's recent decision in *Rasul v. Bush* supports this holding.[112] In *Rasul,* the Court held that whatever the constitutional doctrines expressed in *Johnson* in relation to habeas relief, they did not apply to the federal court's statutory jurisdiction to extend such a remedy. Most importantly for this article, the Court also appears to have confined *Johnson* to its predicate facts, none of which were present in relation to detainees of the "war against terror" at Guantanamo Bay. The Guantanamo detainees were not

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105. *See* Examining Bd. of Eng'rs, Architects & Surveyors v. Otero, 426 U.S. 572, 599 n.30 (1976).

106. *See* Ralpho v. Bell, 569 F.2d 607, 618 (D.C. Cir. 1977) (dealing with U.S.-administered U.N. trust territory, and holding that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law" and the fact that "the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories") (citations omitted).

107. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992) (holding that the Fifth Amendment extended to Guantanamo Bay, a place where the court had exclusive control and jurisdiction), *vacated as moot*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918 (1993); United States v. Tiede, 86 F.R.D. 227, 249 (U.S. Ct. for Berlin 1979) (holding that non-citizens before a U.S. occupation court in Berlin should have constitutional rights, in part because they were before a U.S. court); Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2001) (rejecting the extraterritorial extension substantive due process principles to a case of torture overseas, but in a fashion suggesting that the outcome may have been different had the victim been "tortured in a country in which the United States exercised de facto political control").

108. 374 F.3d 727 (9th Cir. 2004).

109. *Id.* at 734.

110. *Id.* at 737.

111. *Id.* at 734.

112. Rasul v. Bush, 542 U.S. 466 (2004) (concluding that U.S. courts have jurisdiction to consider legal appeals from foreign citizens held by the military at Guantanamo Bay).

nationals of a country at war with the United States. They had denied engaging in acts of aggression against the United States. A tribunal had not adjudicated their case. Finally, "for more than two years they had been imprisoned in territory over which the United States exercises *exclusive jurisdiction and control*;" that is, subject to a robust leasing arrangement just short of full sovereignty.[113]

Pointing to this latter passage and to the Insular Cases, the District Court for the District of Columbia held recently in *In re Guantanamo Detainee Cases* that "Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment."[114]

These developments in U.S. constitutional law are quite new and not yet definitive. Nevertheless, they suggest that the U.S. Constitution does have some extraterritorial reach to aliens, even outside the sovereign territory of the United States, so long as the United States exercises sufficient *de facto* control over the place in which the constitutional infractions take place. The amount of control necessary remains unclear. However, in places like Guantanamo where the United States exercises all powers short of formal sovereignty, the Constitution likely will follow the flag.[115]

3. Comparison of Constitutional and International Geographic Standards

This discussion points to a marked similarity between the geographic limits

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113. *Id.* at 475 (emphasis added). *See also id.* at 487 (Kennedy, J., concurring) (observing that "the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it"). The Court described the lease governing the U.S. presence in Guantanamo as follows: "The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" *Id.* at 471 (citations to lease agreement omitted).

114. 355 F. Supp. 2d 443, 464 (D.D.C. 2005). At the time of this writing, this case was on appeal and set for hearing before the D.C. Circuit in March 2006. *See also* O.K. v. Bush, 377 F. Supp. 2d 102, 112 (D.D.C. 2005).

115. On the other hand, Johnson v. Eisentrager, 339 U.S. 763, may suggest that constitutional rights do not extend to a Landesberg Prison situation; one in which the United States lacks exclusive jurisdiction and exercises a more intermediate level of control on a temporary basis. As noted above, *Johnson* may be distinguished on other bases; not least, the fact that detainees in the modern "war on terror" are citizens of countries with no declared war against the United States and are held without trial. Nevertheless, U.S. courts would develop new constitutional doctrine were they to assert extraterritorial constitutional jurisdiction over foreign detainees housed in territories over which the United States exercises less than full, proto-sovereign control. For this reason, many of the other venues in which the war on terror is being fought—for example, the various "undisclosed," foreign locations in which terrorism suspects are being held—may not be subject to constitutional oversight.

incorporated into the U.S. Constitution and those found in at least Article 16 of the Torture Convention. Given recent U.S. constitutional case law, both instruments now focus on territorial control, rather than simple sovereignty. Both appear to extend to circumstances, like those in Guantanamo Bay, where the state exercises substantial *de facto* control. Whether either instrument reaches further to lesser forms of territorial control, such as temporary military bases, remains uncertain.

A much clearer and definite dissonance exists between the U.S. Constitution and the International Covenant. The latter instrument extends its reach to precisely those circumstances where the U.S. Supreme Court's *Johnson* case implies that the U.S. Constitution should not apply: anyone within the effective control of that state's military, even when operating on territory not subjected to U.S. sovereignty or real control.

Given these conclusions, whether the U.S. reservation to the International Covenant in fact folds the U.S. Constitution's limited geographic reach into U.S. obligations under Article 7 is an important question, to be addressed in Part III.

III.
THE INTERNATIONAL LEGAL EFFECT OF THE U.S. RESERVATIONS

International law determines the effect that the U.S. reservations have on the United States' obligations under the Torture Convention and the International Covenant. Two important questions of international law are raised by these reservations. First, is there any factual or legal basis for the Attorney General's claim concerning the geographic effect of the U.S. reservation, as assessed against the law of treaty interpretation? Second, even if there is such a basis, is the reservation to the International Covenant consistent with the international law of reservations?

A. Interpretation of the U.S. Reservations

The Vienna Convention on the Law of Treaties is the starting point for assessing the effect of any reservation. While the Vienna Convention lacks universal membership—and indeed the United States is not a party—commentators regard its provisions as customary international law.[116] The

116. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980, not ratified) [hereinafter Vienna Convention], *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. The treaty had 105 members by January 2006. The customary status of the treaty has been readily acknowledged in the United States. *See* Letter of Submittal to the President, S. EXEC. DOC. L, 92d Cong., 1st sess. (1971), at 1 (observing that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. ("This Restatement accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the

Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[117] Where this approach leaves the meaning of a provision "ambiguous or obscure" or prompts a "result which is manifestly absurd or unreasonable," recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[118]

The Vienna Convention defines a "reservation" as a unilateral statement operating "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to the reserving state.[119] The Convention contains no specific rules on the interpretation of reservations. Nevertheless, the approach it applies in relation to treaties may sensibly be extended to reservations; specifically, a preference for ordinary meaning and recourse to *travaux preparatoires* where ambiguity remains. Because the ordinary meaning of the U.S. reservations at issue in this article is contested, a review of the relevant *travaux preparatoires* is required. In this case, the *travaux preparatoires* is the U.S. ratification history.

1. Ratification History of the International Covenant

The U.S. ratification history of the International Covenant is terse. Accounts in the record suggest that the International Covenant reservation was motivated by fears that, substantively, CID treatment could include acts not covered by the U.S. Constitution, including prolonged judicial proceedings in death penalty cases, corporal punishment, and solitary confinement.[120] However, there is nothing in the record suggesting that the reservation was constructed as a geographic limiter on U.S. obligations.[121] Nor did the United States enter a reservation, understanding, or declaration concerning the geographic reach of the Covenant contained in Article 2(1).[122]

United States even though the United States has not adhered to the Convention"); Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 373 n.5 (2d Cir. 2004) ("Although the United States has never ratified the Vienna Convention, we treat the Vienna Convention as an authoritative guide to the customary international law of treaties.") (citations omitted); Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 2000) ("According to a widespread legal conviction of the international community, the Vienna Convention is largely a restatement of customary rules, binding States regardless of whether they are parties to the Convention. . . . The United States recognizes the Vienna Convention as a codification of customary international law.") (citations omitted).

117. Vienna Convention, *supra* note 116, art. 31.

118. *Id.* art. 32.

119. *Id.* art. 2.

120. U.S. Senate, Comm. on Foreign Relations, *Report on the International Covenant on Civil and Political Rights*, S. EXEC. REP. NO. 102-23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 648, 651, 654 (1992) [hereinafter *Senate Report on ICCPR*]; Explanation of Bush Administration Conditions, *reprinted in id.* at 653 [hereinafter Explanation of Bush Administration].

121. That record is reproduced at *id.*

122. The United States entered an understanding in relation to Article 2(1), but only with respect to its prohibition on discrimination in the way rights are guaranteed to individuals. *Id.*

In fact, although the Covenant predates the Torture Convention by more than a decade, U.S. ratification of the Covenant was contemplated only after similar consideration was given to the Torture Convention. The U.S. CID treatment reservation to the International Covenant was copied expressly from that proposed for Article 16 of the torture treaty.[123] The reservation was made to "ensure uniformity of interpretation" between the Covenant and the Torture Convention "on this point," that is, the substantive reach of the CID treatment obligation.[124] It is therefore instructive to review the ratification history of the Torture Convention to understand the scope of the International Covenant's reservation.

2. Ratification History of the Torture Convention

Ironically, the rationale for the U.S. reservation to the Torture Convention is admirably summarized in an August 1, 2002 memorandum to then-White House Counsel Alberto Gonzales from Assistant Attorney General Jay Bybee. Famously, in that memorandum, Bybee confined the definition of torture to only the most egregious of acts; that is, those producing lasting psychological damage such as post-traumatic stress disorder or physical pain of an "intensity akin to that which accompanies serious physical injury such as death or organ failure."[125]

More importantly for this article, Bybee explained that the U.S. reservation to the CID treatment provision in the Torture Convention was sparked by the "vagueness" of the phrase and the fear that it "could be construed to bar acts not prohibited by the U.S. Constitution."[126] The United States would not agree, for instance, that "refusal to recognize a prisoner's sex change might constitute degrading treatment."[127] The language employed by Bybee emphasizes the effect of the reservation on the *type* of acts constituting CID treatment. Thus, Bybee reasoned that because of the reservation, "[t]reatment or punishment must . . . rise to the *level of action* that U.S. courts have found to be in violation

123. *See Senate Report on ICCPR*, *supra* note 120, at 651, 654 (describing the Article 7 reservation as "consonant with the reservation proposed by the Administration and adopted by the Senate" in relation to the Torture Convention); Explanation of Bush Administration, *supra* note 120, at 654 ("Since the United States is already proceeding towards ratification of the more detailed [Torture Convention] . . . on the basis of several carefully crafted reservations . . . it will be made clear in the record that we interpret our obligations under Article 7 of the Covenant consistently with those we have undertaken in the Torture Convention.").

124. *Id.*

125. Memorandum from Jay Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reproduced as Memo 14*, *in* GREENBURG & DRATEL, *supra* note 78, at 214. The U.S. government has since distanced itself from this interpretation. *See* Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Coney, Deputy Attorney General (Dec. 30, 2005), *available at* http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf.

126. GREENBURG & DRATEL, *supra* note 78, at 186-87 (Bybee memo).

127. *Id.*

of the U.S. Constitution" before the treaty's provision on CID treatment is triggered.[128]

The Bybee assessment is supported by the Torture Convention's ratification history. In documents reproduced in the Senate ratification report, the Department of State, for instance, viewed the reservation as necessary given the "unclear" meaning of CID treatment or punishment.[129] It did raise concerns that CID treatment could include acts of a nature not covered by U.S. constitutional norms, particularly in the area of degrading treatment or punishment.[130] These concerns are echoed in Senate hearings[131] and are used to justify the U.S. reservation.[132] There is, however, little in the ratification record suggesting that the reservation was also designed to impose a geographical limitation on U.S. obligations.[133] Indeed, given that Article 16 is confined on its face to territories under U.S. jurisdiction, it is not surprising that

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128. *Id.* at 187 (emphasis added).

129. Letter from Janet G. Mullins, Assistant Sec'y, Legislative Affairs, Dep't of State, to Senator Pressler (Apr. 4, 1990), *reprinted in* U.S. Senate, Comm. on Foreign Relations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. EXEC. REP. NO. 101-30, at 40 (2d Sess. 1990) [hereinafter *Committee Report on Torture Convention*].

130. Reagan Administration Summary and Analysis of the Convention (May 20, 1988), *reprinted in Committee Report on Torture Convention* , *supra* note 129, at 25 (noting that the phrase "cruel" and "inhuman" treatment or punishment "appears to be roughly equivalent to the treatment or punishment barred in the United States by the 5th, 8th and 14th Amendments" but then observing that degrading treatment or punishment "has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution.").

131. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101th Cong. 101-718, at 3 (1990) (statement of Sen. Pressler) ("I do not know what the terms, 'cruel, inhuman and degrading' mean outside the U.S. Constitution. Despite the proposed reservation for article 16, that reservation does not speak to anything outside of punishment — for example, arrest, confinement and interrogation.").

132. *Id.* at 11 (statement of Hon. Abraham D. Sofaer, Legal Advisor, Dep't of State) ("We would expect . . . that our Constitution would prohibit most (if not all) of the practices covered in Article 16's reference to cruel, inhuman and degrading treatment or punishment. Nevertheless, we are aware that some countries give a broader meaning to this provision . . . . [I]t is prudent that the U.S. specify that, because the Constitution of the United States directly addresses this area of the law, and because of the ambiguity of the phrase 'degrading,' we would limit our obligations under the Convention to the proscriptions already covered in our Constitution"); *id.* at 18 (statement of Mark Richard, Deputy Assistant Att'y Gen., Criminal Division, Dep't of Justice) ("the terms 'cruel, inhuman or degrading treatment or punishment' . . . are vague and are not evolved concepts under international law. This is especially the case concerning the scope of what constitutes degrading treatment.").

133. The only statement suggesting that the reservation is meant to apply geographically is the oral transcript accompanying the Statement of Hon. Abraham D. Sofaer, Legal Advisor, Department of State, *id.* at 5-6 ("We do not want to see a bunch of different rules and standards developed with respect to cruel, unusual and inhumane treatment, and therefore, we have proposed that *within the United States* the meaning of 'cruel and inhumane treatment' will be the same as the meaning of our Constitution's cruel and unusual penalties clause") (emphasis added). It is unclear that much can be read into the phrase "within the United States," or whether Mr. Sofaer simply misspoke when explaining the State Department position, substituting "within" for "for." Certainly, as noted, no geographic impulse is found in the formal explanations or document trail made by executive or Senate officials. Notably, Mr. Sofaer has since indicated that the Gonzales view on the Torture Convention's scope "is language" of the treaty. Robert Collier, *Gonzales OK Could Be Seen as OK for Torture Rules*, S.F. CHRON., Feb. 2, 2005, at A12.

the issue of a geographic delimiter was never squarely raised.

In sum, the ratification history strongly suggests that the U.S. reservations to both the Torture Convention and the International Convention were driven by substantive concerns: U.S. policymakers wished to limit the application of the treaties to those types of acts also inconsistent with the U.S. Constitution's Eighth, Fifth, and Fourteenth Amendments. On the other hand, the argument that the reservations also impose a separate geographic limiter enjoys little support from the ratification history.

B. The Legality of the U.S. Reservations

Even if the Attorney General were correct in his assessment of the reservations' impact, it would not automatically follow that the international community would give the desired effect to these instruments. Article 19 of the Vienna Convention permits reservations to treaties, but only so long as the derogations in question are not barred by the convention itself and are not "incompatible with the object and purpose of the treaty."[134]

This "object and purpose" standard imposes several difficulties. First, it is not always easy to decide when a reservation runs counter to the "object and purpose" of a treaty. As noted in the Restatement on the Foreign Relations Law of the United States, the "object and purpose" language, while supposedly amounting to an objective standard for assessing a reservation, "introduces an element of uncertainty and possible disagreement."[135]

Second, it is not always clear who may adjudicate the object and purpose question. Certainly, other states parties to a treaty are free to protest a reservation and denounce it as contrary to a treaty's object and purpose. Indeed, the Vienna Convention sets out this objection procedure and notes that these protestations may relieve both the objecting and the reserving parties of their obligations in relation to the disputed treaty provision.[136] Unfortunately, such rules poorly accommodate reservations to multilateral human rights treaties. Derogations from these treaties affect individuals, not states. Here, whether a reservation is effective as between states in their bilateral relations is largely irrelevant. The more important question is whether the reservation truly relieves the reserving state of a human rights obligation owed to individuals. The Vienna Convention is silent on who decides this question.

For these very reasons, the Human Rights Committee has declared its intent

134. Vienna Convention, *supra* note 116, art. 19.

135. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. c.

136. Vienna Convention, *supra* note 116, art. 21, para. 3 ("When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.").

to pronounce on the legality of reservations to the International Covenant.[137] It must do so, urges the Committee, both because of the inadequacies of the Vienna Convention regime[138] and for practical reasons. The validity of a reservation must be assessed if the Committee is to perform its functions under the Covenant, including reviewing state compliance reports or addressing individual complaints under the Optional Protocol to the Covenant.[139] The Committee presumably would also be obliged to undertake such an assessment in response to a complaint brought by one state against another concerning adherence to the Covenant, a prospect permitted by Article 41.[140]

In practice, the Committee would likely apply the "object and purpose" test in any of these sorts of proceeding by considering whether the reservation transgresses a universal prohibition and whether it violates a treaty-specific prohibition. Both of these matters are discussed below.

1. Universal Prohibition

Some reservations are barred, regardless of the precise objective and purpose of the treaty at issue. In particular, reservations that purport to derogate from treaty articles that are also peremptory or even plain-vanilla customary norms are ineffective.[141]

Reservations running counter to peremptory norms are an obvious legal impossibility. Indeed, a treaty is void if it conflicts with a peremptory

137. U.N. Human Rights Comm., *General Comment No. 24*, ¶ 18, U.N. Doc. A/50/40 (1994) [hereinafter *General Comment No. 24*] ("It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.").

138. *Id.* ¶ 17 (observing that "it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties").

139. *Id.* ¶ 18. Reporting obligations exist under Article 40. The Optional Protocol, meanwhile, allows individuals to address complaints of ill-treatment to the Committee, against state parties that have ratified the Protocol. The United States has not agreed to the Protocol. *See* Optional Protocol to the International Covenant on Civil and Political Rights., art. 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302.

140. The Article 41 procedure is only available as against states that have lodged a declaration accepting it the jurisdiction of the Committee in relation to inter-state complaints. The United States issued such a declaration upon ratification. *See* Ratification by the United States of America, 1676 U.N.T.S. 543, 545, *available at* http://untreaty.un.org/ENGLISH/bible/englishint ernetbible/partI/chapterIV/treaty7.asp (depositing Declaration under Article 41 recognizing the competence of the Human Rights Committee with ratification instrument).

141. *General Comment No. 24*, *supra* note 137, ¶ 8 ("Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations.").

principle.[142] *A fortiori,* a reservation to an otherwise valid treaty cannot modify the terms of that convention in a fashion inconsistent with peremptory concepts.

The rationale for disallowing reservations derogating from an article that codifies simple—that is, non-peremptory—customary law requires lengthier discussion. Certainly, treaties may supplant and replace customary law. A reservation to a treaty term intended to codify (and not modify or replace) customary law should not, however, have that effect. Notoriously, reservations "bilateralize" multilateral treaties, creating unique rules applicable as between the reserving state and other states parties that differ from the standards applicable to those other parties *inter se.*[143] It would be incongruous if a bilateral understanding were permitted to impose an exception to the customary international law applicable as between the reserving state and the international community. If reservations were to operate in this fashion, the codification of customary law into treaties would facilitate something states could not otherwise accomplish: the derogation from a universal principle to which they had not persistently objected during its emergence as customary law. An effort to render a customary norm in writing would, ironically, be turned on its head and used to gut its universality. It follows that a reservation to a treaty term codifying customary law does violence to the treaty's object and purpose and is therefore impermissible.

Turning specifically to CID treatment, in its general comment on reservations to the International Covenant, the U.N. Human Rights Committee observed that "a State may not reserve the right to . . . subject persons to cruel, inhuman or degrading treatment or punishment."[144] It urged that this and other rights, like the prohibition on torture, are customary international laws.[145] An outright reservation to Article 7 (and presumably Article 16 of the Torture Convention) would, therefore, be impermissible.

The U.S. reservation to Article 7 of the International Covenant obviously does not relieve the United States of all its obligations under that provision. Nevertheless, to the extent that it prompts U.S. performance under Article 7 falling short of the (admittedly ambiguous) customary law standard of CID treatment, questions will arise as to whether the reservation is proper.

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142. Vienna Convention, *supra* note 116, art. 53.

143. *See id.* art. 21, paras. 1-2 ("A [properly established] reservation. . .modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and modifies those provisions to the same extent for that other party in its relations with the reserving State. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se.*"); *see also id.* art. 21, para. 3 (discussing the impact of the reservation on bilateral obligations where a state objects to the reservation).

144. *General Comment No. 24, supra* note 137, ¶ 8.

145. *Id.*

2. Treaty-Specific Prohibition

Discerning the circumstances in which a reservation offends the specific object or purpose of the treaty at issue is an even more difficult undertaking. Treaties often do not define their specific object and purpose, a pattern reflected in the International Covenant.

Nevertheless, the precise "object and purpose" of the International Covenant has been considered in a general comment issued by the Human Rights Committee. In its words, "[t]he object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify."[146] Reviewing the U.S. reservation to the Covenant with an eye to this standard, the Human Rights Committee has noted that it:

> [R]egrets the extent of the [U.S.] State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to . . . article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.[147]

States parties to the Covenant have also objected to the Article 7 reservation. As already noted, the Covenant specifies in Article 4 that states may not derogate from certain rights, even in times of national emergency. Article 7, in its entirety, is listed as one of the provisions from which derogations may not be made. Pointing to Article 4, several European states have objected to the U.S. reservation as a derogation from Article 7, incompatible with the object and purpose of the Covenant.[148]

The Human Rights Committee's finding and these objections do not, of course, give rise to true legal penalties.[149] They do suggest, however, that the United States would be hard pressed to rely on its reservation to justify *any* actions found to be inconsistent with Article 7 by—at least—the U.N. Human Rights Committee. From this, it seems certain that the Committee and some portion of the international community would reject a claim by the United States

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146. *Id.* ¶ 7.

147. U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶¶ 266, 279, U.N. Doc. A/50/40 (1995), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b7d33f6b0f726283c12563f000512bd1?Opendocument.

148. *See* Objections by Denmark, Netherlands, Norway, Spain, and Sweden to the United States Reservations to the ICCPR, *in* 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2004, *supra* note 4, at 185, 186-91, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp. Finland and (less clearly) Portugal, meanwhile, consider the U.S. reservation an impermissible use of a country's domestic law to justify non-compliance with an international obligation. *Id.*

149. The European objections mean that those countries are free to view Article 7 as inapplicable between them and the United States. *See* Vienna Convention, *supra* note 116, art. 21.

that its reservation relieves it of all CID obligations vis-à-vis the treatment of aliens by its forces and agents deployed internationally.

IV.
CONCLUSION

All told, Attorney General Gonzales' assertions concerning the scope of the United States's CID treatment obligations are unpersuasive. His comments on the geographic reach of U.S. obligations apply, in part, to Article 16 of the Torture Convention, but only by reason of that provision's own geographic limiter and not to the extent the Attorney General urges. Meanwhile, for a number of reasons, his interpretation does not adequately capture the extent of U.S. obligations under other instruments, most notably, the International Covenant.

First, the U.S. ratification history for both the Torture Convention and the International Covenant suggest that the U.S. reservations were never designed to free U.S. personnel operating outside of U.S. territory from the strictures of U.S. CID treatment obligations. Instead, they were motivated by concerns about the substantive meaning of CID treatment. The Attorney General's current interpretation is therefore an *ex post facto* spin, one that greatly alters the apparent intended effect of the reservations.

If the reservations do not have the geographic effect claimed by Gonzales, the reach of U.S. obligations under the International Covenant and the Torture Convention is unimpaired. Under the International Covenant, and as per Article 2, U.S. obligations apply to U.S. forces and agents, irrespective of location. Under the Torture Convention, U.S. obligations extend to territories under *de facto* U.S. control.

Second, even if the U.S. reservations did impose an implied geographic limitation tied to U.S. constitutional law, the geographic reach of the U.S. Constitution likely extends further than the Attorney General's statements suggest. While the matter has not yet been fully adjudicated by the U.S. Supreme Court, lower courts have held that U.S. personnel enjoy no constitutional *carte blanche* in places like Guantanamo Bay, even in relation to aliens.

Third, even if the Attorney General were correct in his assessment of the reservations and U.S. constitutional law, the United States would be hard pressed to rely successfully on the reservation in responding to an international complaint concerning its compliance with Article 7 of the International Covenant. The Human Rights Committee has already condemned the CID treatment reservation—even when proffered without Gonzales' interpretation—as contrary to the object and purpose of the Covenant, and thus invalid.

Finally, even if the reservations did immunize U.S. personnel for their extraterritorial actions in relation to aliens, those reservations were entered only with respect to Article 16 of the Torture Convention and Article 7 of the

International Covenant. Thus, Article 10 of the latter instrument would continue to apply. Given the fashion in which the Human Rights Committee has interpreted Article 10 and the geographic reach of the Covenant, Article 10 would likely fill any space left by a truncated Article 7. Specifically, it would bar inhumane treatment by U.S. personnel directed at persons within their custody, even while overseas and even if these persons were aliens.

For all of these reasons, the patchwork quilt of international CID obligations proposed by the Attorney General likely does not exist. International law does not authorize zones in which a state may act with impunity in its treatment of detainees. The United States's CID treatment obligations do not, in other words, have an uneven geography.

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Financial Privacy in the United States and the European Union: A Path to Transatlantic Regulatory Harmonization

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A Path to Transatlantic Regulatory Harmonization

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I.
INTRODUCTION

Information has been described as the "cornerstone of a democratic society and market economy,"[1] and enhanced technologies for using personal data have arguably transformed financial services into an "information industry."[2] Walter Wriston, former chairman of Citicorp, asserted that "information standards" have replaced money in global financial markets.[3]

> Information today is fundamentally global. The technologies that carry it ignore national borders. Multinational corporations and consortiums of organizations that share data dot the globe. In the case of the Internet, multinational banking networks . . . , credit and financial services networks . . . , and stock and commodities networks . . . , it is virtually meaningless to talk of national privacy law. What consumers and service providers alike need are common standards applicable throughout the world. Commonality does not require identical laws but rather legal regimes that, while still reflecting national contexts, are based on shared principles.[4]

The sheer technological power of the digital age, offering huge advances in the type and quality of products offered in the economic marketplace, also poses unprecedented threats to personal safety and autonomy if privacy is not adequately protected. In response to mounting privacy concerns in an era of

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1. FRED H. CATE, PRIVACY IN PERSPECTIVE xiv (2001) (quoting the Federal Reserve Board).

2. Richard M. Kovacevich, *Privacy and the Promise of Financial Modernization*, 14 THE REGION 1 (2000) (Kovacevich is the former president of the Financial Services Roundtable).

3. PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION 262 (1996).

4. FRED H. CATE, PRIVACY IN THE INFORMATION AGE 128-29 (1997).

escalating technology, as well as concerns that divergent standards could undermine the functioning of a Single Market, the European Council ("EC") of the European Union[5] enacted a Directive in 1995[6] to safeguard all personal information of its citizens. The Directive may be the world's most ambitious and far-reaching data privacy initiative of the high-technology era.[7] Significantly, it imposes restrictions on data transfers outside the EU to countries that have not been found to provide "adequate protection." It thus creates tension between the goal of harmonizing trans-Atlantic financial regulation and the need to respect national legal regimes.[8] The United States approaches privacy differently, in part due to a reluctance to enact universal privacy legislation for constitutional and historical reasons. Varying degrees of privacy legislation exist in different sectors of the US economy, largely in response to perceived dangers of abuse, and the European Union has not found that the overall level of protection in the United States meets the European standards. Because great volumes of personal information are transferred across borders daily, divergent standards could lead to the emergence of data havens and the EU's imposition of restrictions on certain data transfers to the United States where privacy regulation has not been deemed adequate, either of which could pose significant obstacles to overseas trade.[9] The levels of privacy protection provided in the United States and the European Union must be harmonized, or at least recognized as equivalent, in order to maintain the integrity of global financial markets.[10]

It may be debated how the international privacy standards should be determined. It is currently unclear whether the EU's efforts to enforce its Directive will set the global standard or whether the standard will emerge as a hybrid of the data protection practices of several large commercial countries. Some have expressed skepticism as to the feasibility of establishing a standard through international treaties,[11] yet others believe that such voluntary

5. The European countries that currently belong to the EU are: Austria, Belgium, Cyprus, Czech Republic, Estonia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

6. Council Directive 95/46/EC 24, 1995 O.J. (L 281) 31 [hereinafter Data Protection Directive].

7. Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT'L L. 655, 656 (2002).

8. *Id.*

9. In 2002, two-way cross-border trade in goods and services amounted to more than €650 billion, and transatlantic trade represented 39% of EU and 35% of US total cross-border trade in services. *Hearing Before the H. Comm. on Financial Services*, 108th Cong. (May 13, 2004) (testimony of Alexander Schaub, Director–General, DG Internal Market of the European Commission), http://europa.eu.int/comm/internal_market/finances/docs/general/2004-05-13-testimony_en.pdf.

10. *See* CATE, *supra* note 4, at 129.

11. Marcia Cope Huie, Stephen F. Laribee, & Stephen D. Hogan, *The Right to Privacy in Personal Data: The EU Prods the US and the Controversy Continues*, 9 TULSA J. COMP. & INT'L L. 391, 402 (2002).

international consensus is necessary.[12]

Anchoring its data protection legislation in a fundamental human right to privacy, the EC Directive created a broad data protection framework applicable to almost all personal information held by any data controller in any sector of the economy. However, enforcement of the Directive has not been ideal for a number of reasons, including inconsistent Member State implementation. In the United States, privacy of personal information is not a fundamental or explicit Constitutional right. US privacy protection has emerged as a sectoral "skyline," with skyscrapers (high regulation) in some areas, such as the financial and health care industries, and tenements (lower regulation) in others.[13] Currently, federal privacy protections for consumers in the financial services sector are contained in the provisions in Title V of the Gramm-Leach-Bliley Financial Services Modernization Act (GLBA) of 1999, 15 U.S.C. §§ 6801-6809 (2006) and in the Fair Credit Reporting Act (FCRA) of 1970, 15 U.S.C. §§ 1681-1681u (2006), amended by the Fair and Accurate Credit Transactions Act (FACTA) of 2003 (2006). In addition, federal statutes, including the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693 (2006) and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f (2006), state law, self regulation, codes of conduct, and market mechanisms play a significant role in the actual privacy protections provided to customers of financial institutions.

This paper will outline the overall data protection standards and the enforcement mechanisms applicable to the financial services sectors in the United States and the EU with a view toward identifying the disparities in approaches and in functional privacy protections. It will offer key legal modifications that would enable the US financial services sector to qualify for a sectoral adequacy decision by the European Commission. Part II will focus on the US approach to data protection, illustrating the US reliance on a theory of self regulation, harm prevention, and active enforcement in the design of its sector-based privacy system. Part III will turn to the EU's approach to data protection, characterized most significantly by an emphasis on the concept of privacy as a fundamental human right and on stringent formal legal regulation with somewhat inconsistent enforcement.

Part IV will compare and contrast the two jurisdictions' regulatory systems using a functional similarity analysis, considering first the content of the privacy principles applicable to financial institutions and then actual enforcement in the United States and the EU. Despite differing conceptions of privacy, it is possible that two distinct approaches could lead to functionally equivalent protections for consumers. In the United States, a mixture of self-regulatory,

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12. As Professor Fred Cate stated, referring to the international agreement providing for global harmonization of copyright laws: "It is time for a Berne Convention for privacy." CATE, *supra* note 4, at 129.

13. David A. Tallman, *Financial Institutions and the Safe Harbor Agreement: Securing Cross-Border Financial Data Flows*, 34 LAW & POL'Y INT'L BUS. 747, 754 (2003) (citing email correspondence with Gregory Baer, former Assistant Secretary for Financial Institutions at the Treasury Department, December 31, 2002).

federal, and state legislative systems can give rise to real protections. On the other hand, Member States' varying implementations of the Directive may weaken its formal privacy protections, indicating that privacy in the EU is actually governed by less stringent standards than its Directive suggests. Logically, the EU should hold third countries only to those standards by which EU companies are actually required to abide. Finally, Part V will consider the Directive's restrictions on transfers to the United States and evaluate potential modifications of US data protection law that would ensure that the US financial services sector provides "adequate protection" for personal data, indicating why such a determination is important given the current stalemate.

I conclude that, if the United States makes a few key amendments to the applicable federal laws, it would be appropriate for the EU to make a sectoral adequacy determination for financial services based on the entirety of legal and other regulatory protections afforded in that sector in the United States.

II.
REGULATION OF FINANCIAL PRIVACY IN THE US

A. Historical Overview of Financial Privacy Regulation

Although the United States has been credited with inventing the concept of individual privacy with respect to government intrusions, information privacy is not explicit in the Constitution and may even run counter to the First Amendment's protection of free information flows.[14] Privacy is not perceived as an absolute, fundamental human right, equivalent to liberty or equality.[15] Rather, information privacy laws are generally adopted because of a perceived need to protect against specific abuses of private personal information, risk of which must be balanced against the benefits that result from increased efficiency of information sharing. Some have described the limits of privacy protection in the United States as being shaped by the strength of the external forces of the time, such as the fear of terrorism after September 11, 2001, rather than by any intrinsic or fundamental value.[16] The US legal tradition breeds a reluctance to regulate the private sector absent a demonstrated need, and there is generally

14. *See* CATE, *supra* note 4, at 58. The concept of privacy is often traced to Brandeis & Warren's article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See* DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 306 (1989) (stating that "the United States invented the concept of a legal right to privacy"). In the public sector, the debate over invasions of privacy centers on the Fourth Amendment, in particular the idea that the zone of protected privacy is defined by both the individual's actual, subjective expectation of privacy and the extent to which that expectation was "one that society was prepared to recognize as reasonable." United States v. Katz, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

15. CATE, *supra* note 4, at 56-57. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court applied intermediate scrutiny to a privacy-based challenge because strict scrutiny was reserved for laws touching on 'fundamental' interests.

16. Oliver Ireland & Rachel Howell, *The Fear Factor: Privacy, Fear, and the Changing Hegemony of the American People and the Right to Privacy*, 29 N.C.J. INT'L L. & COM. REG. 671, 688-89 (2004).

greater concern about government than private sector excesses.[17] As Professor Fred Cate stated, "Regulation of privacy in the United States has focused on preventing the uses of information that harm consumers."[18]

In the financial services industry, the harms arising from information sharing include increased likelihood of fraud through unauthorized collection, use or transfer of information (including, surreptitious monitoring of personal habits, profiling, identity theft, telemarketing, denying benefits based on inaccurate information), and retaining harmful information indefinitely. Against these harms must be measured the benefits of information sharing, which include expanding availability and reducing delays and costs of consumer credit, identifying and meeting consumer needs, promoting competition, enhancing customer convenience and service, targeting interested consumers, and preventing fraud. While the financial services industry has generally resisted costly privacy protection measures, there is some evidence that more stringent privacy policies can actually benefit companies because consumers value their privacy and are willing to pay for it. For this reason, the banking industry has historically adhered to voluntary standards of confidentiality.[19]

Consistent with this balancing approach, US financial privacy regulation is strongest in the areas that are most likely to give rise to unauthorized uses or abuses of personal information. However, the underlying substantive ideology of privacy protection, initially codified in the 1973 "Code of Fair Information Practices," [20] is similar to the EU's fundamental principles because the United

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17. BARBARA S. WELLBERY, BRIDGING THE DIFFERENCE: THE SAFE HARBOR AND INFORMATION PRIVACY IN THE UNITED STATES AND THE EUROPEAN UNION 4 (2001). After the terrorist attacks of September 11, 2001, the US enacted the USA PATRIOT Act, which has caused some tension between the US and the EU with respect, for example, to the privacy of EU citizens traveling to the US. *See, e.g.*, the Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection. *See also* Council Decision of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (2004/496/EC).

18. CATE, *supra* note 1, at 4.

19. A recent study indicates that customers who have more confidence in their financial institutions' privacy policies are substantially more likely to engage in other financial services, such as online banking. Peter Swire, *Efficient Confidentiality for Privacy*, Brookings—Wharton Papers on Financial Services (2003).

20. U.S. Dep't of Health, Educ. & Welfare, Records, Computers, and the Rights of Citizens: *Report of the Secretary's Advisory Committee on Automated Personal Data Systems* xx-xxi (1973). The Code of Fair Information Practices is based on the following five principles:

(1) There must be no personal data-record-keeping systems whose very existence is secret.

(2) There must be a way for an individual to find out what information about him is in a record and how it is used.

(3) There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.

(4) There must be away for an individual to correct or amend a record of identifiable information about him.

(5) Any organization creating, maintaining, using or disseminating records of identifiable

States adopted the 1980 Organization for Economic Cooperation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, [21] on which the EU privacy principles are also based. Most recently, in 1998, the Federal Trade Commission (FTC) articulated the core principles of US privacy as notice/awareness, choice/consent, access/participation, integrity/security, and enforcement/redress.[22] Notice has been interpreted as the "most fundamental principle" because, "without notice, a consumer cannot make an informed decision as to whether and to what extent to disclose personal information."[23]

While US federal privacy law exists in several areas in addition to financial services, it does not exist comprehensively.[24] Certain information sharing between financial institutions is regulated under the Bank Secrecy Act, as amended by the USA PATRIOT Act.[25] The insurance industry is regulated by state statutes, most of which have adopted implementing regulations and information safeguards pursuant to GLBA or the National Association of Insurance Commissioners (NAIC) Model Codes of 2000 or of 1982.[26]

A series of events helped to put privacy on the Congressional agenda in 1999, pending the passage of the Gramm-Leach-Bliley Act. First, the GLBA was designed to "modernize" financial services by doing away with regulations preventing the merger of banks, stock brokerage firms, and insurance companies.[27] New possibilities for mergers raised significant concerns that the

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personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.

21. Signed by the US in 1980 and ratified at the Ottawa OECD Conference in September 1998.

22. Peter P. Swire, *The Surprising Virtues of the New Financial Privacy Law*, 86 MINN. L. REV. 1263, 1266 (2002).

23. Federal Trade Commission, *Privacy Online: A Report to Congress* 7 (1998).

24. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (2006); Family Educational Right to Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232g (2006); Electronic Fund Transfer Act of 1978, 15 U.S.C. §§ 1693-1693r (2006); Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2006); Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (2006); Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 U.S.C. § 1320d (2006); Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1028 (2006); and Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-25 (2006). The statute that is broadest in scope and thus most similar to the EU Directive is the Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6508 (2006).

25. Section 314(b) of the USA PATRIOT Act permits financial institutions, upon providing notice to the U.S. Department of the Treasury, to share information with one another in order to identify and report to the federal government activities that may involve money laundering or terrorist activity. More specifically, the BSA authorizes the Treasury to require financial institutions to maintain records of personal financial transactions that "have a high degree of usefulness in criminal, tax and regulatory investigations and proceedings" and to report "suspicious transactions relevant to a possible violation of law or regulation." Again, because this Act deals with governmental, rather than private, intrusion into customer privacy, it is outside the scope of this discussion.

26. *See* GAO Report, *Financial Privacy: Status of State Actions on Gramm-Leach-Bliley Act's Privacy Provisions*, GAO-02-361 (2002).

27. *See* Glass-Steagall Act of 1933, 12 U.S.C. § 227 (2006) (prohibited national and state banks from affiliating with securities companies); Bank Holding Company Act (BHCA) of 1956, as amended, 12 U.S.C. § 1841 (2006) (prohibited a bank from controlling a non-bank company); and

new Financial Holding Companies would have access to large amounts of personal information about their customers, which they could consolidate, analyze, and sell with no restrictions.[28] Internationally, the EU's 1995 Data Protection Directive, which came into effect in 1998, put pressure on lawmakers to devise a privacy system that would be deemed "adequate" by the EU. In addition, a series of high-profile cases involving marketing abuses, credit fraud and identity theft sharpened the debate and fueled consumer lobbying.[29] Surveys indicated that 89% of consumers were concerned about threats to their privacy in relation to financial services.[30] Finally, in Congress, much support for the Markey Amendment, creating the privacy provisions in Title V of the GLBA, came from representatives who had themselves been the victims of identity theft and other financial fraud.[31] The unprecedented level of detail in financial records, combined with the possibility of comprehensive matching with other databases as a result of consolidation, indicated that self regulation alone might not be adequate to combat the rising potential for widespread abuse of personal information.[32] Although compliance with consumer expectations of privacy is imperative in competitive markets, companies may have systematic incentives to overuse personal information where customers have imperfect information about privacy practices and thus will not find out about abuses.[33]

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the Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. § 226 (2006), an amendment to the BHCA (prohibited banks from conducting general insurance underwriting or agency activities).

28. As pressure increased to develop a more comprehensive privacy regime in the US, more than 12% of all bills introduced in the 104th Congress included provisions on a wide range of privacy issues. CATE, *supra* note 4, at 131.

29. NationsBank paid civil penalties totaling $7 million to the SEC and other agencies, plus millions more in private class action settlements, over its sharing of confidential bank accountholder information with an affiliated securities firm. In addition, Minnesota Attorney General Mike Hatch sued U.S. Bank and its holding company in 1999, accusing them of having sold their customers' private, confidential information to MemberWorks, Inc., a telemarketing company, for $4 million dollars plus commissions on sales made by MemberWorks to those customers. *See The Gramm-Leach-Bliley Act*, Electronic Privacy Information Center, http://www.epic.org/privacy/glba (last visited March 13, 2006). *See also* Mark Huffman, *Hard to Escape from Negative Option Trading*, CONSUMERAFFAIRS.COM, Oct. 6, 2005, http://www.consumeraffairs.com/news04/2005/vertrue.html (noting, "[i]n June 1999 Minnesota Attorney General Mike Hatch sued US Bank. . . . The state reached a settlement, under which the bank paid $3 million and agreed to stop sharing customers' financial information to marketers of non-financial products, to give customers notice and an opportunity to "opt out" of the sale of their financial information to market financial products, and to provide certain refunds to customers charged by telemarketers who bought their account numbers").

30. Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. REV. 847, 849 (1998).

31. Representative Joe Barton (R-TX) provided crucial and unexpected support for the Markey Amendment when his address was sold to Victoria's Secret by his credit union and, to his (and his wife's) great shock, he began to receive Victoria's Secret catalogues at his Washington home. Chris Jay Hoofnagle and Emily Honig, *Victoria's Secret and Financial Privacy*, Electronic Privacy Information Center (last updated January 25, 2005), http://www.epic.org/privacy/glba/victoriassecret.html (last visited March 16, 2006).

32. The 1998 FTC Report found that only 16% of banks had privacy notices or policies on their websites, and there was empirical uncertainty about how self-regulatory codes were improving practice. Swire, *supra* note 22, at 1284.

33. *See* PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 8 (1998).

In addition, costs of bargaining for the desired level of privacy may be high.[34]

B. Title V of the Gramm-Leach-Bliley Act

The core privacy protections of the GLBA's Title V, Subtitle A are marketing disclosure, notice, choice, security, and enforcement. Starting from the premise that each financial institution has "an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information,"[35] the GLBA sets out three principal requirements for financial institutions.

First, such institutions must provide customers with "clear and conspicuous" notices describing their information-sharing procedures, both at the initiation of the customer relationship and annually thereafter.[36] The notices must include the financial institutions' policies and practices of disclosing nonpublic personal information to affiliates and nonaffiliated third parties, protecting such information, and disposing of such information after the customer relationship is terminated. Second, financial institutions must develop precautions to ensure the security and confidentiality of customer records and information, protect against anticipated threats or hazards to the security or integrity of such records, and protect against unauthorized access to or use of such records that could substantially harm or inconvenience a customer. Finally, subject to certain exemptions, financial institutions may not disclose nonpublic personal information about a customer to any nonaffiliated third party unless customers are given notice and a reasonable opportunity to direct that such information not be shared ("opt out"). For example, financial institutions may not disclose customer account numbers, such as credit card numbers, to any nonaffiliated third party for marketing use. Although the GLBA does not permit customers to prevent disclosure to corporate affiliates, disclosures of certain information to affiliates may be subject to the notice and opt-out provisions of the FCRA. In addition, anti-fraud, or "pretexting," provisions in Subtitle B round out the scope of GLBA's Title V coverage.[37]

The GLBA privacy requirements apply to a broad range of "financial institutions,"[38] including any bank, credit union, securities entity, insurance company, or other business that engages in activities that are "financial in

34. *See id.*

35. 15 U.S.C. § 6801(a) (2006).

36. *Id.*

37. Title V, Subtitle B of the GLBA prohibits "pretexting," or using false, fictitious or fraudulent statements or documents, or forged, counterfeit, lost or stolen documents in order to collect customer information from a financial institution or directly from a customer. The FTC regularly reports to Congress on its enforcement actions taken pursuant to this Subtitle. However, because Subtitle B deals with fraud and other criminal activities that are dealt with by law enforcement agencies and the FTC, it is, for the most part, outside the scope of this discussion.

38. Any institution the business of which is engaging in financial activities as described in 12 USC § 1843(k). 15 U.S.C. § 6809(3)(A) (2006).

nature" under the BHCA.[39] The Act's requirements are intended to protect "consumers,"—consumers are defined as people who provide nonpublic personal information to financial institutions primarily for personal, family, or household purposes—rather than corporate clients.[40] "Nonpublic personal information" is defined as "personally identifiable financial information" obtained by the financial institution from the consumer, in connection with a transaction performed for the consumer, or otherwise.[41] It includes consumer lists derived from nonpublic personally identifiable information, information on applications to obtain financial services, account histories, and the fact that an individual is or was a customer, as well as names, addresses, telephone numbers, and Social Security Numbers. It excludes publicly available information.

1. Notice

The GLBA notices, provided to consumers at the initiation of the relationship and annually thereafter, must contain (1) the institution's practices with respect to disclosing nonpublic personal information to nonaffiliated third parties, including the categories of persons to whom the information is or may be disclosed, with the exceptions of disclosures under the joint marketing exception; (2) the categories of nonpublic personal information that are collected by the financial institution; (3) the policies of the institution which are intended to protect the confidentiality and security of nonpublic personal information; and (4) any disclosures required by the FCRA.[42]

2. Choice

The GLBA adopts a basic opt-out rule, which enables customers to object to sharing personal data with nonaffiliated third parties.[43] However, there are two main exceptions to the opt-out requirement: consumers may not prevent sharing with non-affiliates for joint marketing purposes or for certain other generally accepted statutory exceptions. Furthermore, while financial institutions must give notice before sharing with affiliates, consumers may not opt out of such sharing.[44] The default rule of opting out rather than opting in represents a major victory for the industry. Studies show that the majority of consumers do not respond at all,[45] and the costs of an opt-in rule would in some cases be prohibitive. Third parties that receive information pursuant to the notice and opt-out provision may reuse the information for any internal purpose,

39. 15 U.S.C. § 6809(3) (2006); 12 U.S.C. § 1843(k) (2006).
40. 15 U.S.C. § 6809(9) (2006). *See, e.g.*, 12 CFR 40.3(e)(1).
41. 15 U.S.C. § 6809(4)(a) (2006).
42. 15 U.S.C. § 6803(b) (2006).
43. 15 U.S.C. § 6802(b)(1) (2006).
44. 15 U.S.C. § 6802(a) (2006).
45. The industry figure for opting out in 2001 was 5%. Swire, *supra* note 22, at 1267. *See also* Fred H. Cate & Michael E. Staten, *Protecting Privacy in the New Millennium: The Fallacy of "Opt-In,"* http://www.the-dma.org/isec/optin.shtml (last visited Apr. 27, 2005).

including marketing. Institutions are not required to monitor third party reuse of information.[46] There is a blanket prohibition on disclosures of personal account numbers or other access numbers to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.[47]

i. Joint Marketing Exception

In the context of nonaffiliate sharing, the "joint marketing exception" allows financial institutions to share personal information with a partner without providing the customer with notice or choice so that partner may perform "services for or functions on behalf of" the financial institution.[48] These services may include marketing of the financial institution's own products or services or those offered pursuant to joint agreements between two or more financial institutions subject to GLBA. However, in order to qualify, the financial institution must (a) fully disclose to the customer that it is providing such information to a third party and (b) enter into a contractual agreement with the third party that requires the third party to maintain the confidentiality of such information.[49] Some federal agency guidelines pursuant to this exception also require the contract with a third party to prohibit the third party from disclosing or using the information for any purpose other than that for which the bank or thrift disclosed the information. For example, the banking agencies' Privacy Rule[50] limits redisclosure and reuse of information disclosed under a GLBA joint marketing exception. Under that rule, the third party may disclose and use the information pursuant to another GLBA exception in the ordinary course of business, but it may only use it to carry out the activity covered by the exception under which it received the information.[51] Finally, the GLBA precludes recipients from sharing non-public information pursuant to a chain of third-party joint marketing agreements.

ii. Statutory Exceptions

The GLBA permits disclosure of nonpublic personal information without providing notice or choice if one of eight conditions is met.[52] These statutory exceptions are reasonably well-accepted by all the stake holders in the privacy

46. *See* Final Privacy Rule of the Banking Agencies, 65 Fed. Reg. 35,162 (June 1, 2000).
47. 15 U.S.C. § 6802(d) (2006).
48. 15 U.S.C. § 6802 (b)(2) (2006).
49. *Id.*
50. *See* 65 Fed. Reg. 35,162, *supra* note 46.
51. *See* 65 Fed. Reg. 35,161, *available at* http://www.occ.treas.gov/ftp/regs/2000-21b.txt (last visited Apr. 27, 2005). *See* L. Richard Fischer, *The Gramm-Leach-Bliley Act and its Implementation*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, Financial Services Modernization (2003). *See also* 12 C.F.R. § 216.13(a)(ii) (2002).
52. 15 U.S.C. § 6802(e) (2006).

debate.[53] One such exception is that transfers may be carried out without notice as "necessary to effect, administer, or enforce" a transaction requested or authorized by the consumer.[54] The requirement of necessity has been interpreted broadly to encompass situations where disclosure is either required or is "appropriate" to enforce the right of the financial institution or whoever is responsible for carrying out the transaction. Activities considered "necessary" include: engaging in related business, servicing related claims, providing records of the transaction, and fulfilling the consumer's insurance requests.[55] Notice is not required if the consumer consents or if information sharing is necessary to protect the confidentiality or security of the financial institution's records (that is, to prevent fraud, unauthorized transactions, or other claims that could give rise to liability). In addition, financial institutions may transfer nonpublic personal information to certain regulators, such as insurance rate advisory organizations, attorneys, accountants, and auditors. Disclosures permitted or required under other laws, including disclosures made to a Credit Reporting Agency (CRA) under the FCRA, to law enforcement agencies, to self-regulatory organizations, or for an investigation of a matter related to public safety also fall under the exception to the notice and opt-out requirements. Finally, disclosures are permitted in connection with the sale of a business unit or in the context of a governmental investigation.[56]

A third party that receives nonpublic personal information pursuant to one of the statutory exceptions may disclose the information to its affiliates or to affiliates of the financial institution from which the information was received. It may also use the information and disclose it to nonaffiliates under one of the statutory exceptions. The third party's affiliates may only disclose and use the information to the extent permissible for the original third party. The same general rules concerning limits on reuse and disclosure apply to non-financial third parties that receive information from financial institutions.[57] However, there may be difficulties concerning enforcement against such non-financial institutions from a practical point of view.

The GLBA does not provide individuals with the right to access data about themselves in order to contest that data's accuracy and completeness, but certain access rights may be guaranteed under the FCRA. However, a financial institution must disclose to a consumer the categories of nonpublic personal information shared and the categories of affiliates and nonaffiliated third parties with whom it is/was shared.

3. Security

The notion of "security" under the GLBA requires that financial institutions

53. Swire, *supra* note 22, at 1268.
54. 15 U.S.C. § 6802(e)(1) (2006).
55. *See* 16 C.F.R 313.14.
56. 15 U.S.C. § 6802(e) (2006).
57. 65 Fed. Reg. 35,162, *supra* note 46.

implement managerial and technical measures to protect against loss and unauthorized access, destruction, use, or disclosure of data. The GLBA charges the agencies responsible for enforcing its provisions with establishing appropriate standards "(1) to insure [sic] the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer."[58] For example, the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission (CFTC) require the institutions they oversee to adopt policies and procedures implementing these safeguards but do not prescribe specific procedures or policies. While it does offer suggestions for compliance, the SEC believes that it is more appropriate for each institution to tailor its procedures to its own system of information gathering and the needs of its own customers.[59] The Federal Trade Commission (FTC), on the other hand, issued a Safeguards Rule in 2002 and is active in enforcing it.[60]

4. Enforcement

Ensuring financial institutions' compliance with GLBA, Title V, Subtitle A, is assigned to the five federal banking agencies,[61] as well as to the SEC and the CFTC,[62] with residual oversight power granted to the FTC. These agencies take enforcement actions pursuant to their regulations and guidelines.[63] As in other areas of financial regulation, many agencies follow a highly self-regulatory approach, allowing firms to devise their own specific practices, and oversight generally entails ensuring that the safeguards provided are adequate. The GLBA also calls upon state insurance authorities to adopt implementing regulations and to enforce its provisions. There is no private right of action for consumers to claim damages resulting from privacy violations.

Enforcement of financial privacy regulation under the GLBA is complex because eight federal regulators must coordinate similar regulations implementing the GLBA's disclosure-related requirements and establishing safeguarding standards. For holding companies containing different financial

58. 15 U.S.C. §§ 6801(b)(1)-(3) (2006).

59. CCH Business and Finance Group, 1 FINANCIAL PRIVACY LAW GUIDE (2001), ¶ 3041.

60. *See* 16 C.F.R pt. 313; 16 C.F.R pt. 314.

61. The Federal Reserve Board of Governors ("FRB"), the Office of Thrift Supervision ("OTS"), the National Credit Union Administration ("NCUA"), the Federal Deposit Insurance Corporation ("FDIC"), and the Comptroller of the Currency ("OCC").

62. Entities subject to the CFTC's jurisdiction became subject to the privacy provisions of the GLBA when Congress enacted the Commodity Futures Modernization Act of 2000, 7 U.S.C. § 1 (2006).

63. On June 1, 2000, the federal banking regulators issued final regulations implementing the privacy provisions of the GLBA. They are codified at 12 C.F.R pt. 40 (OCC); 12 C.F.R pt. 216 (FRB); 12 C.F.R pt. 332 (FDIC); 12 C.F.R pt. 716 (NCUA); 12 C.F.R pt. 573 (OTS). *See* 65 Fed. Reg. 35,162, *supra* note 46. Similar regulations for the remaining enforcement agencies are codified at 16 C.F.R pt. 313 (FTC); 17 C.F.R pt. 248 (SEC); 17 C.F.R pt. 160 (CFTC).

services companies under the jurisdiction of multiple regulators, oversight by multiple federal regulators could be problematic. The regulators may deploy the full powers that they use in other enforcement actions,[64] and the FTC may use its powers to enforce against unfair or deceptive trading practices committed by financial institutions not subject to oversight by one of the other agencies.

Finally, a layer of state regulation and enforcement that is more stringent than GLBA may overlay the federal regulation. The GLBA's privacy provisions generally preempt state law to the extent that state law is inconsistent with those provisions.[65] However, to the extent that state laws afford greater privacy protection, they are deemed not inconsistent with the GLBA. In fact, many states do have stronger privacy protections, including opt-in regimes.[66] The FTC, which has authority to make preemption determinations under the statute, has held that state opt-in requirements are not preempted by the GLBA because they provide greater consumer protection. The GLBA's preemption provision allowing for stricter state regulation, known as the Sarbanes Amendment, was hailed by Minnesota Attorney General Mike Hatch as the "best hope to secure protections for consumers."[67] More stringent regulation by large states may raise national compliance costs for firms, and stricter state laws may provide private rights of action where the GLBA does not.

C. The Fair Credit Reporting Act

The FCRA also applies to personal information and, in particular, to the information contained in consumer reports. Consumer reports are defined as any communication by a Credit Reporting Agency (CRA) of any information relating to a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used or may be used in deciding the consumer's suitability for employment or benefits, or eligibility for credit or insurance for personal, family or household purposes.[68] It targets the *uses* of information, focusing on preventing harm from the subsequent use of credit reports rather than on limiting or allowing individuals to control collection.[69] The core principles of the FCRA are notice, choice, and access.

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64. Swire, *supra* note 22, at 1271.

65. 15 U.S.C. § 6807(a) (2006).

66. For example, the California Security Breach Information Act, SB 1386, now requires notification of consumers in the event of certain security systems breaches; Vermont's Department of Banking, Insurance, Securities, and Health Care Administration adopted opt-in provisions for information sharing, and Alaska (ALASKA STAT. § 06.05.175), Connecticut (CONN. GEN. STAT. ANN. § 36a-42), Illinois (205 ILL. COMP. STAT. ANN. 5/48.1) and Maryland (MD. CODE ANN. § 1-301) require some form of opt-in consent before financial information can be shared.

67. *Financial Privacy and Consumer Protection: Second Session on the Growing Concerns Over the Way Consumers' Personal and Financial Information Is Being Shared or Sold by Their Financial Institutions: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 107th Cong. (September 19, 2002).

68. 15 U.S.C. § 1681a(d)(1) (2006).

69. Testimony of Fred Cate, *supra* note 67, at 7.

The FCRA divides financial information into two categories: (1) experience information and (2) eligibility, or application, information. While the FCRA does not restrict institutions from transferring identification, transaction, and experience information to affiliates or third parties, such information is covered as "nonpublic personal information" under the GLBA.

Before eligibility information can be shared with affiliates, the FCRA requires that financial institutions provide customers with notice and a reasonable opportunity to opt out. If the information is disclosed to a nonaffiliated third party, the financial institution becomes subject to significantly increased regulation as a CRA. Financial institutions must include the FCRA affiliate sharing opt-out notice along with its GLBA privacy notice.[70] However, there are exceptions to the FCRA's notice and opt-out provisions for insurance disclosures or disclosures permitted by government regulations.[71] Affiliates are prohibited from re-disclosing information received pursuant to an exception. The FCRA requires opt-in consent for very sensitive data sharing, including the transfer of personal medical information.[72]

The Fair and Accurate Credit Transactions Act's (FACTA) amendments to the FCRA provide that an entity that receives eligibility or experience information from an affiliate may not use that information to make marketing solicitations without providing clear and conspicuous notice to the consumer that information received from affiliates may be used for marketing purposes. The consumer must also have an opportunity and a simple method available to opt out of the sharing. A consumer may prohibit use of all information shared by affiliates for marketing purposes (including both eligibility and experience information generally covered by GLBA), subject to certain exemptions, such as when the affiliate receiving the information has a preexisting business relationship with the consumer.[73] The consumer's election to opt out is effective for five years but may be revoked, and states are preempted from regulating marketing covered by this provision. The FACTA legislation does not limit the ability of affiliates to share information, nor does it limit their ability to establish and maintain a database of information shared by affiliates; rather, it only requires notice of sharing before the information is used to send marketing solicitations.[74]

The FCRA provides consumers with access to almost all the information

70. Banking Agencies' Privacy Rule, *supra* note 46.

71. 15 U.S.C. § 6802(e) (2006).

72. FRED H. CATE, ROBERT E. LITAN, MICHAEL STATEN, & PETER WALLISON, FINANCIAL PRIVACY, CONSUMER PROSPERITY, AND THE PUBLIC GOOD 9 (2003).

73. Other exceptions include: when the information is used to perform services on behalf of an affiliate, unless the affiliate would not be permitted to send the solicitation itself because of a consumer opt out; if the information is used to respond to contact initiated by the consumer or in response to solicitations authorized or requested by the consumer; and to comply with state insurance laws regarding unfair discrimination. L. Richard Fischer & Marcia Z. Sullivan, *Privacy and the Fair and Accurate Transactions Act of 2003*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, Financial Services Institute 2004 (2004); CCH, *supra* note 59, at ¶ 10-062.

74. Ireland and Howell, *supra* note 16, at 688.

about them contained in CRA files and provides a mechanism by which they can have inaccurate or incomplete information removed or corrected. The Consumer Credit Reporting Reform Act of 1996 required credit reporting agencies to inform consumers of their legal rights under the FCRA and to delete any disputed data that they could not verify within 30 days, as well as comply with certain procedural requirements for correcting data and notifying recipients of disputed or inaccurate data.[75] Report users must notify consumers of adverse actions taken based on the report and inform them that they may obtain a free copy of the report and dispute its accuracy with the CRA. In 2003, the FACTA further increased customers' rights of access, giving consumers a right to obtain a free annual credit report from nationwide CRAs and to obtain credit scores.

Although the FCRA has been described as largely self-enforcing,[76] it is technically enforced by the FTC, which treats infringements of the FCRA as unfair or deceptive acts or practices in violation of the Federal Trade Commission Act (FTCA). Remedies for such practices include cease and desist orders, injunctions, and civil penalties.[77] CRAs generally are required to follow "reasonable procedures" to ensure that their actions comply with the Act.[78] Consumer suits for defamation, invasion of privacy and negligence in reporting information are generally prohibited unless false information was provided maliciously with the intent to injure the consumer.[79] While prior to the GLBA, the FCRA was solely complaint-driven, the GLBA now allows for agency enforcement of the FCRA via the examination process.[80]

Generally, the FCRA does not preempt state law unless the law is inconsistent with the FCRA. However, states may not alter certain FCRA provisions, even to provide more stringent regulation. For example, unalterable, or "uniform," provisions include those that address information sharing by affiliates, certain obligations of consumer report users, the rules placing limits on the age of information included in a report, and the responsibilities of persons who furnish information to CRAs.[81] The FACTA permanently reauthorized the FCRA's national uniformity provisions, which were expected to sunset at the end of 2003. After the FACTA, the FCRA's consumer right to opt out of marketing solicitations by affiliates, as well as its requirement that creditors provide risk-based pricing notices and credit score disclosures also may not be altered by the states.[82] Many of the important benefits to individuals and the economy from the current US reporting system, including greater access to

75. CATE ET AL., *supra* note 72, at 6.
76. *Id.* at 5.
77. *See* 16 CFR pt. 601.
78. 15 U.S.C. § 1681b (2006).
79. 15 U.S.C. § 1681r (2006).
80. Ann Graham, *Fair Credit Reporting Act - Privacy Issues Give it New Focus*, TEX. BANKING 52 (2000).
81. In *Bank of America v. City of Daly City*, 279 F. Supp. 2d 1118 (N.D. Cal. 2003), a California District Court held that the affiliate sharing preemption provision of the federal FCRA preempts local privacy ordinances to the extent they purport to address affiliate sharing.
82. CCH, *supra* note 59, ¶ 10-075.

credit, more efficient markets, more accurate decision making, and consumer mobility and choice, have been said to result from the FCRA's national character.[83]

The FACTA may limit consumers' abilities to enforce their rights under the FCRA. For example, it expands limits on liability for violations of the FCRA and restrains States from bringing actions for damages on behalf of their residents.[84] Not all of the FACTA amendments have yet reached their effective dates.

D. State Law, Self Regulation, and the Internet

In addition to federal laws, States have also enacted financial privacy laws. Prior to the GLBA, several court decisions established a limited common law duty of confidentiality. For example, state courts have found it implicit in a bank's contract with its customers that the bank could not disclose information to third parties concerning the customer's account.[85]

Furthermore, in response to consumer demand for privacy, many financial services providers have established privacy-related products and services, as well as options for individuals to control the use of their information, beyond what is required by law. In 2002, Professor Fred Cate stated: "Banks use privacy protection to compete for consumer business and have developed best practices for a variety of privacy protections. Citigroup has released telemarketing best practices developed with State attorneys general."[86] Industry groups, such as the American Bankers Association (ABA), the Bankers Roundtable, and Consumer Bankers Association of America, announced joint industry privacy principles in 1997.[87]

Independent third-party enforcement mechanisms promote compliance with self-regulatory codes. Online groups, such as BBB On-Line and TRUSTe, as well as the FTC and other federal agencies, have broad powers under the FTCA to enforce against "unfair and deceptive acts or practices," either by seeking injunctive relief or providing redress for injured consumers. All of the states

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83. CATE ET AL., *supra* note 72, at 23.

84. *See* National Consumer Law Center, *Analysis of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159 (2003)*, http://www.consumerlaw.org/initiatives/facta/nclc_analysis.shtml (last visited March 16, 2006).

85. *See, e.g.*, Peterson v. Idaho First National Bank, 367 P.2d 284 (Idaho 1961).

86. Testimony of Fred Cate, *supra* note 67.

87. The ABA's eight privacy principles include using, collecting and retaining customer information only if the customer will benefit; establishing and maintaining customer financial information that is as accurate, current and complete as possible; protecting information via established security procedures; restricting disclosure of account information to situations where (a) the information is provided to help complete a customer initiated transaction; (b) the customer requests it; (c) the disclosure is required by/or allowed by law (i.e., investigation of fraudulent activity); or (d) the customer has been informed about the possibility of such disclosure and has the opportunity to "opt out"; and making an institution's privacy principles or policies known to the customer. *See* American Banking Association, "Financial Privacy in America: A Review of Consumer Financial Issues" (June 1998), http://www.aba.com/About+ABA/ABA_privprinpublic.htm (last visited Apr. 27, 2005).

have enacted laws similar to the FTCA to prevent unfair or deceptive acts.

Furthermore, better privacy policies, although reducing the ease of information sharing, may even enhance efficiency. As Swire explains, because of increased consumer trust, banks with better privacy policies may experience higher rates of customer participation in other services, such as online banking, and banks that provide clear and explicit notice of the customer of the right to opt out may not experience a higher rate of opt-out requests.[88] Stronger privacy practices have even been correlated with a lower likelihood of customers exercising their right to block data sharing.[89]

Electronic and online banking pose a range of new problems concerning the security of consumer information provided via the Internet. The FTC, which regulates individual and commercial online privacy, found in 2000 in its Report on Online Privacy that industry self regulation was inadequate to counter the significant privacy concerns raised by the Internet, and it called for federal privacy legislation to address this issue.[90] However, to date, most of the online privacy statutes are directed toward children or toward specific abuses[91] and the FTC has not imposed a general privacy policy disclosure requirement on website operators, focusing instead on whether a company's practices are consistent with its privacy policy. However, states may be more aggressive in passing online privacy legislation.[92]

E. Insurance

The GLBA calls on state insurance authorities to enforce its provisions by adopting information disclosure and safeguards regulations. To facilitate implementation, the National Association of Insurance Commissioners issued a Model Regulation in 2000, the "Privacy of Consumer Financial and Health Information Regulation," that substantially conforms to the regulations adopted by the federal agencies. The 2000 regulation follows the Insurance Information and Privacy Protection Model Act adopted by the NAIC in 1982, which established an affirmative consent ("opt-in") standard for disclosure of consumers' personal information.[93] Currently, 35 states have adopted the 2000

88. *See* Swire, *supra* note 19.

89. For the top five banks, where customers reported a much higher awareness of the privacy policy, only 8% said that they had ever requested that their bank stop using or sharing their personal information. By contrast, for the bottom five banks, where relatively few customers are even aware of the privacy policies, 14% of customers had prevented data sharing. *Id.*

90. *Privacy Online: Fair Information Practices in the Electronic Marketplace*, Federal Trade Commission Report to Congress (May 2000).

91. *See, e.g.*, the Children's Online Privacy Protection Act of 1998, *supra* note 24; the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-22 (2006).

92. California passed its own Online Privacy Protection Act of 2003, effective July 1, 2004, which requires Operators to post a privacy policy that includes specified information. CAL. BUS. &. PROF. CODE §§ 22575-79 (2004).

93. *See* Kyle Thomas Sammin, Note, *Any Port in a Storm: The Safe Harbor, The Gramm-Leach-Bliley Act, and the Problem of Privacy in Financial Services*, 36 GEO. WASH. INT'L L. REV. 653, 668 (2004).

Model Regulation, and the remaining states have amended the regulations they had in place pursuant to the 1982 Model Act.[94] Some states have opt-in requirements, or are otherwise more protective of consumer privacy than required by the GLBA.[95] The notice required by the 1982 Act is more detailed than that provided by the GLBA, but, like the GLBA, it contains no restriction on affiliate sharing.[96] The NAIC Act contains an "access" provision, and it provides for investigation of violations of security and enforcement provisions, providing individual remedies in some cases.[97]

III.
DATA PROTECTION IN THE EUROPEAN UNION

A. Historical Overview of Data Protection

The European right to privacy was initially articulated in the United Nations' (UN) Universal Declaration of Human Rights (1948)[98] and the landmark Council of Europe Convention on Human Rights and Fundamental Freedoms (1949).[99] This approach to information privacy in Europe is derived in part from invasions of privacy at the root of certain World War II abuses and in part from a tradition of prospective lawmaking that seeks to guard against future harms, particularly where social issues are concerned.[100] In 1968, the Council of Europe recognized the potential of the computer to threaten individual privacy,[101] and in 1970, the German State of Hesse adopted the world's first national data protection law.[102] Sweden's Data Bank Statute[103] followed swiftly on its heels in 1973, and by the end of the 1970s, seven members of the Council of Europe had adopted national data protection laws.

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94. *See* GAO Report, *supra* note 26, at 3.

95. *See, e.g.*, the New Mexico Privacy Rule, 13 NMAC 1.2.1 TO 28, *available at* http://www.nmprc.state.nm.us/insurance/pdf/insbul23003.pdf.

96. Sammin, *supra* note 93, at 668-69.

97. *Id.* at 669.

98. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Part I, at 71, U.N. Doc A/810 (1948). Article 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." Huie et al., *supra* note 11, at 441.

99. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). The Convention requires members to uphold democracy, human rights, and the rule of law. Art. 8(1) reads: "everyone has the right to respect for his private and family life, his home and his correspondence." *See* DAVID BAINBRIDGE, EC DATA PROTECTION DIRECTIVE 14 (1996).

100. Wellbery, *supra* note 17.

101. Patrick Cole, *New Challenges to the US Multinational Corporation in the European Economic Community: Data Protection Laws*, 17 N.Y.U. J. INT'L L. & POL. 893, 897-98 (1985). The Council began a two-year study by its Committee of Experts on Human Rights. The Committee of Experts produced Resolution 73(22), which contained recommendations regarding personal information stored in electronic data banks in the private sector.

102. BAINBRIDGE, *supra* note 99, at 14.

103. The Swedish statute protects data in automatic processing systems containing personal information and creates a Data Inspection Board. Cole, *supra* note 101, at 902.

However, compliance with national laws proved insufficient to protect consumer information as nation-states became increasingly part of a global financial network in which companies located their processing operations outside the country of origin.[104] National data protection legislation produced conflicting standards, and concerns about "data havens" and outsourcing emerged.

The OECD initiated the first attempt to implement privacy standards at an international level when, in September 1980, it adopted a recommendation urging member countries to take into account a set of eight guideline principles on the protection of privacy.[105] The problem with the OECD guidelines was that they were merely prefatory, with no mechanism for enforcement.[106] A year later, the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), which contains provisions similar to the Guidelines and emphasizes data protection as a key to personal privacy. Its provisions are still considered the blueprint for a minimum standard of protection in national law.[107] However, the binding force of a Council Directive was necessary. As data protection guarantees became increasingly important to trade, the Commission sought to create a regulatory framework to harmonize widely divergent national legislation, ensure proper functioning of the Single Market, and prevent states from enacting protectionist policies. The formal basis for the Data Protection Directive is the strong link between data processing and economic activity under Article 100a (now Article 95) of the EC Treaty (intended to ensure "the establishment and functioning of the Internal Market"). In 1995, the European Council adopted Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("Directive" or "Data Protection Directive"). The Directive required Member States to enact implementing legislation by 1998.[108]

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104. BAINBRIDGE, *supra* note 99, at 15.

105. *Id.* at 15-16. The OECD principles include: (a) collection limitation; (b) data quality; (c) purpose specification; (d) use limitation; (e) openness; (f) security safeguards; (g) individual participation; and (h) accountability.

106. John T. Soma, Stephen D. Rynerson, & Britney D. Beall-Eder, *An Analysis of the Use of Bilateral Agreements Between Transnational Trading Groups: The U.S./EU E-Commerce Privacy Safe Harbor*, 39 TEX. INT'L L.J. 171, 177 (2004).

107. Fred H. Cate, *Business Law Symposium: Entering a New Era in Telecommunications Law: Article: Privacy and Telecommunications*, 33 WAKE FOREST L. REV. 1 (1998).

108. In 1999, the Commission took France, Germany, Ireland, Luxembourg and the Netherlands to the European Court of Justice for failure to notify all the necessary measures to implement Directive 95/46. Currently, all of the Member States have notified compliance with the Directive, and the cases have been settled. In line with the Copenhagen criteria, the countries that joined the EU on May 1, 2004 transposed Directive 95/46/EC by the time of accession. However, in its First Report on the Implementation of the Directive, the Commission stated that further efforts would be needed to bring this legislation fully into line with all provisions of the Directive, particularly by establishing independent data protection supervisory authorities. While the range of existing supervisory authorities differs, "all the supervisory authorities lack the necessary resources and some also the necessary powers to ensure effective implementation of data protection legislation." *European Commission First report on the Implementation of the Data Protection*

Although each country locates the right to privacy in a range of traditions and legal and constitutional rights, privacy is widely considered by most European legal bodies as a "fundamental right." The Directive states that "the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy."[109] In 2000, the fundamental importance of data protection was reinforced in the European Charter of Fundamental Rights of the European Union of 2000.[110] Furthermore, the recently finalized Treaty Establishing a Constitution for Europe, signed on October 29, 2004, recognizes that "everyone has the right to the protection of personal data concerning him or her."[111] Privacy legislation is therefore not sector-dependent but applies absolutely to *all* personal data processing, whether by the government or by private entities. There are no privacy laws that apply uniquely to the financial services sector.[112]

B. Directive 95/46/EC on the Protection of Individuals withRregard to the Processing of Personal Data and on the Free Movement of Such Data

The Data Protection Directive serves the dual purpose of ensuring the free movement of personal data in the Internal Market and guaranteeing a uniformly high level of privacy protection for data subjects.[113] Directives in the EU are not directly binding but rather provide broad legal norms that must be implemented by Member States in national legislation. If the Commission considers that a Member State has failed to implement a directive appropriately in national law, it may challenge the State in the European Court of Justice ("ECJ").[114]

The Data Protection Directive outlines eight basic personal data protection principles, which are derived from the OECD Guidelines and Article 8 of Convention 108. First, the "purpose limitation" principle stipulates that data should be processed for a specific purpose and subsequently used or communicated only in ways consistent with that purpose. Second, the "data

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Directive (95/46/EC), at 17, COM (2003) 0265 (May 13, 2003).

109. Data Protection Directive, Preamble, at 10.

110. 2000/C 364/01, the European Council of Nice on the 6th of December of 2000. Chapter II on "Freedoms" provides that "everyone has the right to the protection of personal data concerning him or her." *Id.* art. 8(1). Furthermore, personal data must be "processed fairly for specified purposes and on the basis of the consent of the person concerned" or on another legitimate basis expressly granted by law. *Id.* art. 8(2). The Charter grants to every person the right of access to and rectification of data which has been collected concerning him or her. *Id.* art. 8(2). The Charter also specifies that compliance with data protection principles must be subject to control by an independent authority. *Id.* art. 8(3).

111. See Article I-51, entitled "Protection of Personal Data," *available at* http://www.europarl.org.uk/constitution/treatySingleColumn/p007-Constitution-Part1-Title6.htm.

112. An exception is the professional secrecy provision in the Banking Directive.

113. *See* Data Protection Directive art. 1.

114. *See* Treaty Establishing the European Community, art. 226, Nov. 10, 1997, 1997 O.J. (C 340) 3. Specific aspects of a directive may be found by the ECJ to be "directly applicable" to private citizens. For examples of cases brought against Member States for failure to implement the Data Protection Directive (95/46/EC), see *supra* note 108.

quality and proportionality" principle requires data to be accurate and, where necessary, kept up to date. Third, the "transparency" principle dictates that individuals should be informed of the purpose of the processing and the identity of the data controller. Fourth, the rights of "access, rectification and opposition" include the data subject's rights to obtain copies of all data relating to him or her that are processed, to rectify inaccurate data, and to object to processing in certain situations. Fifth, the "security" principle ensures that the data controller takes technical and organizational security measures appropriate to the risks of the processing; it also requires that processors acting under the authority of the controller process data only upon the controller's instructions. Sixth, the Directive's "restriction on onward transfers" to third countries that do not afford "adequate" levels of protection guarantees that the level of protection in the Community will not be undermined by controllers sending data abroad for processing. Seventh, additional protections must be applied to sensitive data, data used for marketing purposes, or data subject to automated processing. Finally, the Directive emphasizes enforcement and remedies for data subjects.

The Directive applies to "personal data," or "any information relating to an identified or identifiable natural person,"[115] if that data is processed "wholly or partly by automatic means" or as "part of a filing system."[116] The Directive does not cover "purely personal or household" use or processing in the course of an activity which falls outside the scope of Community law, such as public security, defense, and State security.[117] Member States differ as to whether corporate data should be treated as personal data,[118] and some States have further limited the scope of personal data.[119] The broad notion of "processing" refers to any operation or set of operations performed upon personal data.[120] The laws enacted pursuant to the Directive apply to "data controllers" or "processors" located in a Member State, in a territory subject to the Member State's laws, or elsewhere if the controller or processor makes use of equipment located on the territory of the Member State for purposes other than simple transmission.[121]

Member States may enact measures in contravention of the Directive if necessary in the interest of national security, defense, public security; the prevention, investigation, detection, and prosecution of criminal offences; an important economic or financial interest of a Member State or of the EU; a monitoring, inspection, or regulatory function connected with the exercise of

115. Data Protection Directive art. 2(a).
116. *Id.* art. 3(1).
117. *Id.* art. 3(2).
118. *See* Citigroup, *Review of the EU Data Protection Directive*, 22 August 2002, at 2.
119. In Britain, for example, "personal data" was found not to refer merely to a person's name mentioned in a document. *See* Durant v Financial Services Authority, [2003] EWCA (Civ) 1746, [1]-[81] (Eng.), *available at* http://www.hmcourts-service.gov.uk/judgmentsfiles/j2136/durant-v-fsa.htm.
120. Data Protection Directive art. 2(b).
121. *Id.* art. 4(1).

official authority; or the protection of the data subject or of the rights and freedoms of others.[122]

1. Purpose Limitation, Data Quality and Proportionality

Under the Directive, personal data must be processed "fairly and lawfully."[123] Article 6 specifies that data may be collected only "for specified, explicit and legitimate purposes," and it must not be "further processed in a way incompatible with those purposes," with a limited exception for data processed for historical, statistical or scientific reasons. Furthermore, the data must be "adequate, relevant and not excessive," given the purposes for which it is acquired. It must be accurate and, where necessary, "kept up to date." "Every reasonable step" must be taken to ensure that inaccurate or incomplete information is either erased or rectified. Finally, data must be kept in a form which permits identification of the data subject for "no longer than necessary" for the purposes for which it was collected or processed.[124]

Currently there is some tension between the different Member States' implementing legislation as to how long data may be kept before it must be deleted.[125] Furthermore, within some Member States, there are conflicts between the length of time that data must be retained under applicable financial law and the limits on the length of time it may be retained under the local Data Protection laws.[126] With respect to the "incompatible use" criterion, Member State laws vary in the range of uses they will permit. Some States provide more flexibility if the controller is a financial institution that already has a special duty of confidentiality.[127]

Data processing may occur only if the "data subject has unambiguously given his consent"[128] unless processing is necessary for one of several reasons. For example, processing may be necessary for the performance of a contract to which the data subject is a party; for compliance with a legal obligation to which the controller is subject; in order to protect the data subject's vital interests; for the performance of a task carried out in the public interest or in the exercise of official authority; or in order to serve the legitimate interests of the controller or a third party to whom the data is disclosed.[129] However, these exemptions do not enable processing where the interests served are overridden by the fundamental rights and freedoms of the data subject. The "unambiguous consent" standard has been interpreted as an opt-out requirement for all but the

122. *Id.* art. 13(1).
123. *Id.* art. 6(1).
124. *Id.*
125. Citigroup, *supra* note 118, at 3.
126. *Id.*
127. Douwe Korff, EC Study on the Implementation of the Data Protection Directive, at 65, (Study Contract ETD/2001/B5-3001/A/49), Human Rights Centre, University of Essex, Colchester (UK) (2002).
128. Data Protection Directive art. 7(a).
129. *Id.* arts. 7(b)-(f).

most sensitive data sharing.

2. Transparency

The data controller or his representative must notify the appropriate national supervisory authority before carrying out any automatic data processing operation.[130] Member States may exempt operations or transactions from the notification requirement, or simplify the notification process under certain circumstances such as where the controller appoints a "personal data protection official" responsible for ensuring the internal application of the national data protection provisions.[131] If notification is required, it must include the name and address of the controller and his representative; the purpose or purposes of the processing; a description of the categories of data subjects and of the categories of data relating to them; the categories of recipients to whom the data may be disclosed; the proposed transfers of data to third countries; and a general description of the measures taken to ensure security of processing that will allow the supervisory authority to make a preliminary assessment of their appropriateness.[132]

In addition, Member States must determine which processing operations are likely to present specific risks to the rights of data subjects and examine these operations prior to their commencement.[133] Member States must ensure that processing operations are publicized and that a register of notified processing operations is made available for public inspection.[134] For processing not subject to notification, the controller or "another body appointed by the Member State" must make the basic Article 19 notification information available to any person on request.[135] It is widely agreed that notification currently serves little real purpose and takes up an excessive amount of resources.[136]

3. Rights of Access, Rectification and Opposition

The Directive specifies that certain information must be provided directly to the data subject. Specifically, the data subject must be informed of the identity of the controller and any representatives, the intended purposes of the processing, and any further relevant information (such as rights of access and rectification, recipients of the data, etc.) that is necessary to "guarantee fair processing."[137] Member States' laws vary considerably with regard to the kinds

130. *Id.* art. 18(1).
131. *Id.* art. 18(2).
132. *Id.* art. 19(1).
133. *Id.* art. 20(1).
134. *Id.* arts. 21(1)-(2).
135. *Id.* art. 21(3).
136. Korff, *supra* note 127, at 165.
137. Data Protection Directive art. 10. If the data was not obtained from the data subject, the controller must disclose the same information as above to the subject either when the personal data is

of information that must be provided, the form in which it must be provided, the time at which it must be provided, and the types of additional information that may be required to ensure "fairness."[138]

Data subjects' rights are central to data protection in the EU because they are the primary means of asserting the "informational right to self-determination."[139] In addition to the rights to obtain, correct, or erase processing information and to object to direct marketing use of personal data, the Directive provides data subjects with a general right to object, as well as a special right not to be subject to certain "fully automated decisions."[140]

A data subject's "right of access" allows the subject to find out from the controller in "an intelligible form" whether data relating to him or her are being processed, the purpose of processing, the types of data involved, the identities of the data recipients, and any information as to their source, as well as the logic involved in any automatic processing.[141] "As appropriate," the controller must grant the subject rectification, erasure, or blocking of data whose processing does not comply with the Directive and must provide notification to third parties to whom the data has been disclosed of any rectification, erasure, or blocking carried out, unless such notification is impossible or "involves a disproportionate effort."[142]

The data subject may object to the processing of his data at any time based on "compelling legitimate" grounds relating to his particular situation, at least where the processing is performed in order to serve the "public interest" or the legitimate interest of the controller.[143] Where the objection is "justified," the controller must stop processing the data. However, there are significant differences in the implementation of the right to object; some Member States extend this right to all, or most, processing, while others do not provide for this right at all.[144]

A data subject's objection to processing is presumptively justified if the data is to be used for direct marketing purposes.[145] Member States have two alternatives for guaranteeing data subjects' right to object to the disclosure or use of their data for direct marketing purposes.[146] First, the data subject may object to the processing of personal data that the controller anticipates will be

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initially recorded or no later than when the data are first disclosed to a third party. However, disclosure to data subjects about whom data has been acquired indirectly is not required where it is impossible or would "involve a disproportionate effort." *See* Data Protection Directive, arts.11(1), 11(2).

138. Korff, *supra* note 127, at 99.
139. *Id.* at 105.
140. *Id.*
141. Data Protection Directive art. 12(a).
142. *Id.* art. 12(c).
143. *Id.* art. 14(a).
144. Korff, *supra* note 127, at 105.
145. Soma, Rynerson, and Beall-Eder, *supra* note 106, at 180.
146. Korff, *supra* note 127, at 113.

processed for direct marketing purposes.[147] If a Member State chooses to give the data subject this right, it must take "necessary measures" to ensure that the data subject is aware of how to exercise it. A "necessary measure" could be providing appropriate publicity about the existence of such a right. Second, the subject must be "informed before personal data are disclosed for the first time to a third party for direct marketing and expressly offered the right to object free of charge to such disclosures or uses."[148] Under this second option, data subjects must be expressly offered the right to object to direct marketing "uses or disclosures" of their data.[149] While there are differences in Member State implementation of this provision, most States maintain suppression lists to which individuals can subscribe in order to avoid having their data processed for direct marketing.[150]

Finally, every person has the right not to be subject to a decision which "significantly affects him" if the decision is based solely on automated processing of data intended to evaluate certain "personal aspects" relating to him.[151] However, a person may be subject to an automated decision if it is made in the course of performing a contract, if the data subject requested to enter into the contract, or if there are "suitable safeguards" of the subject's legitimate interests. Generally, Member States differ in their national provisions for objections to automated decisions as well as for direct marketing use.[152]

4. Security

The Directive requires data controllers to "implement appropriate technical and organizational measures" in order to protect personal data against "accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access . . . and all other unlawful forms of processing."[153] The measures must guarantee a level of security "appropriate to the risks" of the processing, taking into account the cost of implementation and the state of the art. Controllers are responsible for ensuring that their processors provide sufficient guarantees of adequate technical and organizational measures for the processing.

5. Restrictions on Transfers Outside of the EU

Personal data may only be transferred to a party in a non-Member State for processing if that state ensures "an adequate level of protection."[154]

147. Data Protection Directive art. 14(b).
148. *Id.* art. 14(b).
149. Korff, *supra* note 127, at 114-15. *See also id.* at 116-18 (D. Korff, Report on the Directives, FEDMA\DMA-USA, 2002).
150. *Id.* at 115.
151. Data Protection Directive art. 15(1).
152. Korff, *supra* note 127, at 105-06.
153. Data Protection Directive art. 17(1).
154. *Id.* art. 25(1).

"Adequacy" is to be assessed in light of all the circumstances surrounding a data transfer operation, including the nature of the data; the purpose and duration of the proposed processing operations; the countries of origin and destination; the laws (both general and sectoral) in force in the non-Member State; and its "professional rules and security measures."[155] When the Commission finds that a third country does not provide an adequate level of protection, Member States must "take the measures necessary" to prevent personal data transfers to that country.[156]

Member States may provide exceptions to transfer restrictions if certain conditions are met, such as when the data subject has given "unambiguous consent" to the proposed transfer.[157] The transfer is also lawful if it is necessary for the performance of a contract between the data subject and the controller or a contract concluded in the interest of the data subject between the controller and a third party; if it is necessary or legally required on important public interest grounds; or if it is necessary to exercise a legal claim or "protect the vital interests of the data subject.[158]

Furthermore, a Member State may authorize a set of transfers to a third country where the controller adduces adequate safeguards of privacy, such as those provided by appropriate contractual clauses.[159] If the Commission determines that certain standard contractual clauses offer sufficient safeguards, Member States are bound by its decision.[160] While the laws of almost all Member States prohibit transfers to third countries without adequate data protection laws, some countries have also implemented laws focused on the "adequacy" of the protection offered by the *recipient* in a third country.[161] The Directive itself calls for the drawing up of quasi-self-regulatory "codes of conduct" that are tailored to take account of specific features of various economic sectors and are largely self-enforced.[162]

Article 29 establishes and grants independent advisory status to a "Working Party on the Protection of Individuals with regard to the Processing of Personal Data." The Working Party (WP) is composed of a representative of each supervisory authority of each Member State, the authorities for the Community institutions and bodies, and the Commission. It advises the Commission on data protection issues and provides opinions on the levels of protection in the Community and in third countries.[163]

155. *Id.* art. 25(2).
156. *Id.* art. 25(4).
157. *Id.* art. 26(1)(a).
158. *Id.* art. 26(1)(e).
159. *Id.* art. 26(2).
160. *Id.* art. 26(4).
161. Korff, *supra* note 127, at 190.
162. Data Protection Directive art. 27(1).
163. *Id.* art. 30.

6. Sensitive Data

The Directive carves out a special category for sensitive data, defined as data "revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership," and data concerning "health or sex life."[164] Such data may be processed only if the data subject gives "explicit consent" to processing. In the absence of explicit consent, processing may occur only if it is necessary to carry out the obligations and rights of the controller as authorized by national law; to protect the vital interests of the data subject; if the data have been made public by the data subject; if the processing is carried out in the course of legitimate activities by a non-profit-seeking body; or to establish, exercise, or defend legal claims.[165] Member States may create exceptions to these added protections for reasons of substantial public interest or law enforcement.

Most of the personal data collected by banks and other financial service providers relating to clients is not considered "sensitive" under Article 8(1) of the Directive.[166] However, some Member States add or assign special treatment to further categories of data they consider sensitive, such as debts, financial standing, and the payment of welfare benefits.[167]

7. Enforcement and Remedies

In addition to administrative remedies, every person must be guaranteed a judicial remedy for any breach of the rights guaranteed by the Member State's national data protection legislation.[168] In most countries, ordinary civil and administrative liability rules apply.[169] All states allow subjects to seek redress through the courts, although damages vary from state to state.[170] All the laws also contain extensive penal provisions, characterizing breaches of data protection laws as criminal offences, punishable by fines or imprisonment.[171] A party injured by unlawful processing is presumptively entitled to receive compensation from the controller for the damage suffered.[172]

The Directive requires that each Member State establish independent supervisory authorities, usually called Data Protection Authorities (DPAs), which are responsible for monitoring the application of data protection legislation.[173] These supervisory authorities hear claims by individuals or associations and each authority has powers of investigation and intervention,

164. *Id.* art. 8(1).
165. *Id.* art. 8(2).
166. BAINBRIDGE, *supra* note 99, at 157.
167. Korff, *supra* note 127, at 81.
168. Data Protection Directive art. 22.
169. Korff, *supra* note 127, at 180.
170. *Id.* at 179.
171. *Id.* at 180.
172. Data Protection Directive art. 23.
173. *Id.* art. 28(1).

including the power to "engage in legal proceedings" when national data protection provisions have been violated.

Member States must also lay down sanctions for infringement of national data protection laws.[174] However, the DPAs in all the Member States rarely apply formal sanctions; most matters of contention, including manifest breaches of the law, are dealt with through discussion and negotiation.[175] Criminal prosecutions are extremely rare. In practice, the most important function of sanctions may be to greatly improve the DPAs' negotiating position.[176]

The EU has recently enacted several directives aimed specifically at online and telecommunications privacy.[177] These directives generally uphold and reinforce the data protection principles of Directive 95/46/EC.

C. The European Court of Justice's Interpretation of the Directive

The ECJ, established in 1952 by the Treaty of Paris, ensures that "Community Law" is interpreted and applied in the same way in each Member State. An ECJ decision is binding on national courts of the EU Member States. The ECJ's decisions in the *Rechnungshof*[178] and *Linqvist*[179] cases establish that Directive 95/46/EC can be applied broadly. In *Rechnungshof*, the Court interpreted the scope, applicability, and legal basis of the Directive for the first time. It considered the validity under the Directive of a German law requiring certain employers to disclose to a government agency the salaries of specific employees if they exceeded a certain amount. The ECJ held that the Data Protection Directive applied because the national law was adopted to enhance the functioning of the internal market and was thus considered a "Community Law." The applicability of the Directive did not depend on whether the processing had an actual connection with freedom of movement between Member States.[180] The Court went on to uphold the general applicability of the Directive's provisions in Articles 6(1)(c) and 7(c) and (e). These provisions

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174. *Id.* art. 24.

175. Korff, *supra* note 127, at 208.

176. *Id.* at 209.

177. *Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector* translated the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector. *Directive 2002/58/EC on privacy and electronic communications of 12 July 2002* has recently updated Directive 97/66/EC to reflect developments in the markets and technologies for electronic communications services, such as the Internet, so as to provide an equal level of protection of personal data and privacy, regardless of the technologies used. *First report on the implementation of the Data Protection Directive, supra* note 108, at 4. While these Directives may influence the scope of data protection for internet banking, a detailed analysis of the scope of this legislation is beyond the scope of this discussion.

178. Case C-465/00, Rechnungshof v. Österreichischer Rundfunk and Others (joined cases C-465/00, C-138/01 and C-139/01), 2003 O.J. C171/3.

179. Case C-101/01, Bodil Lindqvist, 2004 O.J. C7/3. This case concerns posting of personal data online by an individual; therefore, it does not implicate the privacy obligations of financial institutions at issue in this discussion.

180. Case C-465/00, *supra* note 178, ¶ 43.

require that data must be "adequate, relevant, and not excessive" in relation to the purposes of collection, and that it must be collected pursuant to legal obligations of the controller in order to enable performance of a task carried out in the public interest. The ECJ found that these provisions state "unconditional obligations" that may be directly applicable in a national court.[181]

The ECJ remanded the case to the national court to determine whether the law could be interpreted in a manner consistent with the Directive.[182] It found that the law could meet the conditions for exemption under Article 13 of the Directive, which allows States to enact laws in order to safeguard certain public interest goals, including "an important economic or financial interest of a Member State."[183] Finally, the Court emphasized that the Directive's provisions governing the right to privacy in the processing of data have the status of fundamental rights and general principles of Community Law.[184]

IV.
COMPARISON OF US AND EU FINANCIAL PRIVACY PROTECTION

Comparative legal scholars have remarked that "privacy law is part of a national legal system and must be fitted into this system with proper respect to its legal environment and national institutions."[185] The legal instruments used to address privacy concerns depend on how privacy is defined and what values it is perceived to serve.[186] Despite divergent approaches to privacy, similar levels of protection may be achieved overall. The more pragmatic US approach to creating and applying data protection laws has thus far precluded a determination by the EU as to whether the US financial sector meets the basic European data protection requirements. A meaningful analysis of adequate protection from a functional perspective must comprise "two basic elements: the content of the rules applicable, and the means for ensuring their effective application."[187]

This Part will first consider "the content of the rules applicable," including a discussion of the most significant differences in actual privacy standards in the financial services industry in the US and the EU. These include: (a) the scope of information subject to regulation, including the fact that the US does not have a single broad data protection law; (b) data subject access to personal information held by a data controller; (c) standards of consumer control over the secondary uses of personal information, particularly with respect to information sharing

181. *Id.* ¶¶ 100, 101.
182. *Id.* ¶ 93.
183. Data Protection Directive art. 13(1)(e); Case C-465/00, *supra* note 178, ¶ 67.
184. *Id.* ¶¶ 68-69.
185. COLIN BENNETT, REGULATING PRIVACY 195 (1992).
186. CATE, *supra* note 4, at 129-30.
187. *First orientations on Transfers of Personal Data to Third Countries: Possible Ways Forward in Assessing Adequacy,* Discussion Document DG XV D/5020/97, WP 4, *adopted by the Working Party* June 26, 1997.

with affiliates, joint partners or in a marketing context; and (d) special treatment of sensitive information. In considering the content of the data protection laws, this paper aims to analyze the systems from a "functional similarity" perspective, which "looks for the aggregate, substantive standards applied to the treatment of personal information in the United States."[188] The pragmatic and sectoral approach to data protection in the United States creates a system in which the overall standards emerge from a complex interplay of state and federal regulations, as well as industry practices. In contrast, the EU's global approach uses broad strokes to delineate overall standards, yet these standards are enforced in such a way that the actual, functional protections provided may be more pragmatic and limited than they appear from the language of the Directive itself.

Next, this Part will consider enforcement of these legal standards, or the "means for ensuring their effective application," including the existence of a private right of action and the effectiveness of self regulation in establishing de facto privacy standards. US law is premised on the idea that self regulation, backed by enforceable legislation where there are risks of serious harm, can be effective. In the EU, self-regulatory measures are increasingly accepted as valid mechanisms for enforcement only to the extent that they can be shown to provide a good level of compliance, support for the data subject in exercising her enforcement rights, and appropriate individual redress.[189] The self-regulatory measures of the US, analyzed under this enforcement rubric, provide substantial safeguards that the EU should recognize.

A. Scope of Protection

The Data Protection Directive covers certain types of personal data and certain forms of processing that receive little formal legal protection in the US financial regulatory system, including non-financial data, certain types of processing operations, and certain data processed both within and outside the regulator's territory. However, when considered from a functional perspective and in the context of the financial sector, these discrepancies may not be as serious as they appear.

First, one of the EU's major concerns is the absence of a "horizontal law" in the United States, similar to the Directive, which would cover any sort of processing of personal data.[190] In the United States, while privacy regulation of the financial sector is substantial, other industries are largely unregulated for privacy. Europeans may argue that, although processing of EU citizens' personal data may be adequately protected within US financial institutions,

188. SCHWARTZ & REIDENBERG, *supra* note 3, at 24-25.

189. *Transfers of Personal Data to Third Countries: Applying Article 26 (2) of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfers*, Working Document 11639/02/EN, WP 74, *adopted by the Working Party* June 3, 2003.

190. Email correspondence of Rosa Barcelo, European Commission, then-Director General, Internal Market, Data Protection Unit, Mar. 7, 2005 (on file with author).

weak regulations in other sectors put their personal information at risk. In particular, the EU may be concerned that there are inadequate safeguards for transfers to non-financial entities and other countries that do not provide adequate protection.

With respect to transfers to non-financial entities unregulated under the GLBA or the FCRA, there are some safeguards in place, and the absence of omnibus legislation has not prevented European determinations that certain entities in the US (such as those that have agreed to abide by the US-EU Safe Harbor[191] or the approved Model Contracts) provide "adequate protection" for personal data. It is true that US financial institutions can now share information freely with affiliates that are not traditionally conceived of as "financial," and non-financial third parties can receive nonpublic personal information pursuant to the notice and opt-out provisions. However, GLBA restrictions on further use also apply to non-financial recipients of data, and in theory, customers may opt out of third-party sharing altogether. More importantly, the EU accepted notice and choice in the Safe Harbor as sufficient safeguards for onward transfers. In the Model Contracts, the "purpose limitation" is adequate, and the levels of protection in other sectors are not considered.

Even for financial data, the Directive's definition of "personal data" covers more information than the GLBA's "nonpublic personal information." "Personal data" under the Directive is defined as "*any* information *relating to* an identified or identifiable natural person,"[192] whereas "nonpublic personal information" under the GLBA includes any *personal financial* information that is obtained by the financial institution.[193] The FCRA only covers information used in making credit decisions. As a result, the Directive applies to certain public information about individuals, professional data, and encrypted data if the controller has both the data and the "key" to interpret it.[194] However, these types of information, not covered in the US but covered by the Directive, are arguably not likely to give rise to abuses that harm individual consumers. Encrypted information is less easily misappropriated, public information has already been released to those who may misappropriate it, and corporate information, which is not even consistently covered in the EU States' national laws, poses no obvious threat to the individual's right to privacy.[195]

The Directive also covers data "processing" as "any operation performed upon personal data." This definition renders the data protection laws applicable

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191. *See infra* note 352.

192. Data Protection Directive art. 2(a).

193. 15 U.S.C. § 6809(4) (2006).

194. *See* Analysis and Impact Study on the Implementation of Directive EC 95/46 in Member States, at 3, http://europa.eu.int/comm/justice_home/fsj/privacy/docs/lawreport/ consutation /technical-annex_en.pdf (last visited Apr. 7, 2006).

195. In the UK, for example, the Information Commissioner's Office finds that professional data does not normally require application of the full panoply of data protections. Andrew Charlesworth, *Symposium: Enforcing Privacy Rights: Thinking About Optimal Enforcement: Information Privacy Law in the European Union: E Pluribus Unum or Ex Uno Plures?*, 54 HASTINGS L.J. 931, 942 (2003).

to almost all types of processing operations, including profiling and other identity analysis. However, while the European Court of Justice interpreted "processing" broadly in *Lindqvist* to include posting material on a website,[196] it seems impractical that the terms of the Directive would be enforced against every activity pertaining to data on open networks. Because such broad enforcement is implausible, the actual standard for applying the Directive is somewhat unclear. Nevertheless, the most significant discrepancy may be that, under the GLBA, consumers may not be able to prevent "profiling" of information that is not covered under the FCRA as eligibility information. However, for credit information, the FACTA requires disclosure of the score generated by the agency's computer model as well as "all of the key factors that adversely affected the credit score of the consumer in the model used."[197] In addition, common law torts of "intrusion on seclusion," "breach of confidentiality," and "appropriation privacy," may offer effective weapons against profiling by financial institutions.[198] As a result, the scope of processing that is actually covered in the United States may not differ significantly from that covered in the EU.

Significantly, the Directive covers broad geographic territory in order to prevent outsourcing or the creation of data havens that undermine data protection standards and hinder the free flow of information in the Internal Market. First, the Directive covers any controllers and processors that use equipment located in a Member State or its territories. While the Directive is technically limited to matters that fall within the scope of "Community Law," the ECJ has interpreted the Directive's application broadly. It has held that, as long as a Member State law is "intended to improve the conditions for the establishment and functioning of the Internal Market," it falls within the scope of Article 100a of the Treaty establishing the European Community.[199] This renders the Directive applicable to situations that otherwise may not have ties to the EU. Finally, the Data Protection Directive covers the personal data of EU citizens processed in a third country.

In contrast, US federal legislation applies only to certain information processing activities of US financial institutions subject to the jurisdiction of one of the eight federal regulatory agencies or, in the case of insurance, to state insurance agencies. The FTC has stated that there are no legal restrictions on financial services companies' sending customer data abroad for processing.[200] However, in practice, while financial institutions may outsource data processing

196. Case C-101/01, *supra* note 179, ¶ 25.

197. FACTA § 212(b), amending FCRA § 609(f), 15 USC § 1681(g) (2006).

198. *See* Janet Dean Gertz, *The Purloined Personality: Consumer Profiling in Financial Services*, 39 SAN DIEGO L. REV. 943, 993-94 (2002) (providing a general description of these torts and their application to financial institutions, including in particular where there is a "reasonable expectation" of privacy in financial information).

199. Case C-465/00, *supra* note 178, ¶ 41.

200. Michele Heller, *In Brief: FTC: No Need to Keep Information in U.S.*, AM. BANKER, May 13, 2004.

operations for economic reasons, if they violate basic privacy expectations of US consumers, they may be subject to lawsuits under state laws, in addition to receiving substantial negative publicity. Furthermore, although financial institutions do not have to disclose whether they are sharing nonpublic personal information with service providers outside the United States pursuant to joint marketing agreements, they are legally responsible under the GLBA for ensuring that their joint service providers "maintain the confidentiality" of that information. In any event, more stringent legislation is currently pending with respect to transfers of personal data abroad; as of August 2004, there were almost 200 bills in Congress that would curb outsourcing.[201] Representative Edward J. Markey (D-Mass) vowed "to close down these privacy loopholes."[202] The FDIC released a report in June 2004, "Offshore Outsourcing of Data Services by Insured Institutions and Associated Consumer Privacy Risk," outlining five major risk areas, including lack of sufficient internal operational and transactional controls.[203] However, thus far, there have been surprisingly few breaches of consumer privacy by data processors abroad.[204] There are some indications that India, an outsourcing hub afraid of losing North American and European business if it violates privacy standards, may be voluntarily adopting very high standards of privacy, especially with respect to security and confidentiality.[205]

Furthermore, Article 25's restrictions on transfers have been found to be inadequately enforced in many countries,[206] and there is evidence that EU financial institutions are also outsourcing. While the EU may perceive the theoretical right to prevent transfers as a greater substantive right, in practice, it may not provide European citizens with more real protection than US citizens who have no benefits of "adequacy determinations." Some argue that institutions that decide to outsource for financial reasons will find ways to do so. For example, a strategic policy manager at the UK's Data Protection Registry stated: "Companies have found ways round the law. They often use a contractual relationship with the Indian subsidiary or subcontractor that binds them to acting as if the UK's law was in force. We have had few complaints

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201. Simon Chester, *Outsourcing Threat to Privacy Overblown*, FINANCIAL POST, Aug. 16, 2004.

202. Heller, *supra* note 200. The world's 100 largest financial services companies expect to transfer about $356 billion of their operations and two million jobs offshore over the next five years, according to Deloitte Research, a division of Deloitte Consulting LLP. Jeremy Quittner, *Offshoring Can Cut Costs, But It Raises Risk*, AM. BANKER, July 6, 2004.

203. Quittner, *supra* note 206.

204. Chester, *supra* note 201.

205. *Id.* Chester states: "To reassure their North American customers, Indian outsourcers are installing state of the art surveillance and monitoring equipment that is so intrusive that it would scarcely be tolerated in a North American workplace. Indian staff works under security cameras and at terminals that lack printers, hard drives and e-mail—workers cannot copy any data. Rigid confidentiality pledges are the norm. . . . India's fear is that security and privacy concerns will become non-tariff barriers to trade in services and information technology."

206. *First Report on the Implementation of the Data Protection Directive*, *supra* note 108, at 12-13, *available at* http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0265en01.pdf.

from consumers, so we think that, by and large, this means it is being handled well."[207] Other companies, such as HSBC, claim that they have permission from customers, based on a set of revised conditions sent to customers.[208] An absence of complaints may support the argument that outsourcing centers are voluntarily policing information abuses.

In sum, the disparities between the scope of covered processing in the United States and the European Union are actually less significant than they may appear, and they are not relevant for a sectoral adequacy determination. The existence of a single horizontal law is not required, as indicated by the EU's acceptance of the Safe Harbor and Model Contracts. The categories of personal data not covered in the United States are less likely to pose real harm to consumers, and the concerns with respect to profiling can be largely dealt with through the FCRA and state laws. Finally, the difference in territorial scope may in practice be less significant than it appears, and the United States is already willing to pass more stringent legislation to protect against outsourcing of personal data.

B. Data Subject Access to Personal Information

While the GLBA lacks a consumer access provision similar to the European Data Protection Directive's provisions for data subject access, the FCRA contains broad access provisions comparable to those of the Directive. Furthermore, in practice, US consumers often have access to their personal financial information and individuals generally receive detailed records for checking accounts, credit card records, and securities brokerage accounts.[209] They can contest the accuracy and completeness of those records as problems arise.[210] Even privacy lobbyists admit that "consumers generally have access to review and dispute their account statements."[211] In addition, the Fair Credit Billing Act (FCBA) allows customers to contest certain billing aspects of their transaction histories. The scope of the right to rectify or erase inaccurate information is not any greater than that provided under the FCRA for credit reports, where errors can have the most significant impact.

First, under the GLBA, consumers have no explicit rights to review or dispute the development of detailed profiles on them created by financial institutions based on their transaction information. In contrast, under the FACTA, consumers have access to their credit scores. The US approach focuses on preventing the potential harm; under the FCRA, any *adverse action* taken

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207. *See* Simon Fluendy, *Banks Flout Ban in Call Centre Exodus; Human Rights Group Hits Out As Loophole Allows Customers' Details to be Exported*, THE MAIL ON SUNDAY, Jan. 4, 2004.

208. *Id.*

209. Swire, *supra* note 22, at 1269-70.

210. *Id.* at 1270.

211. *Financial Privacy and the Gramm-Leach-Bliley Financial Services Modernization Act: Oversight Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 107th Cong. (2002) (testimony of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group (U.S. PIRG)).

against a consumer as a result of a profile must be disclosed to the consumer in addition to the consumer's personal information on which the profile was based. The consumer must be able to exercise her right to access such information, correct it, and have the correction passed on to any other institutions that received the erroneous information. In the EU, Member States themselves differ on the right to be informed of the "logic" used in certain decisions, although all States provide this right with respect to completely automated processing.[212] The right to understand the internal logic of the controller's processing operations does not appear to be as crucial to preventing consumer harm as the right to rectify or erase inaccurate facts.

Second, other US laws have access provisions that apply to financial information held by financial institutions. For example, laws provide for customers to receive images of their returned checks or personal checks after processing.[213] In addition, the Fair Credit Billing Act, applicable to "open end" credit accounts, such as credit cards and revolving charge accounts, provides settlement procedures for disputes about billing errors.[214] Businesses that offer this type of credit must provide written notice describing the customer's right to dispute billing errors. If a customer legitimately objects to a charge and demands rectification, the institution must determine whether the bill contains an error, and if it does, the creditor must credit the account and remove all finance charges, late fees or other charges related to the error. The creditor must explain to the customer, in writing, the corrections that will be made to the account. Moreover, standard industry practice generally dictates that customers have access to personal financial files in the ordinary course of business; most banks send out account statements monthly and provide ongoing online or phone access to one's account.[215] Thanks to the longstanding nature of these practices, consumers have come to expect and demand them.

State laws also provide certain access rights. For example, customers may pursue state law contract and tort claims if an institution breaches a stated policy of granting customers access to files containing their personal information.

Currently, two bills are pending in Congress that would require customer notification of any security breach that occurs at the financial institution relating to that customer's data.[216] In addition, federal financial regulators have

212. Korff, *supra* note 127, at 105.

213. *Check Clearing for the 21st Century Act: Hearing on H.R. 1474 Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. (2003) (testimony of C.R. (Rusty) Cloutier, Chairman, Independent Community Bankers of America), *available at* http://www.icba.org/advocacy/testimonydetail.cfm?ItemNumber=545&sn. ItemNumber=1699. (last visited Apr. 27, 2005).

214. The FTC enforces the FCBA for most creditors except banks, whose fair billing practices are enforced by the federal banking agencies. *See* Federal Trade Commission, Facts for Consumers: Fair Credit Billing, http://www.ftc.gov/bcp/conline/pubs/credit/fcb.htm (last visited March 16, 2006).

215. Telephone interview with Peter Swire (Mar. 2, 2005).

216. The Notification of Risk of Personal Data Act, S. 1350, is pending before the Senate Judiciary Committee. Under its provisions, any person engaged in interstate commerce who owns or

requested comments on proposed rules requiring financial institutions to establish a response system, including customer notification, in the event of a security breach.[217] Moreover, discovery of a database security breach may give rise to disclosure obligations under state and federal criminal laws. For example, California's Security Breach Information Act of 2003, or SB 1386,[218] and other state laws have recently exposed several high profile data thefts, which are spurring consumer protection bills in Congress. In March 2005, the Senate Banking Committee held a hearing on Identity Theft,[219] largely in response to widely-publicized security breaches at Bank of America and ChoicePoint, a provider of identification and credential verification services. Senator Patrick Leahy (D-VT) of the Senate Judiciary Committee has labeled these data breaches a massive threat to individuals as well as to national security.[220] As of April 2005, several bills were pending in Congress that would require better subject access to data and more stringent disclosure requirements.[221] On June 16, 2005, the Senate Commerce Committee held a Hearing on federal legislative solutions to data breach and identity theft, and there may be serious congressional action in this area in the near future.

In the EU, the data subject's formal right of access may not be as broad or as widely exercised as it appears from the language of the Directive. There are several important limitations on the general right of access, including a requirement that providing access not be unduly burdensome on the data controller. Furthermore, access to personal information does not include those documents in which an individual has only participated as a contributor and not a subject.[222] For example, the UK Court of Appeal in *Durant v. FSA* substantially limited the scope of subject access by limiting the notion of

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licenses electronic data containing personal information would be required, upon discovery of a breach of security, to notify any U.S. resident whose unencrypted personal information may have been acquired by an unauthorized person. In addition, H.R. 818, currently pending in the House Financial Services Committee, would amend the GLBA and the FCRA to require a financial institution to notify a consumer whose nonpublic personal information may have been compromised through unauthorized disclosure.

217. *See* Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice, 68 Fed. Reg. 47,954 (Aug. 12, 2003).

218. SB 1386, Gen. Assem., Reg. Sess. (Cal. 2002), *entered into effect on* July 1, 2003 (requires organizations that keep databases containing sensitive information on individuals to notify those individuals as well as to provide access to personal records if there is a security breach resulting in exposure of personal data).

219. *Identity Theft: Recent Developments Involving the Security of Sensitive Consumer Information: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. (Mar. 10, 2005).

220. *Id.* (statement of Senator Patrick Leahy (D-Vt.)).

221. Senators Charles Schumer (D-N.Y.) and Bill Nelson (D-Fla.) introduced a bill on April 12, 2005 to require better disclosure from data brokers. This bill would also create a new Office of Identity Theft at the FTC to help victims of identity theft. The Senate Judiciary Committee held hearings on April 13, 2005 regarding the Notification of Risk to Personal Data Act of 2005, a bill introduced by Senator Dianne Feinstein (D-Calif.). The bill, modeled on SB 1386, is a notification law that requires businesses to tell an individual when his private information has been compromised.

222. *See, e.g.*, *Durant v. FSA*, *supra* note 119.

"personal data" under the UK's Data Protection Law of 1998.[223] The Court of Appeal stated that whether or not any particular information amounts to "personal data" depends on where it falls in a continuum of relevance or proximity to the data subject. Durant sought information that related not to him but to a complaint made by him to the FSA; therefore, it was not personal data, and he did not have the right to access it.

As in the United States, many European financial institutions provide customers with account records in the ordinary course of business. Data controllers are required to provide access if doing so would not require them to carry out an exhaustive search for data that could be held anywhere on their systems. However, Data Protection Authorities accept that, for large organizations, compliance with this standard would be enormously costly. Therefore, in practice, controllers are generally obliged only to carry out searches that they would carry out in the course of normal, day-to-day operations. In other words, data which would not normally be retrievable need not be provided.[224]

Furthermore, Member States' differences in the substantive scope of access provided, coupled with confusion as to which State's law will be applicable, tend to preclude enforcement of the national access laws. Only some states, for example, require access to information about the sources of the data, and states differ as to the form in which information must be provided.[225] Many of the national implementation laws do not provide for a "right to object," or they limit it contrary to the Directive.[226] The laws in all the Member States provide for the right of data subjects to receive, on request, confirmation of whether their data is processed by a particular controller.[227]

Finally, statistics demonstrate that demand for access in the EU is not substantial. According to the Commission's 2001 Inter-Active Policy Making online consultation ("IPM survey"),[228] the number of access requests in 2001 was not overwhelming; out of 317 controllers who responded to the query, 65% responded either that there were less than 10 access requests or that there were no figures available. Only 25% of controllers stated that responding to access requests from individuals was an "important" effort for their organization.

To summarize, US laws provide subject access to credit and billing data, and state laws and industry practices often accommodate certain access demands. In conjunction with the EU's differential enforcement of the right of

223. *Id.*
224. Korff, *supra* note 127, at 107.
225. *Id.* at 105.
226. *Id.* at 113.
227. *Id.* at 107.
228. *First Report on the Implementation of the Directive*, *supra* note 108, at 9. The questionnaire includes all types of data controllers, only about 10% of which (97 out of 982) described themselves as being primarily in financial services. However, The Commission recognized that the results cannot be considered representative in the way that survey results based on a scientifically selected sample can. Furthermore, there was little information provided about the size of the data controllers or the number of total customers their access figures are based on.

access and its national limitations on the scope of access through case law and otherwise, these regulations should permit the conclusion that, if the practical rights are formalized and enforced, the right of access to personal financial data would be functionally equivalent to that provided in the EU.

C. Standards of Consumer Control Over Information Sharing

"Consumer choice" in this context refers to the ability of the data subject to control the secondary uses of personal data following its collection by a financial institution. US and EU laws differ with respect to the following issues: the requirement of purpose specification; the limit on the duration of storage; consumer choice in whether institutions can share information with affiliates; choice in whether sharing can occur with third parties pursuant to joint marketing arrangements and statutory exceptions; and the standard of consent for transfer or disclosure of sensitive data. In the EU, consumers are given broad opportunities to control data use and sharing, while in the United States consumers have very little control over the secondary uses of information by financial institutions.

First, in the EU, data generally must be processed for a specified purpose, and it may not be processed, used or transferred for that or any other purpose unless certain conditions are met to ensure that the processing is "fair and lawful." If it is used for a purpose other than that specified, the controller must have explicit authorization for such use from the data subject or the use must be necessary for some other important interest, such as performance of the contract or to serve the "vital interest" of the data subject. Although US legislation has few express requirements to specify a purpose for data collection, there are certain situations in which federal law indirectly provides that there must be a narrow purpose for data collection, such as electronic fund transfers and collection of information by a credit card issuer for billing purposes.[229] Furthermore, most banks have internal policies mandating confidentiality of customer records and thus may limit external secondary uses of information.[230] While the US lacks specific legal rights that restrict the collection of unnecessary payment transaction data, most financial institutions usually do not collect information beyond the data needed to execute and confirm payment.[231]

In addition, in the EU, despite the fact that Member States uniformly use the purpose-specification and use-limitation language of the Directive, the inherent flexibility of the principles leaves them open to divergent application, and Member States apply different tests. For example, in determining "incompatible use," Member States' laws range from the "reasonable expectations" of the data subject, to "fairness," to the application of various

229. SCHWARTZ &REIDENBERG, *supra* note 3, at 268.
230. *Id.* at 271.
231. *Id.* at 273.

"balance" tests.[232] Several Member States have more general, relaxed rules which allow for processing whenever "authorized by law" or by "special provisions" under any law.[233] A recent Eurobarometer Survey indicated that there is a generally low level of compliance with regard to providing data subjects with "the purpose of the processing for which the data are intended."[234]

Second, in contrast to the EU, the US does not have general laws limiting the duration of storage for personal information,[235] but there are limits on dissemination of credit information by a Credit Reporting Agency following statutorily defined periods of time.[236] Generally, there are minimum retention periods imposed on financial institutions for electronic fund transfers or credit card transactions because financial institutions would otherwise dispose of transaction records as quickly as necessary to serve corporate interests.[237] The EU also imposes such retention requirements for financial services providers. As a result, firms in compliance with the applicable financial regulations may be in violation of the Directive.[238] Recently, proposed requirements for online data retention have been strongly advocated by several states.[239]

Third, consumers do not have the right to prevent US financial institutions from sharing certain information with affiliates, while consumers may opt out of transfers to affiliates in the EU. Although the FCRA requires that consumers be given notice and the opportunity to opt-out of affiliate sharing with respect to eligibility information, the GLBA does not limit such sharing with respect to experience information.[240] However, in the EU, due to different corporate conglomerate structures such as universal banks, data protection laws may permit free sharing between different parts of a company that would technically be "affiliates" under US law. Thus, the US standard may in practice be similar to the European standard because "affiliates" in the US are the analogues of divisions of the same company in the EU. David Aaron, Undersecretary of Commerce for International Trade, stated in congressional testimony:

> The European banking institutions and financial institutions aren't structured the way we are. They have insurance. They have brokerage. They have banks. They are not affiliates. They are actual divisions of a company. So, therefore, they share this between each other all the time, with no difficulty. We are structured—many of our companies are structured differently. So all of a sudden you get this issue of affiliate sharing, and whether there should be opt-in or there should be opt-out. Well, I think we have got to be careful there because the fact

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232. Analysis and Impact Study, *supra* note 194.

233. *Id.* at 10.

234. Data Protection in the European Union, Eurobarometer Survey, Executive Summary, at 6, http://europa.eu.int/comm/public_opinion/flash/fl147_exec_summ.pdf (last visited Mar. 17, 2005).

235. SCHWARTZ & REIDENBERG, *supra* note 3, at 274.

236. *Id.* at 296.

237. *Id.* at 274-75. However, marketing departments may retain personal information for longer periods for the purpose of studying long-term personal habits.

238. *See* Citigroup, Review of the Directive, *supra* note 118.

239. *See* http://www.edri.org/issues/privacy/dataretention (last visited Mar. 17, 2005).

240. FCRA § 603(d)(2)(A)(iii) (2006), 15 U.S.C. § 1681a (2006).

> of the matter is if we accepted either one of those procedures—and we did accept opt-out to some extent—we find ourselves at a competitive disadvantage.[241]

However, universal banks generally do not include the broad range of "financial activities" that financial holding companies in the US may include under the GLBA. In addition, consumers may not expect sharing between different companies, even if they happen to be affiliates, while customers would expect sharing within a universal bank. With the passage of the GLBA in 1999, it was expected that many of the affiliates that had been kept separate by regulation would merge, and it was implicitly understood that consumers would expect such services to come from the same organization. Representative Michael Oxley (R-Ohio) stated at a Congressional Hearing on the GLBA that "the integrated products and services today's consumer expects from his or her financial institutions require information sharing, especially among affiliates. After all, in the eyes of the consumer, what are affiliates other than different departments of the same company that they are dealing with."[242] Thus, the affiliate choice distinction between the US and the EU may not be as significant as it appears. However, there may still be a difference in the sense that affiliate sharing may occur in the United States between entities that would not be permitted to be under the umbrella of a universal bank.

Fourth, while the GLBA prohibits financial institutions from disclosing account numbers to nonaffiliated third parties for marketing use,[243] the consumer does not have the choice to object to information shared with a "joint marketing" partner. However, if such "joint marketing" occurs, the contractual agreement requires the third party to maintain the confidentiality of such information.[244] This exception to the opt-out requirement was originally based on the idea that a principal should be able to choose whether to hire an employee or an independent contractor to perform a task.[245] Similarly, the EU's Directive provides for a "data processor" that is the analogue of the US's "joint marketing partner." However, the Directive places greater constraints on the contractual relationship between the controller and his agent, as described below.[246]

The "chief problem" of the joint marketing exception has been described as the fact that the third-party marketing partner is technically permitted to use the information it receives freely for its own purposes and within its own family of affiliates.[247] However, in practice, many joint marketing agreements limit the use of the data to those purposes for which it is disclosed. In December 2001,

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241. *The EU Data Protection Directive: Implications for the U.S. Privacy Debate: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 97 (2001) (statement of David Aaron, Senior International Advisor, Dorsey & Whitney, LLP).

242. Swire, *supra* note 22, n.175 (citing 145 CONG REC. H5310 (daily ed. July 1, 1999) (statement of Rep. Oxley)).

243. GLBA § 502(d) (2006), 15 U.S.C. § 6802(d) (2006).

244. GLBA § 502(b)(2) (2006), 15 U.S.C. § 6802(b)(2) (2006).

245. Swire, *supra* note 22, at 1297.

246. Data Protection Directive art. 17.

247. Swire, *supra* note 22, at 1301.

staff of the federal banking agencies issued a series of Frequently Asked Questions (FAQs) clarifying how banks can qualify for the joint marketing exception, in particular for products such as insurance and annuities.[248] Under these guidelines, the bank's written agreement with the nonaffiliated company to jointly offer, endorse or sponsor a financial product or service must (a) restrict the insurance company from disclosing or using customer information for any purpose other than selling insurance products to the bank's customers and (b) comply with the banking agencies' customer information security guidelines.[249] Moreover, the FAQs specify that a bank's initial privacy notice must include a separate statement describing the joint marketing arrangement.[250] Currently, large financial institutions often fail to disclose the details of the extent of the sharing or the partners' identities.[251] The GLBA also precludes third-party recipients from sharing information pursuant to a joint marketing agreement, thus precluding a chain of third-party joint marketing agreements.

Under the EU standard for disclosures of information between controllers and processors, a processor who has access to personal data must not process such data except on instructions from the controller,[252] and the controller must guarantee the security of the processing.[253] The Directive's Article 17 provides more detailed legal contractual requirements than the GLBA's requirement of maintaining confidentiality; it provides that the controller must supervise the processor's guarantees of technical security and organizational measures and ensure compliance.[254] In addition, in several Member States, the controller is liable for the (wrongful) actions of the processor.[255]

However, in Europe, there may be difficulties enforcing the rules with respect to data processors due to uncertainty as to the applicable governing law. The law that applies to the processor should in theory be the law of the country in which the controller is situated. However, the processor must adhere to his local law as far as the legal requirements concerning security and confidentiality are concerned. Finally, the law of the contract between the controller and the processor covers, *inter alia*, the respective liabilities towards one another. As a result, various national laws may apply, which "makes for a very complex

248. *See* Federal Deposit Insurance Company, *Frequently Asked Questions for the Privacy Regulation*, Dec. 2001, *available at* http://www.fdic.gov/news/news/press/2001/pr9301a.html (last visited Mar. 15, 2006).

249. Financial Services Modernization 2003: Implementation of the Gramm-Leach-Bliley Act, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, Feb. 2003. Examples of an agreement that jointly offers, endorses or sponsors a financial product or service would be an agreement in which the insurance company agrees to use the bank's name in its marketing materials or an agreement where the insurance company agrees to offer insurance products and services on the bank's premises.

250. *Id.*

251. Swire, *supra* note 22, at 1321.

252. Data Protection Directive art. 16.

253. *Id.* art. 17.

254. *Id.* art. 17(2).

255. Korff, *supra* note 127, at 158.

relationship."[256]

In sum, the controller in the EU is legally required to exercise greater control over the information shared than the US institution that discloses information to a partner under a joint marketing agreement. In practice, US agreements that follow the FAQs' guidelines may limit the scope of the service provider or partner's use of the information.

Fifth, the generally accepted statutory exceptions under which consumers may not prevent information sharing are similar in the GLBA and in the Directive. The GLBA provides that transfers may be carried out without notice "as necessary to effect, administer or enforce a transaction requested or authorized by the consumer";[257] the Directive provides that processing is lawful if it is "necessary for the performance of a contract to which the data subject is party."[258] In both the US and the EU, the data subject implicitly consents to any processing that is necessary. However, the EU subjects international transfers to further scrutiny under Article 25.

The United States and the European Union also have similar provisions to allow processing in order to protect the data subject's interests[259] or when necessary to comply with a legal obligation.[260] One real difference in the statutory exceptions is that the EU makes processing lawful when necessary for the performance of a task carried out "in the public interest,"[261] thus providing a broader exception than exists under US law. Another difference is that the United States has additional exceptions for transfers in connection with sales, mergers, transfers, or exchanges of business or operating units, as well as for providing information to insurance rate advisory organizations and auditors.[262] These exceptions are for corporate activities that are unlikely to harm individuals.

Finally, while the EU Directive provides that processing is lawful if the data subject has "unambiguously given his consent,"[263] the GLBA provides explicitly for an opt-out standard,[264] thus creating a potential gap between implicit and explicit authorizations. However, national Data Protection Authorities permit opt-out systems in practice, reserving the strictures of the opt-in only for sensitive information.[265] The Directive does not specify the form in which consent must be obtained, and there is not widespread consensus on the

256. *Id.* at 162.
257. 15 U.S.C. § 6802(e)(1) (2006).
258. Data Protection Directive art. 7(b).
259. *Compare id.* art. 7(d) *with* 15 U.S.C. §§ 1602(e)(3)(A),(B) (2006) (dealing with security breaches and fraud).
260. *Compare* Data Protection Directive art. 7(c) *with* 15 U.S.C. §§ 1602 (e)(5),(6),(8) (2006).
261. Data Protection Directive art. 7(e).
262. 15 U.S.C. §§ 1602(e)(7), (e)(4) (2006), respectively.
263. Data Protection Directive art. 7(a).
264. 15 U.S.C. § 1602(b) (2006).
265. Confirmed by Rosa Barcelo, *supra* note 190.

opt-out versus the opt-in among the Member States.[266] Because of the tremendous costs to financial institutions and society associated with the opt-in regime, Cate and Staten asserted, "'[o]pt-in' may be the law on the books throughout Europe, but 'opt-out' is the reality because government officials realize the blow that an 'opt-in' requirement would deal to European economic performance."[267] Given that the FCRA also uses an opt-in standard for sensitive credit data, the standard of choice distinction (opt-in versus opt-out) may be largely illusory.

Furthermore, even though the GLBA only requires opt-out, some states have adopted opt-in standards.[268] The difficulty with stricter state legislation regarding affiliate sharing is that it may be preempted by the FCRA's affiliate sharing opt-out provisions. However, a recent decision upholding more stringent state privacy legislation in California against the FCRA's preemption provisions may open the door to increased state privacy regulation. In *ABA v. Lockyer*,[269] the Court found that because the FCRA preemption provision only relates to consumer reports, it does not broadly preempt all state laws regulating sharing of other types of information by affiliates. "Limitations on the sharing of personal financial information between financial institutions in non-credit reporting situations are specifically contemplated by the provisions of the GLBA, which allows states to enact more stringent privacy regulations in that regard, therefore permitting state laws like SB1."[270] The industry groups have filed an appeal to the Ninth Circuit.[271]

In sum, the most significant differences between the actual choices that

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266. Charlesworth, *supra* note 195, at 943.

267. Fred H. Cate and Michael Staten, *Protecting Privacy in the New Millennium: The Fallacy of "Opt-In,"* http://www.thedma.org/isec/optin.shtml (last visited Apr. 17, 2005).

268. States that have opt-in regimes include North Dakota, California, Vermont, Alaska, Connecticut, and Illinois. Alaska generally requires customer consent for a financial institution to disclose customer information, with no blanket exception or authorization for sharing information. A Connecticut law similarly requires consent for disclosure by financial institutions subject to certain exceptions, but it contains no blanket exception for sharing of information among affiliates and places restrictions on sharing of information with broker-dealers. North Dakota requires customer written consent for sharing of information among affiliates. Vermont's prohibition of information sharing does not contain an exception for inter-affiliate sharing of customer information. *See Privacy Protection for Customer Financial Information*, CRS Report RS20185 (updated Jan. 5, 2001).

269. American Bankers Ass'n v. Lockyer, 2004 U.S. Dist. LEXIS 12367 (E.D. Cal. June 20, 2005) (upholding California's SB 1, also known as the California Information Privacy Act, CAL. FIN. CODE § 4050 (2004), which took effect July 1, 2004).

270. *See id. See also Federal Court Rules California Privacy Statute Takes Precedence Over FACT Act*, 28 EFT REPORT 14, 19-20, 2004 WL 62675944 (July 7, 2004).

271. *See Am. Bankers Ass'n, supra* note 269. Some commentators predict that this decision will be overturned, pointing out that it is directly opposed to the "clear and unequivocal preemption provisions in the 1996 and 2003 amendments" to the FCRA in the Reform Act and the FACT Act, as well as the broad scope of preemption provided for by the U.S. District Court for the Northern District of California in *Bank of America v. City of Daly City*. In the interim, the financial services industry may experience the disruptions the FACT Act's preemption provisions were designed to avoid. Fischer and Ireland, *Federal Court Made Mistake In Calif. Data-Sharing Case*, CALIFORNIA, Aug. 2004.

consumers have in the EU and the US are the EU citizens' formal right to purpose-specification at the initiation of the customer relationship and certain safeguards assured by the Directive in the context of joint marketing or contracting with service providers. The US opt-out is currently very similar to the EU provision for obtaining consumer consent, except that sensitive data may use a different standard. Finally, the affiliate sharing provisions may not be as significant as they initially appear because of the realities of European financial practices, but there may still be some discrepancies.

D. Treatment of Sensitive Information

Pursuant to Article 8(1) of the Directive, many EU Member States' laws create more stringent opt-in policies for sharing data relating to racial or ethnic origin, religious beliefs, sex life, or trade union memberships. While the GLBA does not provide for special treatment of sensitive data, the FCRA includes an opt-in standard for use of sensitive data in credit reports, such that US protection of sensitive credit information has been described as "functionally similar" to that in the EU.[272] The FCRA places greater restraints on disclosure or use by CRAs of information relating to criminal records, sex, race, ethnic origin, age, or marital status.[273] In addition, the Equal Credit Opportunity Act[274] and similar state discrimination statutes prohibit discrimination against individuals on the basis of race, color, religion, national origin, sex, marital status, age, or because an applicant receives income from a public assistance program. Employing a broad definition of "sensitive," the ECOA and FCRA limit the *uses* to which sensitive information can be put. Sensitive data is considered "sensitive" because it is more personal and therefore can cause more harm to individuals if misappropriated. Under this logic, the United States protects sensitive data where abuses are most likely to occur, as in the context of discrimination. In practice, sensitive data collection may not even be necessary for the performance of many financial services.

In addition, the FACTA specifically allows consumers to prevent affiliates from sharing consumer reports that include medical data. [275] Except for insurance transactions, the FACTA requires financial institutions to obtain specific written consent that includes a clear and conspicuous description of the use for which the agency is disclosing the medical information.[276] It restricts creditors from obtaining or using medical information from an affiliate and

272. SCHWARTZ & REIDENBERG, *supra* note 3, at 303.

273. *See id.*

274. 15 U.S.C. § 1691(a)(1) (2006); 12 C.F.R. pt. 202.

275. Title IV of FACTA. Specifically, the FACTA makes the standard exclusions from the definition of "consumer report" inapplicable if medical-related information is contained in the disclosure, so that any medical information shared by affiliates will be considered a consumer report. Medical information is defined in section 603(i) of the FCRA as information or data, other than age or gender, relating to past, present or future physical, mental or behavioral health, the provision of health care to an individual or the payment for the provision of health care to an individual.

276. FACTA § 411(a) (2006), amending FCRA § 604(g) (2006), 15 U.S.C. § 1681b (2006).

using it in determining the consumer's credit eligibility, subject to certain exceptions for insurance and other circumstances specifically exempted by the federal banking agencies and the NCUA and FTC. The federal banking agencies issued a notice of proposed rulemaking regarding these provisions of the FACTA on April 28, 2004,[277] allowing banks, thrifts, and credit unions to use medical information in a credit decision when "necessary and appropriate" in connection with determinations of consumer eligibility for credit.[278]

However, in the non-credit context, sensitive data is subject to more stringent protection in the European Union than in the United States. According to the Directive, the processing of "special categories of data" must be prohibited by Member States unless the data subject gives "explicit consent."[279] The Directive gives Member States the option to provide that data subjects not be permitted even to consent to processing of their sensitive data.[280] Some countries lay down strict "necessity" tests or require that controllers obtain special permits or authorizations.[281] Several DPAs defer to other domestic laws or rules that authorize sensitive data processing, as permitted by Article 8(4). However, under Article 8(4), these exceptions must be subject to provisions providing for adequate safeguards, yet some Member States have not adopted such safeguards, and, to the extent they exist, they are often unsatisfactory.[282] The Commission has not always been notified of alternative national laws governing sensitive data, and therefore it is difficult to determine the extent to which they undermine Article 8's provisions.[283]

In sum, differential treatment of sensitive data in the United States and the European Union outside of the credit context appears to stem from different ideologies: in the European Union, data protection preserves a fundamental human value inherent in private life, while in the United States, it is protected to prevent abuse and discrimination. It may be that the European rules surrounding sensitive personal data are at times unnecessarily strict when viewed in the context of the actual risks posed to individuals.[284] The functional difference seems to represent a philosophical difference in the conception of privacy and

277. 69 Fed. Reg. 23,379 (Apr. 28, 2004).

278. Damian Paletta, *As Deadline Nears, FACT Rules & Far From Done; Fair and Accurate Credit Transactions Act*, AM. BANKER, October 25, 2004. For example, one exception in the proposed rule would allow a creditor to obtain and use medical information that pertains to debts, expenses, income, benefits, collateral, or the purpose of the loan. Another exception would allow lenders to obtain medical information needed to verify the purpose of a loan sought to finance a medical procedure or purchase medical equipment. Also, a financial institution could obtain medical information needed to comply with local, state or federal laws or to prevent or detect fraud.

279. Data Protection Directive art. 8(2).

280. *Id.* art. 8(2)(a).

281. Korff, *supra* note 127, at 82.

282. *First report on the implementation of the Data Protection Directive*, *supra* note 108, at 14.

283. Korff, *supra* note 127, at 82.

284. *See, e.g.*, Allen & Overy questionnaire for corporate organizations (20 Sept. 2002), *available at* http://europa.eu.int/comm/justice_home/fsj/privacy/docs/lawreport/paper/allenovery_en.pdf.

the purposes it is meant to serve. It is one area where compromise may be necessary.

E. Enforcement

EU privacy protection relies on principles embodied in law and a system of "external supervision" by an independent authority. However, the European Commission has stated that these two features are not necessarily required for protection to be considered "adequate."[285] The Article 29 Working Party has stated that the objectives of a data protection procedural system are essentially threefold. First, the procedure must deliver a good level of compliance with the rules. Second, it must provide support and help to individual data subjects in the exercise of their rights, such that the individual can enforce his or her rights rapidly and effectively, without prohibitive cost. This requires an institutional mechanism allowing independent investigation of complaints. Third, the procedure must provide appropriate redress to the injured party if rules are violated. This should involve a system of independent arbitration which allows compensation to be paid and sanctions imposed where appropriate.[286]

This section will consider enforcement mechanisms and policies in light of these three requirements. In the US, a variety of federal and state agencies, as well as self-regulatory practices, are responsible for ensuring that privacy protections are enforced. Although compliance and enforcement statistics are difficult to obtain because the federal agencies do not separate privacy enforcement actions from enforcement of other rules, there appear to be generally high levels of compliance with existing laws. There is also institutional support for data subjects. Effective redress for damages may often be pursued through state laws. In the EU, enforcement statistics for the financial sector were also very difficult to find because they are located in 25 different DPAs, and they are not divided up by sector. Enforcement generally occurs through the supervisory DPAs in the Member States, focusing on individual data subjects' rights to redress. While there is little comprehensive data on compliance, studies have shown divergent Member State implementation, as well as inadequate enforcement resources. The DPAs are the primary institutional mechanisms, and it is through them that individuals receive support and redress. While there are sanctions and criminal penalties for violations, these are rarely used because compliance can be achieved through negotiation and consultation with the DPA.

It has been suggested in congressional testimony in the United States that "[u]nlike the EU's lax enforcement of its privacy directive, the U.S. systematically enforces its privacy laws."[287] Professor Fred Cate, in his testimony at the Senate Hearing on Financial Privacy in September 2002, stated

285. Discussion Document DG XV D/5020/97, WP 4, *supra* note 187, at 7.
286. *Id.*
287. 107th Cong. 98, *supra* note 241 (statement of Jonathan M. Winer, Alston & Bird, LLP).

that "there is virtually no evidence of tangible harms to consumers that are not already covered by Gramm-Leach-Bliley, the Fair Credit Reporting Act, or some other financial privacy law."[288] Moreover, Minnesota Attorney General Mike Hatch stated that the GLBA's customer protections have proven "of little value" in protecting consumers, and as proof he offered that "[a]ll 50 State Attorneys General recently filed comments with the FTC stating that consumer complaints and State consumer protection enforcement actions against preacquired account telemarketers have continued without significant change after passage of the GLBA."[289] Attorney General Hatch's office has continued to bring actions for telemarketing schemes after the passage of GLBA.[290]

1. Enforcement in the United States

In the United States, there appears to be a relatively good level of compliance among the regulated financial institutions. A 2002 study on whether or not to impose new regulation of the commercial market for personal information found that, "despite perceptions to the contrary, there is a striking lack of evidence of consumer harm from privacy violations associated with the commercial use of information for advertising and marketing purposes."[291] The federal regulatory agencies responsible for ensuring compliance with the GLBA and the FCRA describe themselves as "active in protecting financial privacy."[292] Recently, the FTC has enforced its Safeguards Rule[293] against mortgage companies in a nationwide compliance sweep enforcing the Safeguards Rule.[294] The FTC also actively monitors compliance with the adverse action notification provision of the FCRA.[295] The Office of the

288. 107th Cong., *supra* note 67 (testimony of Professor Fred Cate).

289. *Id.* (testimony of Mike Hatch).

290. *See* Minnesota v. Fleet Mortgage Corp., 158 F. Supp. 2d 962 (D. Minn. 2001); Minnesota v. Fleet Mortgage Corp., 181 F. Supp. 2d 995 (D. Minn. 2002). *See also* complaint filed by the State of Minnesota against Fleet Mortgage, December 28, 2000, *available at* http://www.ag.state.mn.us/consumer/news/pr/Comp_Fleet_122800.html. Fleet Mortgage Corporation entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using pre-acquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner's mortgage account.

291. PAUL H. RUBIN AND THOMAS M. LENARD, PRIVACY AND THE COMMERCIAL USE OF PERSONAL INFORMATION 83 (2002).

292. Howard Beales, Director, Bureau of Consumer Protection, FTC, Remarks: Privacy Notices and the FTC's 2002 Privacy Agenda (Jan. 24, 2002).

293. *See* 67 Fed. Reg. 36,484 (May 23, 2002).

294. Administrative actions were filed against Nationwide Mortgage Group, Inc. and its president, based in Fairfax, Virginia, as well as Sunbelt Lending Services, Inc., based in Clearwater, Florida. Sunbelt has settled the charges brought pursuant to the FTC's Safeguards and Privacy Rules (16 C.F.R pt. 313 and 16 C.F.R pt. 314) and section 5(a)(1) of the FTC Act in an FTC Decision and Order dated January 3, 2005, http://www.ftc.gov/os/caselist/0423153/050107do0423153.pdf (the consent order bars Sunbelt from future violations of the Safeguards Rule and the Privacy Rule and sets out requirements for its security program to be certified within six months and biannually thereafter by an independent professional).

295. Remarks of Howard Beales, *supra* note 292.

Comptroller of the Currency (OCC) is committed to policing privacy violations by the banks under its jurisdiction. Although a source within the OCC confirmed that there have not been a large number of actions,[296] the agency takes its responsibility seriously.

The federal regulators frequently issue guidelines with respect to financial privacy protections. Virtually all of the regulators charged with implementing the legislation have provided not only regulations but also FAQs, Guidelines, and other information and resources to ensure effective application of the laws.[297] The FTC and the seven financial regulatory agencies are taking measures to improve notices, such as hosting GLBA notice workshops.[298] Furthermore, the OCC and other federal banking agencies have issued uniform examination procedures to verify compliance with the implementing regulations, including requirements regarding privacy and opt-out notices, reuse and redisclosure of nonpublic personal information , and account number sharing.[299] The Banking Agencies have jointly issued guidelines implementing the security standards contained in Section 501(b) of the GLBA ("Security Guidelines").[300] The OCC has also issued advisory letters regarding information sharing.[301] In addition, there may be significantly higher levels of enforcement of financial regulations in the United States than in the European Union, and it is reasonable to assume that such levels of intensity would extend to privacy regulation as well.

Support for individuals in exercising rights of information privacy in the financial sector is provided in the United States through the GLBA and FCRA notices as well as through self-regulatory codes of conduct adopted by financial institutions, often pursuant to federal guidelines. Furthermore, strong privacy advocacy groups such as the Electronic Privacy Information Center ("EPIC"), the Privacy Rights Clearinghouse, and the US Public Interest Research Group are influential in calling media attention to privacy violations and assuring that consumers are aware of their rights.[302] In practice, many banks state their privacy policies clearly and provide click-through or telephone mechanisms that make it easy for customers to opt out.[303]

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296. Telephone interview with Bob Pasley, Office of the General Counsel, OCC (March 2005). For an example of a privacy action, see *In the Matter of Goleta National Bank*, Consent Order, http://www.occ.gov/FTP/EAs/ea2002-93.pdf.

297. For example, in 2002 the FTC released FAQs to assist with compliance with the GLBA and on December 12, 2001, the federal banking agencies issued guidance to help financial institutions comply with the regulations, http://www.ftc.gov/privacy/glbact/glb-faq.htm.

298. Remarks of Howard Beales, *supra* note 292.

299. Federal Deposit Insurance Corporation, Financial Institution Letters: Privacy of Consumer Financial Information, May 17, 2001, http://www.fdic.gov/news/news/financial/2001/fil0146.html.

300. *See* 66 Fed. Reg. 8,616 (Feb. 1, 2001).

301. *See* 8 Fair Credit Reporting Act, OCC AL 99-3 (Mar. 29, 1999). CRS Report for Congress, *supra* note 268.

302. *See, e.g.*, Electronic Privacy Information Center, Privacy Rights Clearinghouse, http://www.privacyrights.org; U.S. Public Interest Research Group, http://www.uspirg.org.

303. *See, e.g.*, JPMorgan Chase & Co., www.chase.com.

Although many claim that the opt-out notices provided to customers in the United States pursuant to the GLBA have in practice failed to provide consumers with effective choice, the federal banking agencies have issued regulations and are currently making efforts to remedy this shortcoming. The notices were criticized as incomprehensible,[304] and reports indicate that most are written at a college upperclassman reading level.[305] A Petition for Rulemaking filed by Public Citizen requested improvements in the clarity of notices and the ease of opting out, demanding that federal agencies require a standardized notice that clearly explains consumers' rights.[306] The federal agencies have responded. In December 2003, the eight federal agencies issued an Advance Notice of Public Rulemaking to consider the development of alternative forms of privacy notices for consumers, soliciting public comments on the feasibility, design, and content for a short notice.[307] The agencies are currently engaged in an interagency notice research project to develop alternative forms of privacy notices through consumer testing.[308]

Perhaps the single greatest obstacle to creating a comprehensive privacy enforcement regime in the US financial services industry is the problem of uniting and coordinating multiple regulatory agencies with overlapping jurisdictional mandates.[309] Coordination is further complicated in that financial institutions may face an extra layer of stricter state regulation, which may or may not be preempted.

With respect to individual remedies and causes of action, US consumers must obtain redress from explicit legal rights provided by other state and federal laws, such as the GLBA and the FCRA, rather than from legislation governing financial institutions, which provide for actions to be initiated only by federal regulatory agencies. However, individuals may have claims for financial privacy violations pursuant to other federal statutes, such as the EFTA[310] or the ECOA.[311] Furthermore, individual redress is also provided by state fund transfer regulations and computer crime laws,[312] as well as state law contract and tort claims.

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304. *See* Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 Minn. L. Rev. 1219, 1230-31 (2002).

305. Mark Hochhauser, *Lost in the Fine Print: Readability of Financial Privacy Notices*, Privacy Rights Clearinghouse (July 2001), http://www.privacyrights.org/ar/GLB-Reading.htm.

306. Public Citizen Litigation Group et al., Petition for Rulemaking, http://www.epic.org/privacy/consumer/glbpetition.pdf (last visited Mar. 17, 2005).

307. 68 Fed. Reg. 75,164 (comments were due Mar. 29, 2004).

308. The agencies have issued a "Statement of Work: Form Development Project," describing the research design for the first "form development" phase of the project and hired a contractor to begin form development and testing, *available at* http://www.ftc.gov/privacy/glbact/sow_privacy_notice_final1.pdf.

309. *See, e.g.*, GAO Report: *Better Information Sharing Among Financial Services Regulators Could Improve Protections for Consumers*, June 29, 2004, GAO-04-882R, at 1; Sammin, *supra* note 93, at 669-70.

310. 15 U.S.C. §§ 1693(m),(n) (2006) ((m) is civil liability, (n) is criminal liability).

311. 15 U.S.C. § 1681(e) (2006).

312. SCHWARTZ & REIDENBERG, *supra* note 3, at 283.

The GLBA specifically preserves state remedies for individuals, including unfair practice claims. Voluntarily adopted privacy policies, such as the ABA's adopted Privacy Principles,[313] can often result in legally enforceable consumer rights under state law. Various common law tort claims are based on a reasonable expectation of privacy, and stated policies create expectations. Furthermore, breach of a privacy policy could be deemed an "unfair or deceptive act" under the FTCA.[314] In addition to banks' common law obligations of confidentiality, all states have laws providing consumers with a state right of action to remedy unfair or deceptive practices. States themselves can also bring suits for violations of state and federal law.[315] Class action lawsuits may also be effective where an institution has committed violations that affect a large number of individuals.

Personal data protection in the insurance field is enforced by 51 different state authorities. However, while insurance companies are generally in compliance with the GLBA's notice requirements, most State regulators have not yet implemented security and confidentiality requirements.[316] Enforcement of security measures thus may occur pursuant to the provisions of the previous NAIC Model Act of 1982, which offers significant protections.

2. Enforcement in the European Union

The overall level of compliance is difficult to measure in the European Union because it differs widely between the 25 regulatory bodies of the Member States. National Data Protection Authorities have different enforcement programs and priorities and are endowed with varying enforcement powers and resources.[317] The Working Party has been charged by the Commission to hold periodic discussions on enforcement and to launch sectoral investigations at the EU level in order to provide a more accurate picture of the implementation and enforcement of data protection law in the Community.[318] In 2004, the Working Party stated that the promotion of harmonized compliance is one of its strategic and permanent goals.[319] The Working Party has committed itself to developing proactive enforcement strategies, such as awareness-raising activities and guidance, increasing enforcement actions such as sanctions, and intensifying its cooperation efforts through mutual assistance.[320] The Working Party has also

313. *See supra* note 87.

314. L. Richard Fischer, *Emerging Issues in the World of Financial Privacy*, SEA1 A.L.I.-A.B.A. 241, 247-48 (Feb. 2000).

315. *See, e.g., Fleet Mortgage Corp., supra* note 294.

316. GAO Report, GAO-02-361, *supra* note 26, at 3.

317. *Declaration of the Article 29 Working Party on Enforcement*, at 4, 12067/04/EN, WP 101, Nov. 25, 2004.

318. *First Report on the Implementation of the Directive, supra* note 108. According to Rosa Barcelo, *supra* note 1900, at 23, as of Mar. 7, 2005, these had not yet occurred.

319. Strategy Document 11648/04/EN, WP 98 at 5, *adopted* Sept. 29 2004.

320. *Declaration of the Article 29 Working Party on Enforcement, supra* note 317, at 5.

called for investigations of the enforcement practices of the national DPAs.[321]

In 2003, the First Report on the Implementation of the Data Protection Directive[322] found that it was difficult to obtain accurate or complete information about compliance with the data protection laws. Anecdotal evidence, combined with various elements of "hard" information available to the Commission, such as the small number of individual complaints received by the Commission itself and the low number of authorizations by national DPAs for transfers to third countries notified to the Commission in accordance with Article 26 (3), were taken to suggest the presence of three interrelated phenomena.[323] First, the enforcement effort is under-resourced and supervisory authorities are charged with such a wide range of tasks that enforcement actions have a low relative priority. Second, data controllers may be reluctant to undertake changes in their existing practices to comply with what may seem to be complex and burdensome rules when the risks of getting caught seem low. Third, data subjects demonstrate an apparently low level of knowledge of their rights.[324] The DPAs themselves in many Member States are particularly concerned about their DPAs' lack of resources.[325]

Several obvious problems with enforcement stem from divergent implementation in various Member States. For example, Article 4's "applicable law" provisions have been inconsistently implemented, thus subjecting data controllers in the EU to the regulations of several sets of national laws simultaneously and creating great confusion as to which laws should be followed and enforced. Submissions to the Commission from Member States on the occasion of its first implementation report argued for a country of origin rule that would allow multinational organizations to operate with one set of rules across the EU. Many also argued that the "use of equipment" was not an appropriate or workable criterion for determining the application of EU law to controllers established outside the EU.[326] In the 2002 survey conducted by Interactive Policy Making (IPM) for the European Commission, 32% of the respondent data controllers believed that the disparities between Member States' legislation were too significant to consider that data can be moved freely within the Community/EEA. Fifty percent of the respondents believed that data protection supervisory authorities did not devote sufficient resources to advising companies.[327]

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321. In early 2005, the Working Party will develop a list of candidate issues, cases or sectors and will determine their eligibility for EU-wide synchronized national investigations to be undertaken in 2005 and 2006, with due regard to the diversity that exists in terms of the powers, policies and resources of national DPAs. *Id.*

322. *First Report on the Implementation of the Directive*, *supra* note 108.

323. *Id.* at 12.

324. *Id.*

325. *Id.*

326. *Id.* at 17.

327. Questionnaire for Data Controllers on the Implementation of the Data Protection Directive (95/46/EC): Results of Online Consultation 20 June - 15 September 2002, Study Conducted by Interactive Policy Making (IPM).

With respect to support for individuals in enforcing their rights, "notice" to consumers in the EU appears to occur with "purpose specification" at the initiation of the relationship; the individual consents to processing for a particular purpose. Awareness of data protection rights varies immensely between Member States. David Smith, Assistant Information Commissioner from the UK, stated, on behalf of the UK's Commission, "We are very keen to develop awareness amongst citizens and amongst businesses of how the law operates and their rights and responsibilities under it."[328] According to the other IPM survey for data subjects,[329] the largest single category of respondents (4113 out of 9156, or 44.9%) considered the level of protection in the EU at a minimum, and 81% of individuals thought the level of awareness about data protection was insufficient, bad or very bad.[330] Of the controllers, the largest single group, 295 of 982, responded that citizens' awareness of data protection was insufficient. Most believed that the existing data protection requirements are necessary in a market where there is traditionally a high level of protection for consumers and a strong concern for fundamental rights. Europeans are increasingly aware of personal data protections, and, for example, they are becoming more skeptical about giving broad consent to controllers to transfer data to third countries.[331] The UK data controllers' responses to a Department of Constitutional Affairs consultation in 2002 suggest that they have received more subject access requests under the 1998 Data Protection Act than under the previous 1984 Act.[332]

Finally, the EU provides that data subjects must have judicial remedies and rights to recover damages for breaches of national data protection laws. The Commission or the Council may also challenge the adequacy of Member States' laws in the ECJ, which may find Directive provisions to be directly applicable to data subjects.[333] For example, in the UK, individuals can enforce their rights in court.[334] As David Smith stated, "[t]he UK laws, as it stands at the moment, only allows individuals to bring cases. And I think it's fair to point out that actually the individuals' rights are fairly limited, in that it only enables them – in terms of getting redress, to get compensation for damage, which in UK legal terms involves some sort of financially quantifiable loss. And most of the data protection breaches result in distress to individuals, but not necessarily a

328. Statement of David Smith, Assistant Information Commissioner from the United Kingdom, *supra* note 241, at 16.

329. Questionnaire for Data Subjects on the Implementation of the Data Protection Directive (95/46/EC); Results of Online Consultation 20 June - 15 September 2002, Study Conducted by Interactive Policy Making (IPM).

330. *First Report on the Implementation of the Directive*, *supra* note 108, at 9.

331. Rosa Barcelo, *Seeking Suitable Options for Importing Data from the European Union*, 36 INT'L LAW 985, 995 (2002).

332. Response to the Consultation Paper, Data Protection Act 1998: Subject Access (July 2003), *available at* http://www.dca.gov.uk/consult/foi/dpsaresp.htm (last visited March 17, 2005).

333. *See, e.g.*, Case C-465/00, *supra* note 178.

334. Statement of David Smith, *supra* note 328, at 16.

financially quantifiable loss."[335] A private right of action for data protection breaches is not necessarily guaranteed in the United States.

A final factor to be considered in determining levels of privacy protection is actual practice in each jurisdiction. Although empirical data is often difficult to obtain and voluntary practices are not necessarily backed by legally enforceable provisions or formal legal records, the actual practices contribute to a more comprehensive picture of the system as a whole. In the United States, financial institutions generally adhere to industry codes that bring their privacy practices in line with high consumer expectations, in part because consumers may choose to do business only with financial institutions with strongly enforced privacy policies. Furthermore, firms may also voluntarily implement more restrictive privacy policies than required by the GLBA because of the threat of more stringent state regulation that would give rise to costly changes in internal procedures to comply with state laws. Finally, privacy violations can create high-profile scandals that generate significant negative publicity.[336] For example, nine of the top fifteen U.S. banks, or 60%, do not share customer information with third parties, according to Financial Insights data.[337] A research analyst with Financial Insights stated: "A lot of banks are adopting the most conservative privacy policies possible. They're not just following Gramm-Leach-Bliley guidelines, they're going even further and just not sharing data with third parties at all."[338] Furthermore, practices reflect the fact that many consumers realize that "the abundance of marketing information out there contributes to the identity theft problem."[339] For example, SunTrust Bank has long enforced policies of sharing and safeguarding customer information that are stricter than required by law.[340] The only other firm SunTrust shares customer data with is its affiliate card issuer, and customers are explicitly made aware that if they choose not to share their information, they cannot get a credit card through SunTrust.[341]

In the EU, the Commission's and the Working Party's willingness to recognize sectoral codes of conduct and binding corporate rules may indicate that certain sectors and companies are also adopting certain privacy practices voluntarily. David Smith of the UK Commission stated: "We promote good practice which goes wider than simply complying with the law and covers conduct which is consistent with those requirements . . . we also put emphasis

335. *Id.* at 28.

336. In 2005, public attention turned to several information security breaches at financial institutions, including, for example, an embarrassing loss of personal information at Bank of America and a high-profile security breach at ChoicePoint. *See, e.g.*, Michael Rasmussen, *ChoicePoint Security Breach Will Lead to Increased Regulation*, FORRESTER, *available at* http://www.csoonline.com/analyst/report3416.html (last visiting Mar. 19, 2006).

337. Matthew de Paula, *Privacy Versus Profits: For Consumers, Not Sharing Is Caring*, 18 BANK TECHNOLOGY NEWS 3, 30 (Mar. 2005).

338. *Id.* (quoting Sophie Louvel).

339. *Id.*

340. *Id.*

341. *Id.*

on the development of codes of practice, codes that develop how the law applies in the area of particular industry, particular activities, fields such as the use of data in employment."[342] It is likely that EU institutions respond to the same or greater privacy concerns of European consumers and adapt their policies accordingly. The traditional sector-specific bank secrecy and confidentiality norms do not generally recognize national borders. It may be that industry codes are more indicative of actual practices than the formal laws themselves.

In sum, US privacy protections appear to have generated a good level of compliance. There are many regulations and guidelines issued in response to perceived shortcomings, and relatively few enforcement actions. US regulation provides for support through a notice-based system, reinforced by self-regulatory codes and the vigilance of active consumer privacy groups, and it provides for individual redress at the state level and for most quantifiable consumer harms. In the EU, compliance with the Directive appears inconsistent, and, while there is a private right to a judicial remedy, there are indications that data subjects' awareness levels are low. Furthermore, the judicial remedy may be limited to measurable damages, as it is under US state law. The formal legal enforcement remedies in the Directive thus in practice may be functionally equivalent to those in the United States, even if the United States lacks certain institutions or procedures that Europeans favor. The EU should acknowledge US self regulation within the rubric of compliance, support, and redress.

V.
THE EC DATA PROTECTION DIRECTIVE AND TRANS-ATLANTIC DATA TRANSFERS

Article 25 of the Data Protection Directive limits transfers to non-EU countries that have not been found to provide adequate protection;[343] however, as discussed above, Article 26 permits transfers to such third countries under certain circumstances, such as when the data subject has consented or when the transfer is necessary for the performance of a contract between the data subject and the controller. In 2000, the European Commission and the Article 29 Working Party reviewed the recent US privacy legislation contained in the GLBA to assess whether it could be considered adequate for the purposes of issuing an adequacy decision. The European Parliament found that "there is not at present any generally applicable legal data protection in the private sector and virtually all data are currently processed without specific guarantees of judicial protection."[344] However, the European Parliament noted that there were

342. Statement of David Smith, *supra* note 328, at 16.

343. Outside the EU, data may be transferred freely to Switzerland, Canada, Argentina and the UK territories of Guernsey and the Isle of Man, whose privacy regimes have been recognized by the Commission as offering adequate data protection. In addition, some Member States have open transfer provisions regarding transfers to non-EU EEA countries (Norway, Liechtenstein and Iceland).

344. Report on the Draft Commission Decision on the Adequacy of the Protection Provided by the Safe Harbour Principles (C5-0280/2000-2000/2144(COS)), June 22, 2000.

numerous legislative proposals pending before Congress, that the President and the FTC supported further legislative measures, and that the guidelines approved by the OECD must in any case be applied in the area of personal data protection.[345] John Mogg, Director General of the Internal Market Directorate General, indicated in 2001 that the adequacy of the GLBA was a closed issue.[346]

The Commission and the US Treasury engaged in an active dialogue regarding a potential adequacy decision until 2002, when the Commission indicated that it would favor extending the Safe Harbor to financial services by adding the SEC and the federal banking agencies to the list of enforcement bodies rather than by issuing an adequacy decision regarding a given law (such as the GLBA alone). The United States held back, preferring to consider other options. Since 2002, the Treasury Department has not stated its position, nor has it sought an adequacy decision based on other legislation. The European Commission is willing to have more productive and active discussions on this topic if the US Treasury Department shows an interest in pursuing the dialogue.[347] In the meetings of the Trans-Atlantic Financial Markets Regulatory Dialogue in 2005, the data protection issue was noted, but it was not discussed actively.[348]

The most probable explanation of why the harmonization of Data Protection regimes is not currently at the forefront of these discussions is that Data Protection Authorities in Member States have, thus far, shown little interest in enforcing the Directive against US companies.[349] As a result, many transfers occur extra-legally without obstacles and US government authorities are not actively pressured to confront the Directive's Article 25 transfer restrictions.[350] Furthermore, financial institutions have three options under which they may legally transfer data on EU citizens to the US. Data controllers may make transfers pursuant to the Article 26 derogations, for example where the institution obtains the consent of the data subject or where the transfer is necessary for the performance of a contract between the data subject and the controller. Transfers may also occur pursuant to one of three sets of approved Standard Contractual Clauses, or pursuant to individual contracts that are pre-approved by a national Data Protection Authority. It is likely that the majority of legal transfers occur pursuant to Article 26 derogations because the use of

345. *Id.*

346. Tallman, *supra* note 13, at 765-66.

347. Email from Rosa Barcelo to author (Mar. 2, 2005). *See supra* note 190 (on file with author).

348. Email from Crispin Waymouth, Delegation of the European Commission, to author (Mar. 2, 2005) (on file with author).

349. Email from Leonardo Cervera Navas, formerly of the Data Protection Unit of the European Commission, to author (Apr. 21, 2005) (on file with author).

350. This issue was a priority for US authorities under the Clinton Administration when the Directive first entered into force and some American companies feared that national DPAs would block data transfers. These fears gave rise to the discussions that resulted in the Safe Harbor Agreement of 2000.

standard contractual clauses or ad hoc contracts approved by the national DPAs is still very rare.[351] Most financial institutions are not eligible to join the EU-US Safe Harbor[352] because they are not subject to the jurisdiction of the FTC or the Department of Transportation (DOT).

The Commission has recognized that the national laws concerning international data transfers may not be adequately enforced and that a large number of transfers may be occurring in violation of the Directive.[353] Indicators suggest that "many unauthorised and possibly illegal transfers are being made to destinations or recipients not guaranteeing adequate protection."[354] One of these indicators is the very limited number of notifications received from Member States pursuant to Article 26(2) of the Directive: "this number is derisory by comparison with what might reasonably be expected."[355] While EU officials may currently be reluctant to disrupt trans-Atlantic data flows, the First Commission Report on the Implementation of the Directive and the Working Party's recent Enforcement paper[356] are likely to generate a response by the national DPAs. If DPAs begin to monitor international data transfers more carefully, they may very well begin to use their existing powers to enforce the Directive's provisions against financial institutions. Penalties vary from one Member State to another, and they can include not only economic but also criminal sanctions.[357] The fact that the recently published reports highlight the Article 25 enforcement problems suggests that the EU may not be willing to continue its policy of lax enforcement that permits a de facto solution to the privacy issue in the face of the formal contradiction.

Given the high level of trans-Atlantic data flows, if Article 25 of the Directive is enforced, the United States and the Europoean Union must reach some formal agreement that will promote certainty in the legality of data transfers between them. The current options for legal transfers are problematic; they tend to be unrealistic or inefficient. Both European and American financial institutions would gain tremendously from a sectoral adequacy determination for the financial services sector.[358] EU officials have stated that they would like to provide for more flexible arrangements for transborder flows, especially out of

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351. Email from Leonardo Cervera Navas, *supra* note 348.

352. *See* Commission Decision 2000/520/EC of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council On the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce, 2000 O.J. (L 215).

353. *The First Commission Report on the Implementation of the Directive*, *supra* note 108, at 19.

354. *Id.*

355. *Id.*

356. *See, e.g.*, *Declaration of the Article 29 Working Party on Enforcement*, *supra* note 317.

357. Barcelo, *supra* note 331, at 988.

358. In the absence of such a determination, the financial services sector could become eligible for inclusion in the Safe Harbor or seek to enhance the use of model contracts and streamline the process of approval of individual contracts in order to facilitate the process of data transfer. However, for reasons discussed *infra*, neither of these options is ideal.

the EU,[359] and there have been indications that the EU would accept the adequacy of a GLBA modified to include the basic Safe Harbor principles.[360] In 1998, American law professors Swire and Litan suggested that the detailed provisions of the FCRA alone may provide adequate protection for credit information, even if transfers for the other sectors were prohibited,[361] and consumer credit regulation has been described as the sector providing the closest degree of functional similarity to European data protection principles.[362] However, the EU has never actually found that the privacy regulations applicable to a discrete sector of a foreign nation's economy constitute adequate protection. However, in the Safe Harbor adequacy decision, the EU determined that the policies of individual companies, rather than the laws of the US or of a particular sector, provided adequate protection.

The language of Article 25 of the Directive establishes that an adequacy consideration may take into account both the general and sectoral laws in force in the non-Member State, as well as the "professional rules and security measures" complied with in that State.[363] For the Commission to make a binding determination that protection is "adequate," several key distinctions between the functional protections offered in the two regimes should be reconciled, and the functional similarities should be clarified and emphasized. Part IV described in detail the divergent areas of the current US and EU data protection regimes. This Part describes the nature of the EU's restriction on transfers, including the extent to which divergence from the terms of the Directive has been permitted. Finally, this section will then consider changes to US regulation that would strengthen the argument that the financial services sector should qualify for an adequacy determination. First, the standards the EU has accepted in the US-EU Safe Harbor, the model contracts, and other adequacy determinations for third countries indicate potentially acceptable alternatives to the Directive's formal data protection principles. Second, given the EU's increased recognition of codes of conduct and corporate rules, as well as the language of Article 25, the EU is in a position to evaluate US self-regulatory practices in making a decision for the sector. Finally, there are several key ways that the US can improve its laws to "bridge the gap" and satisfy the EU that financial services regulation in the US affords an "adequate" level of protection. This ultimate determination must take into account compromises the EU has made with respect to other privacy protection regimes, as well as ideological differences in approaches to privacy and to law in the two jurisdictions.

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359. Frits Charlesworth, *supra* note 195, at 934 (citing speech by Commissioner Fritz Bolkestein given at Closing Remarks of EC Conference on Data Protection, Oct. 1, 2002).

360. Tallman, *supra* note 13, at 779.

361. SWIRE & LITAN, *supra* note 33, at 32.

362. SCHWARTZ & REIDENBERG, *supra* note 3, at 289.

363. Data Protection Directive art. 25(2).

A. Transfers Currently Permitted by the European Union

EU Member States have different standards for permitting transfers under the exemptions of Article 26. Currently, the European Commission and individual DPAs may determine that a third country provides adequate protection or that a particular transaction provides adequate safeguards. Some Member States also allow data controllers themselves, with limited oversight by the national supervisory authorities, to make adequacy determinations for third countries.[364] As the Commission states, an overly lax attitude in some Member States risks weakening protection in the EU as a whole, because with the free movement guaranteed by the Directive, data flows are likely to switch to the "least burdensome" point of export.[365] On the other hand, an overly strict approach risks being unrealistic and creating a gap between law and practice, which is damaging for the credibility of the Directive and for Community Law in general.[366]

1. Article 26 Derogations

The two most important Article 26 derogations are transfers that occur with the data subject's "unambiguous consent" and transfers that are "necessary for the performance of a contract" between the data subject and the controller or concluded in the interest of the data subject between the controller and a third party.[367] To be valid, data subject consent must be fully informed; many states use an opt-in standard for international transfers.[368] After the data subject consents, the US importer is not required to afford access, choice, or any other right that the data subject may have had under the legal framework in the EU country of residence.[369] There are substantial practical difficulties in obtaining full and informed consent, and it can usually be revoked. Customers may be reluctant to opt in if they are informed, as required, that the data will be transferred to a place without "adequate protection."[370] The language "necessary for the performance of a contract" has also been interpreted narrowly. Most DPAs allow data to be transferred pursuant to this derogation

364. Barcelo, *supra* note 331, at 988-89. For examples, see the U.K.'s Data Protection Act of 1998, *available at* http://www.opsi.gov.uk/ACTS/acts1998/19980029.htm, and the Dutch Personal Data Protection Act of July 6, 2000, *available at* http://home.planet.nl /~privacy1/wbp_en_rev.htm. However, if the DPA finds that the importer's country's privacy laws fail to pass the adequacy requirement, the exporting company may be likely to be charged with violation of U.K. or Dutch privacy laws for illegal transfer of data to a country that does not provide adequate protection if the transfer does not fit within an exception. The company may be liable for heavy fines, not to mention the effects of any resulting bad publicity. Barcelo, *supra* note 331, at 989.

365. *First Report on the Implementation of the Directive*, *supra* note 108, at 17.

366. *Id.*

367. Data Protection Directive art. 26(1).

368. Barcelo, *supra* note 331, at 993-94.

369. *Id.* at 995.

370. *Id.* at 1000.

only if the transfer is "absolutely essential" for the performance of the contract.[371]

As a result, consent and necessity are not adequate to support all financial services transfers from the European Union to the United States. Transfers not covered by these derogations include certain payment transactions where credit card processing occurs in the United States; sales of financial services to individuals and businesses located in the EU; investment banking practices, such as market analysis, hostile takeovers, due diligence, private placements, and other sales to Europeans; mandatory securities and accounting disclosures in the US; and the transfer of individual and corporate credit histories out of Europe.[372]

2. Model Contracts

Data transfers that do not meet one of these derogations may be permitted pursuant to a contract approved by the European Commission or a national DPA. To date, the Commission has approved three sets of standard contractual clauses that contain legally enforceable declarations whereby both the "Data Exporter" and the "Data Importer" agree to process the data in accordance with basic data protection rules and to allow individuals to enforce their rights under the contract. The first set of model contract clauses, from June 2001,[373] covers transfers to controllers in third countries. The second set, from December 2001,[374] provides for less stringent safeguards for contracts between controllers and processors to perform data processing operations abroad. The third set of clauses,[375] available for use as of April 1, 2005, concerns transfers to controllers abroad.

The standard contractual clauses impose certain obligations on U.S. importers in addition to the obligations imposed by US data protection law. Under the terms of the June 2001 contract for transfers to data controllers, the data importer and exporter would agree to be bound by "Data Protection Principles" similar to those of the Directive.[376] They provide for an opt-out system for direct marketing and onward transfer and an opt-in system for sensitive data. The rights of access, rectification, and erasure appear to be absolute, and the subject retains a right to object to decisions made on the basis

371. *Id.* at 1000.

372. *See* SWIRE & LITAN, *supra* note 33, at 102-21, 252-55; table at http://www.privacyexchange.org/tbdi/sectorsum.html.

373. Commission Decision 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC, C(2001)1539; Press release, IP/01/851, (June 18, 2001).

374. Commission Decision 2002/16/EC of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC, C(2001)4540.

375. Commission Decision 2004/915/EC of 27 December 2004, amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries, C(2004)5271; Press release, IP/05/12, (January 7, 2005).

376. Decision 2001/497/EC, *supra* note 373, app. 2.

of fully automated processing. Special security measures must be in place for sensitive data, and the required purpose limitation, data quality and proportionality, transparency, and security measures are similar to those found in the Directive. Onward transfer may occur only where the data importer has either obtained the informed consent of the data subject (opt-out or opt-in for sensitive data) or where the third party becomes a party to the contract.[377]

The most recent (2004) standard clauses for transfers to data controllers do not include "Data Protection Principles;" rather, the data importer agrees to process personal data only on behalf of the importer and pursuant to his instructions and the clauses,[378] and to take certain security measures specified in the contract. The data importer agrees to return or destroy all of the personal data transferred, to stop processing at the termination of the provision of the processing services,[379] and to submit its data processing facilities to audits at the request of the data exporter.

In both sets of clauses, the parties must specify the purposes for which the transfer occurs and the data processing activities they anticipate. They must agree that the data transferred will be used only to accomplish the specific purpose of the transfer.[380] Furthermore, the contracts contain a third-party beneficiary clause allowing a data subject who has suffered damages to file lawsuits against both the exporter and the importer in the courts of the data subject's own country or those of the data exporter and to pursue mediation or arbitration. Finally, the parties must either accept joint liability for damages or, in the most recent clauses, the importer must indemnify the exporter for damages. In addition, these 2004 clauses provide for a more pragmatic approach to the substantive obligations imposed on the data importer and on their relationships with the national DPAs. However, the importer is still subject to an EU Member State's governing law, and it may be required to submit to audit by the supervisory authority.[381] Therefore, the new clauses, although an improvement for US data importers, may not assuage concerns with respect to business confidentiality and the subjection of US data importers to litigation abroad.[382] Commentators and businesses stated prior to the adoption of the most recent set of clauses that the Model Contracts are "unlikely to be acceptable to most firms."[383] It is unclear whether the new contract clauses will change that view.

While the model contracts may not be acceptable to data importers, individual contracts may be prohibitively costly. Tailored model contracts may be accepted by a DPA of one state and not by another.[384] Thus, an importer

377. *Id.* app. 3.
378. Decision 2004/915/EC, *supra* note 375, annex, cl. 5.
379. *Id.* annex, cl. 11.
380. Decision 2004/915/EC, app. 1; Decision 2001/497/EC, app. 1.
381. *Id.* annex, cls. 8, 9.
382. Tallman, *supra* note 13, at 770-71.
383. *Id.* at 749.
384. Citigroup's Review of the Directive, *supra* note 118. *See also* Barcelo, *supra* note 331,

may have to implement and comply with up to 25 different individual contracts. Indeed, the importer would have to track the data received from the EU Member States by country of origin in order to comply with the individual requirements of each Member State.

3. Safe Harbor

When the Data Protection Directive came into effect in 1998, US businesses were concerned that enforcement of Article 25 would disrupt data flows and commerce between the US and the EU on a large scale. In response to these concerns, in March 1998, the US Department of Commerce and the European Commission Directorate for Internal Markets initiated a high-level, informal dialogue to negotiate an agreement that would ensure the continued free flow of personal data across the Atlantic.[385] Consistent with US market theory that companies will choose to provide privacy if consumers demand it, the idea was to create a "safe harbor" standard for privacy that would be accepted by the EU as "adequate" and with which companies could comply voluntarily.[386]

In 2000, the European Commission approved the Safe Harbor (SH) for US companies under the jurisdiction of the DOT and the FTC.[387] The SH framework is set forth in a set of seven privacy principles and fifteen FAQs. Companies that voluntarily declare their adherence to these principles are not required to obtain approval by national DPAs. They agree to submit to enforcement by the FTC or the DOT in order to ensure compliance with these principles. As a result, financial institutions are generally not eligible to join. To date, 880 companies have joined.[388]

The SH principles require the importing company to provide *notice* to data subjects about the collection of data. First, the notice must be in clear and conspicuous language and must define the specific purposes of collection and the controller's intended transfers. Second, the principles require that the controller offer an opt-out mechanism for data subjects to exercise the *choice* of whether or not to prevent disclosure of their personal data to third parties. Data subjects may also prevent the use of their data for purposes other than those for which it was initially collected or subsequently authorized, which could prevent use by affiliates if not initially disclosed. The SH's principle of *data integrity* is similar to that contained in the Directive; the data importer may use information for purposes other than those specified, provided that they are "not

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at 998.

385. WELLBERY, *supra* note 17.

386. MARIE CLEAR, FALLING INTO THE GAP: THE EUROPEAN UNION'S DATA PROTECTION ACT AND ITS IMPACT ON US LAW AND COMMERCE 1007 (2000).

387. Decision 2000/520/EC, *supra* note 352.

388. The number of companies subscribing to the Safe Harbor principles has generally been lower than anticipated by the European Commission, suggesting that it is not an ideal framework for many companies. *See infra* note 394, at 5. For the companies participating, see http://web.ita.doc.gov/safeharbor/shlist.nsf (last visited Feb. 23, 2006).

incompatible" with the purpose for which the data was originally collected. Controllers must take reasonable *security* precautions to protect data from loss, misuse and unauthorized use, and they must ensure that individuals have *access* on a "reasonable basis" to all information that might be held about them.[389] This obligation to provide the data subject with access to personal data is subject to the principle of proportionality, as under the Directive. However, a company may refuse to grant the subject the right of access if, for example, the cost is disproportionate. For *sensitive information*, data subjects must be given an affirmative or explicit (opt-in) choice if the information is to be disclosed to a third party or used for a purpose other than that for which it was originally collected or subsequently authorized.[390] For *onward transfer* of information to a third party, the company must apply the notice and choice principles.

The SH's core principle of *enforcement* includes three elements. First, there must be readily available and affordable independent recourse mechanisms by which each individual's complaints and disputes are investigated and resolved by reference to the Principles, and damages must be awarded where the applicable law or private sector initiatives so provide. Second, the SH requires follow-up procedures for verifying that the attestations and assertions businesses make about their privacy practices are true and that privacy practices have been implemented as presented. Finally, the SH imposes obligations to remedy problems arising out of failure to comply with the Principles by organizations announcing their adherence and the consequences of such adherence. Failure to abide by the Principles after having been certified must be actionable as an "unfair or deceptive act," and sanctions must be "sufficiently rigorous to ensure compliance."[391] Data Protection Authorities in the EU may refer cases of non-compliance to the FTC, which must seek injunctive relief or damages to provide redress to individuals on a priority basis. Thus, the enforcement arrangement appears to be a carefully constructed system of self regulation, reinforced by the FTC's authority to police unfair and deceptive acts.[392] While the federal financial regulators do have authority to assert that a violation of a financial firm's policy constitutes an unfair or deceptive act under Section 5 of the FTCA, they have not indicated that they would accept jurisdiction under the SH. The financial services sector was not initially included in the SH in large part because the EU was concerned about enforcement in the absence of FTC jurisdiction.[393]

389. Safe Harbor FAQ 8, http://www.export.gov/safeharbor/sh_documents.html. *See also* Barcelo, *supra* note 331, at 990.

390. However, the opt-in requirement for sensitive data is subject to certain exceptions involving necessity, the data subject's interest, or where the data has already been made public by the individual. Safe Harbor FAQ 1, *supra* note 393.

391. U.S. Department of Commerce, Safe Harbor Privacy Principles, July 21, 2000, http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm).

392. WELLBERY, *supra* note 17.

393. Tallman, *supra* note 13, at 763. US firms were also concerned about losing negotiating leverage for their position in the debate over the GLBA privacy provisions, which were pending.

Finally, it is not clear that financial services joining the SH would be an effective long-term solution to the data protection issue, given the EU's recent determination that the implementation of the SH is deficient in many respects.[394] The review of the effectiveness of SH implementation indicated that, while participating US organizations have made efforts to accommodate privacy concerns, "important improvements are required" to ensure that safeguards for personal data transferred under the SH are adequate.[395] Most of the reviewed US organizations had trouble correctly translating the SH Principles into their existing data-processing policies.[396] The study concluded that the deficiencies and laxity in the US implementation of the SH indicate that the SH regime favors US companies over EU companies. The absence of enforcement actions, despite the easily documented shortcomings of organizational policies and practices, suggested that US companies actually operate under a less stringent data protection standard; indeed, they were seen as processing data in ways contrary to the SH Principles without real risk of sanction.[397] However, if SH Principles are strictly applied, the Commission noted that there may be discrimination against US companies because such application may be more exacting than national laws transposing the EC Directive.[398] As a result of the study, the Commission invited DPAs to suspend data flows to the US that are occurring pursuant to the SH if the DPA believes that there is a substantial likelihood that SH principles are being violated.[399]

In sum, the SH and the Model Contracts follow the Directive's principles fairly rigorously. However, in lieu of EU enforcement by DPAs and a private, individual right of action, the SH adopts a US, agency-based enforcement mechanism, guaranteeing an individual right to damages only where "applicable law and private sector initiatives so provide." The FTC is ultimately responsible for enforcement. Both models insist on purpose specification, although under

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394. *The Implementation of Commission Decision 520/2000/EC on the Adequate Protection of Personal Data Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce*, European Commission Staff Working Document, SEC (2004) 1323, Oct. 20, 2004, at 105.

395. *Safe Harbour Decision Implementation Study*, prepared by Jan Dhont, María Verónica Pérez Asinari, & Professor Yves Poullet, with the assistance of Professor Joel R. Reidenberg & Dr. Lee A. Bygrave, at the request of the European Commission, Internal Market DG, Contract PRS/2003/A0-7002/E/27, Apr. 19, 2004, at 105.

396. Specifically, transparency and comprehensibility of notices or privacy policies were often deficient; relatively few organizations published privacy policies that reflect all seven Safe Harbor Principles, *see supra* note 394, at 8; choice was not clearly mentioned or was lacking entirely; with respect to onward transfers, the status of mentioned "third parties" was not always clear; certain companies did not represent that they had adopted security measures; regarding data integrity, the relevance of the data for the intended use was difficult to determine, since either the "purpose", the "data type" or the "activities" conducted were not specified at all or not clearly formulated; and principle of access tended to be weakly implemented. *Safe Harbour Decision Implementation Study*, *supra* note 399, at 105.

397. *Id.* at 112.

398. *Id.*

399. Emilia Linde, *EU Commission Critical of US Safe Harbor Programme*, Jan. 6, 2005, http://www.twobirds.com.

the SH, companies may engage in processing that is "not incompatible" with the specified purposes. The Directive's principles regarding special treatment for sensitive data, reasonable access, and an opt-out choice for onward transfer are generally retained in their original form under both arrangements.

B. European Perspectives on Self Regulation

Self regulation, a cornerstone of US economic policy, may raise problems for EU law enforcers in considering adequacy of protection because it does not provide formal legal rights of redress. The EU's difficulties in accepting self-regulatory measures stem from the arguments that privacy protection standards may be set in an unaccountable manner by businesses alone, thus avoiding inconvenient but vital protections. Europeans also claim that self-regulatory measures may be unevenly adopted, and they may be used to avoid government regulation.[400] However, if self regulation fails to provide adequate protection in the absence of a legislative baseline, it may, in conjunction with such a baseline, play a critical role within a comprehensive privacy regime.[401] The Directive itself states that "professional rules and security measures which are complied with" may provide a basis for an adequacy determination.

The Working Party has defined a "self-regulatory code" as "any set of data protection rules applying to a plurality of data controllers from the same profession or industry sector, the content of which has been determined primarily by members of the industry or profession concerned."[402] As with general evaluations of enforceability, the WP determines the validity of a self-regulatory code based on whether it achieves a good level of compliance, provides support and help to individual data subjects, and includes a mechanism for the individual to obtain appropriate redress. The evaluation must take into account, among other things, the degree to which rules can be enforced, whether the body responsible for drafting the code is representative of the sector, the transparency of the code, and whether the code prohibits disclosure of data to companies not governed by the code without adequate safeguards.[403]

Despite the omnibus character of the Directive, the EU recognizes that privacy considerations may vary across sectors and that "codes of conduct" for certain sectors may contribute to the proper execution of national data protection laws.[404] The Working Party has recognized that the adoption of codes of conduct by corporate groups is relatively frequent. Such codes may refer to proper maintenance and retention of accurate books and records, truthfulness and accuracy in communications with the public, and protection of confidential

400. *See* Charlesworth, *supra* note 195, at 965.

401. *Id.* at 966.

402. *Judging Industry Self-regulation: When Does It Make a Meaningful Contribution to the Level of Data Protection in a Third Country?*, at 2, Working Document DG XV D/5057/97, WP 7, *adopted by the Working Party* Jan. 14, 1998.

403. *Id.*

404. Data Protection Directive art. 27.

information.[405] US entities with a presence in Europe, including some of the large bank holding companies, have drafted guidelines and codes of conduct to meet the European standard, seeking to satisfy the data protection standard through separate negotiations.[406]

Furthermore, the WP has recently stated that certain "binding corporate rules" may apply to third-country transfers to make them legitimate under Article 26(2).[407] These rules would permit companies to use binding or legally enforceable corporate rules similar to self-regulatory measures as a basis for an international transfer under Article 26 (2).[408] The evaluation of the "binding nature" of such corporate rules requires both an "assessment of their binding nature *in law (legal enforceability)*, and of their binding nature *in practice (compliance)*."[409] Although the ability of data subjects to enforce the rules in court is a necessary element, the WP appears to attach more importance to the fact that the rules are complied with in practice, as is the aim of any self-regulatory approach. The problem, therefore, is in determining empirically whether the rules are complied with in practice.

In order to transfer personal data to a third country on the basis of compliance with "binding corporate rules," the corporate entity must notify the data subject of the purposes of the transfer, the identity of the data exporter, the categories of the further recipients of the personal data, and the countries of destination.[410] The institution must explain to the data subject that, after the transfer, data may be processed by a controller who is not bound by the corporate rules and who is established in a country that has not been found to provide an adequate level of protection.[411] Data subjects covered by the binding corporate rules must become third-party beneficiaries of the rules, for example through contractual arrangements between the members of the corporate group. As such, data subjects may enforce corporate compliance with the rules by lodging a complaint before the competent DPA or before the competent court on Community territory.[412]

Multinational companies with complex global architectural structures are expected to benefit most from such codes of conduct for international transfers. The WP has also advocated combining standard contractual clauses and binding corporate rules to allow onward transfers to other recipients without further contracts.[413]

Overall, EU recognition of self-regulatory codes seems to be increasing, and the EU's recent attitudes toward codes of conduct and binding rules may

405. Working Document DG XV D/5057/97, WP 7, *supra* note 189.
406. Murphy, CRS Report for Congress, *supra* note 270.
407. Working Document DG XV D/5057/97, WP 7, *supra* note 189.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.*

provide a framework in which to evaluate the US regulatory structure in terms of functional standards rather than specific legislation.

C. Recommendations for Amending the US Privacy Regulatory Structure

As described in Part V, even when the US regulatory structure is viewed in its entirety, discrepancies remain between US and EU data protection regulation. These differences stem primarily from two distinct philosophical underpinnings of the right to information privacy, as well as from differing conceptions of the role of law in ensuring individual protections. However, while these divergent perspectives may be irreconcilable, the substantive standards in both privacy regimes are actually somewhat similar, perhaps because both sets of rules are derived in part from the OECD guidelines. Therefore, despite different conceptual frameworks, the actual privacy regulation of financial institutions in each legal system may in fact provide similar protections to consumers. This paper argues that the achievement and recognition of "functional equivalence" would permit transfers to occur between the EU and the US without compromising the level of personal data privacy afforded to any individual.

The most significant differences between the EU and the US data protection regulatory schemes concern the requirements imposed on financial institutions with respect to the following protections: data subject rights of access, data subject choice with respect to further processing and onward transfer, special treatment of sensitive information, and enforcement. The discrepancies in these areas of regulation could be remedied through specific federal privacy legislation while avoiding both omnibus privacy legislation and regulatory requirements that industry perceives as overly burdensome. Because the actual privacy practices of financial institutions in the EU may be less stringent than those formally required by the Directive, the United States should be required to abide by the rules actually enforced in the EU. Nevertheless, some new legislation is required for the United States to attain the functional level of data protection that currently exists in the EU.

First, the US regulatory scheme currently ensures that data subjects have access to personal information under the FCRA, under the Fair Credit Billing Act, and in the ordinary course of business. In its own Member States and in the Safe Harbor agreement, the EU has accepted a level of access rights that only requires the data controller to provide access where doing so is not overly burdensome. If the United States were to formalize the access that most financial institutions already provide, it could comply with this requirement without a major industry change.

Second, in order to comply with the EU's "purpose specification" requirement, the United States should require institutions to describe the purposes of collection at the time they provide the opt-out notice. This opt-out system is permitted by the SH. While institutions may have to provide further notice for uses that are "incompatible" with the original purpose of collection, "compatibility" may be interpreted fairly broadly.

With respect to onward transfers pursuant to "joint marketing agreements,"[414] US regulators have already set out guidelines requiring that service contracts with third parties include a clause restricting further use or transfer, and ensuring that the data is processed securely. Formalization of these guidelines would render the provision very similar to the EU's provision for processors. With respect to onward transfers for marketing purposes, the FACTA allows customers to opt-out of marketing uses of any shared information. EU data controllers have two options for marketing data, either providing explicit notice to the customer or providing general notice to the public. It is likely that the FCRA standard would meet the first of these.

A difficult issue, and one that should be examined more closely, is the question of whether notice and an ability to opt out must be required for affiliate sharing. As noted, differences in financial structures in the United States and the European Union may reduce the discrepancy, but there are still certain situations in which information may be shared freely in the United States where it could not be shared in the EU. One possible solution would be for the United States to create special notice requirements for those affiliates that are in a line of business that the customer would not reasonably expect to be affiliated with the original institution.[415]

Next, the SH and Model Contracts indicate that a key component of the EU regulation is that special treatment be accorded to sensitive data. In the United States, only sensitive *credit information* receives such treatment.[416] However, collecting data on racial or ethnic origins, political or religious beliefs, and health and sex life is generally not integral to financial services practices, and it is possible that special treatment could be adopted for the institutions that do collect such data without overburdening the industry. Currently, such information may not be used for marketing solicitations without providing an opt-out notice under the FACTA. In addition, under the FACTA's Title IV, medical information receives special treatment and can only be shared under limited circumstances. Furthermore, financial institutions are not permitted to use sensitive information in decision making where such use would constitute discrimination under the Equal Credit Opportunity Act. The SH standard for sensitive information would require consumers to opt in to transfers the purposes of which were not initially disclosed.

Finally, with respect to enforcement, it may be difficult for the EU to

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414. GLBA § 502(b)(2) (2006), 15 U.S.C. § 6802b (2006).

415. In 2003, Senators Feinstein and Boxer proposed an amendment to the FCRA that would give consumers the right to opt out of companies' sharing their information with affiliates in different lines of business. The amendment, although geared toward consumers, potentially would have exempted huge businesses, like Citigroup, Inc. and Bank of America Corp., which pool the information in a common database that their affiliates can access. Michele Heller, *Loophole for Big Banks Seen In Amendment to FCRA Bill; Fair Credit Reporting Act reauthorization legislation*, AM. BANKER, Oct. 30, 2003.

416. Special treatment is already required for sensitive credit information under the FCRA. *See* FCRA, 15 U.S.C. § §§1681-1681u (2006).

accept a system that fails to provide for a specific federal private right of action and that does not have a single oversight body responsible for ensuring that privacy protections do not "fall through the cracks." However, the EU has accepted FTC enforcement for companies in the SH. Provided there are sufficient guarantees of adequate enforcement measures, including indices of high levels of enforcement by US agencies, as well as redress for individuals at the state level, the EU might be willing to accept the federal agencies as enforcement bodies. The EU has demonstrated that it is willing to recognize the importance and effectiveness of sectoral codes of conduct and other self-regulatory measures, such as binding corporate rules, which may be considered in the adequacy determination.

The United States must establish strong enforcement practices against institutions that breach their stated codes of conduct or policies. The federal banking agencies may already enforce Section 5 of the FTCA, which prohibits unfair and deceptive acts. In addition, US regulatory enforcement agencies should collect more statistical data on privacy enforcement against financial institutions as well as on their actual levels of compliance in order to be able to indicate to the EU the level of compliance that is actually observed through the mix of federal, state, and self regulation. Finally, the US argument for a sectoral determination would be greatly strengthened by the creation of a federal oversight body, such as an Office of Electronic Commerce and Privacy Policy (OECPP), [417] which would make and coordinate policy with respect to privacy and electronic commerce without being a regulatory or enforcement agency. The General Accounting Office has called for greater harmonization and cooperation between regulators,[418] and this may be an important step toward achieving a clearer and more unified data protection policy in the United States.

VI.
CONCLUSION: TOWARD AN ADEQUACY DETERMINATION FOR FINANCIAL SERVICES

Short of an adequacy determination for the entire United States, the probability of which may be slim, an EU determination that the financial services sector provides "adequate protection" for personal data is the most effective means of facilitating financial services data transfers between the United States and the European Union. Such a decision would eliminate the risk that the EU will enforce the provisions of its Data Protection Directive against US financial institutions and would thus provide for greater certainty in transactions. Currently, EU Member States informally permit many trans-Atlantic transfers to occur in violation of their national data protection laws, but

417. *See* SWIRE & LITAN, *supra* note 33, at 179 (proposing a similar body). In 1999, the Clinton Administration created a similar office, the Chief Counselor for Privacy, based in the Office of Management and Budget.

418. *See* GAO Report, GAO-04-882R, June 29, 2004, *supra* note 309.

there is evidence that Data Protection Authorities in EU Member States may begin to enforce data protection restrictions more actively. In 2003, the First Report on the Implementation of the Directive[419] emphasized the number of international transfers that seem to be occurring illegally, and the Commission called for more stringent enforcement efforts. Even more recently, in November of 2004, the Working Party issued a report indicating that enforcement would be one of its top priorities.[420] Furthermore, the European Commission's Report on the protection provided by the Implementation of the Safe Harbor Principles[421] revealed that the Safe Harbor has not effectively provided adequate protection, and the Commission invited DPAs to stop transfers occurring under that exemption.

If Article 25 of the Directive is actively enforced, making transfers using one of the currently available options would be excessively costly for data transferors. Using an Article 26 derogation would require explicit consent of the data subject or absolute necessity of transfer, both of which may be unlikely. The other options are to use an unfavorable Model Contract, which may subject the US importer to litigation in the EU, or to obtain costly contractual approval on a case-by-case basis by one or more DPAs. While some large corporations have attempted to obtain approval through the use of "binding corporate rules," such approval is relatively informal and presumably subject to challenge by the Commission.

Considering the real risk of increased enforcement and the limited, costly alternatives that are currently available to transfer data legally, the costs of amending US legislation to provide a level of protection considered "adequate" by the EU are relatively low. As illustrated in this paper, several minimal alterations to the law in strategic places, as well as the collection of empirical compliance evidence to further legitimize US self-regulatory measures, could result in the United States providing protections that are functionally equivalent to those provided to EU citizens. For financial institutions, the compliance costs would presumably be similar to those they would incur by joining the Safe Harbor or using a Model Contract, which would probably be required anyway under current law if the EU begins enforcing its Directive. Furthermore, there is evidence that US financial institutions may have to increase their privacy standards independent of what the EU does due to increasing consumer demands and the threat of more stringent state regulation. This threat has become far more pressing in light of the recent preemption decisions.[422]

The EU has indicated a willingness to engage in further discussions on data protection. The United States should take the opportunity now to begin negotiations, before the real risks of enforcement are so high and the stakes for the industry are so great that the EU can exert even stronger pressure on US

419. *Supra* note 108.
420. *Supra* note 317. *See also* Strategy Document of September 2004, *supra* note 319.
421. *Safe Harbour Decision Implementation Study*, *supra* note 4.
422. *See, e.g., Am. Bankers Ass'n*, *supra* note 269.

officials to come to an agreement. While the EU has not yet made a sectoral determination, its current enhanced recognition of the validity of corporate and financial self-regulatory codes makes this an opportune moment to bring such a proposal to the Commission's attention. The United States should offer the GLBA and the recently amended FCRA, in conjunction with federal regulations, state law, self regulation, and industry standards, as a complete sectoral package for the EU to consider for approval.

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The Trafficking of Ethiopian Domestic Workers into Lebanon: Navigating through a Novel Passage of the International Maid Trade

Khaled Ali Beydoun

The Trafficking of Ethiopian Domestic Workers into Lebanon:

Navigating Through a Novel Passage of the International Maid Trade

By
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I.
INTRODUCTION: THE EMERGENCE OF NEW CHANNELS OF MODERN-DAY SLAVERY

Almost daily a steady stream of young girls queue at the check in of Addis Ababa international airport – destined for the Middle East. Smartly dressed, wearing makeup as they laugh and joke with each other, all long for a new life abroad with promises of high wages and a good job. Yet for most that dream becomes a nightmare as they are forced into prostitution or a slave-like existence as housemaids working 20 hours a day without pay.[1]

In today's sociopolitical lexicon, the word slavery connotes archaic generalizations of African slaves being sold and shipped to the New World and Europe. Oftentimes, the historical representation and icons of "classical" (or

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1. *Ethiopia: Focus on Trafficking in Women*, Oct. 14, 2002, United Nations Integrated Regional Information Networks (IRIN News), http://www.irinnews.org/report.asp?ReportID=30386&SelectRegion=Horn_of_Africa&SelectCountry=ETHIOPIA [hereinafter *Focus on Trafficking in Women*].

chattel) slavery monopolize one's understanding of this ever more robust and fluid industry, which effectively extinguishes our belief that it still exists.[2] This limited conception of slavery excludes the many contemporary institutions and practices that are fundamentally akin to the classical form.[3] Shackles and whips have been replaced by more inventive designs to dehumanize, suppress, and subsequently enslave persons for economic or sexual purposes. Nevertheless, slaves are more readily available and sometimes still *chatteled* like before, but today's slaves and abolitionists must also cope with new paradigms:

> Slaves are now less expensive than at any point in recorded history. This cheapness is a boon to criminals, and has also altered the way that slaves are treated and used. These changes mean that while slavery remains a criminal activity, both the law and researchers are forced to confront new manifestations of slavery.[4]

Today, human trafficking has emerged as the imperceptible vehicle for enslavement. From the perspective of the trafficker, like that of the slave-trader, trafficked persons *remain* merely a commodity open for sale and apt for servitude or other forms of exploitation.

This piece presents an inconspicuous, but burgeoning, channel of the "international maid trade."[5] The trafficking of Ethiopian domestic workers into Lebanon has proliferated since 1989, and neither government nor influential transnational human rights actors have instituted any meaningful measures to prevent it. Furthermore, research and scholarship has also failed this class of victims, with little attention being paid to their plight in the pages of law journals, human rights reports, and the like— institutional mechanisms which traditionally launch more formal policy interventions into such crises. Perhaps this piece is nothing more than an academic plea, urging a heightened level of alarm, and action, on the part of the international human rights community.

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2. DEVELOPMENT AND PEACE & ANTI-SLAVERY INTERNATIONAL, DEBT BONDAGE: SLAVERY AROUND THE WORLD 2 (1999) [hereinafter SLAVERY AROUND THE WORLD]:

> To most people slavery conveys images of the Atlantic slave trade of the eighteenth century with all its horrors. They consequently consider slavery to be simply an anachronism from a barbaric past. . . . Yet slavery still occurs. It has simply taken on other forms. . . . Some contemporary slaves still work in the fields, but they also provide manual labor in many other industries, in urban as well as rural settings. These contemporary forms of slavery are in fact as old as traditional 'chattel' slavery and attempts to eradicate them have so far been much less successful than last century's campaigns against the traditional slave-trade.

3. Ann Gearan, *U.S.: 14 Nations Not Stopping Trafficking*, ASSOCIATED PRESS, June 3, 2005 ("'Trafficking in human beings is nothing less than a modern form of slavery,'" Secretary of State Condoleeza Rice said.").

4. Kevin Bales, *International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor*, 24 COMP. LAB. L. & POL'Y J. 321, 322 (2003).

5. *Note*: the bulk of this piece was composed before October 2005, the date when Lebanon ratified the Trafficking Protocol. Although Lebanon formally acceded to the Protocol, it must functionally implement concrete programs, supplementary policies, and revise other areas of law that impact the experience of exploited domestic workers; namely, the Lebanese Labor Law. In addition, coupled with policy or legal reform, comes the more difficult cultural and social reform that must take place if the rights of these victims are to be truly respected and observed by, a largely, unsympathetic Lebanese judicial and legal system.

The international community regards the trafficking of persons, namely children and women, as "a human rights violation that is considered a contemporary form of slavery."[6] Thus, to keep abreast of contemporary mutations of slavery, the international community codified "human trafficking," side-by-side with "slavery;" the former a legal term of art that effectively encompasses non-traditional forms of enslavement. Here, my focus is on trafficking alone (as opposed to *smuggling,*[7] wherein the subjects are fully aware, and not coerced or defrauded, into migrating). The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter "Trafficking Protocol")[8] offers the most comprehensive and universally relied-upon definition of trafficking:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.[9]

A common denominator shared by the contemporary trafficking networks and classical international slave trades is the geographic origins of the enslaved: customarily the globe's most underdeveloped and destitute regions. Today, however, the potential destinations and solicitors of trafficked persons have expanded to include the wealthy bastions that are Europe and the United States, and less developed regions including Latin America, Asia, and the Middle East. Trafficking into the latter less-developed regions, unsurprisingly, is more precarious for the trafficked because inter-cultural exposure and exchange, education, and wealth are all scant. The United States Department of State, in its *2005 Trafficking in Persons Report*, approximates that 600,000 to 800,000 persons are trafficked each year across international borders, roughly 80% of

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6. Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 FORDHAM INT'L L.J. 721, 721 (2003).

7. *See* INTERNATIONAL LABOUR ORGANIZATION, PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE – BOOKLET 3, RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD 54, *available at* http://www.ilo.org/public/english/employment/gems/download/mbook3.pdf [hereinafter RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD] ("*Smuggling* is when you knowingly pay someone to help you to illegally cross borders – when you put yourself in the hands of smugglers, not only do you expose yourself to a dangerous journey, you are also very likely to be subject to exploitation and abuse.").

8. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000), *available at* http://www.ohchr.org/english/law/protocoltraffic.htm [hereinafter TRAFFICKING PROTOCOL].

9. *Id.* art. 3(a).

whom are women. [10] The United Nations (hereinafter "UN") observes a much more staggering number: "The [UN] estimates that four million people are trafficked throughout the world each year either because of choice, or coercion due to violence or the threat of violence, abuse of authority, or deception."[11] The disparity in numbers is a result of the inability to properly identify victims of trafficking and contemporary "slavery,"[12] and also, divergent definitions of "trafficking." The latter UN number is more inclusive of distinctive manifestations of trafficking in its estimation, while the US's definition focuses more on servitude, or the result of trafficking. [13] Nevertheless, there is no single metric for assessing whether an act qualifies as full-fledged "trafficking," and the US's definition, as put forward in the Trafficking Victims Protection Act (TVPA),[14] overlooks many of the novel crimes and tactics used by traffickers to lure and exploit victims. Furthermore, trafficking has several "links," and therefore, can take on different manifestations depending on which link it employs as its vehicle:

> Trafficking does not occur in a vacuum. It is a crime as a result of various and combined social situations and circumstances, legal systems, people and their needs. Trafficking is not one event, but a series of constitutive acts and circumstances implicating a wide range of actors. When seeking a solution, extracting one aspect of the equation would be futile (for example restricting migration) since the combined forces would continue to act (people's need, social situations, poverty, violence, demand, and criminal intent) even with the elimination of one of its links.[15]

Curiously, the United States signed (December 13, 2000) but has yet to ratify the Trafficking Protocol.[16] Nevertheless, the Trafficking Protocol offers a more fluid and comprehensive definition of trafficking, namely because the TVPA[17] primarily focuses on the "state of servitude" and considers essential

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10. *See* U.S. DEP'T OF STATE, 2005 TRAFFICKING IN PERSONS REPORT 6, 6 (2004), *available at* http://www.state.gov/g/tip/rls/tiprpt/2005 [hereinafter 2005 TIP REPORT].

11. D. Scharie Tavcer, *From Poverty to the Trafficking of Women for Sexual Exploitation: A Study of Causal Factors of Trafficked Women from Moldova* 1, Presented at Gender and Power in the New Europe, The 5th European Feminist Research Conference at Lund University, Sweden (Aug. 20-24, 2003).

12. *See* Bales, *supra* note 4, at 322 ("The criminalization of slavery leads to a number of problems in measuring slavery or other abusive labor practices. The first is the basic fact that criminals conceal their activities. . . . Second, . . . societies (as well as social scientists) have been slow to clearly define what now constitutes slavery.").

13. *See* 2005 TIP REPORT, *supra* note 10, at 9-10. [T]he TVPA [Trafficking Victims Protection Act] was intended to define and expand the anti-slavery laws that would apply in trafficking situations, in order to reflect modern understanding of victimization. By more broadly encompassing the subtle means of coercion that traffickers use to bind their victims, these new criminal statutes make good on the promise made in the 13th Amendment of the Constitution: that no person shall suffer slavery or involuntary servitude on American soil.

14. 22 USC § 7102.

15. Tavcer, *supra* note 11, at 4.

16. *See* Signatories to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, *available at* http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html [hereinafter Protocol Signatories].

17. *See* TVPA, *supra* note 14, § 7103(b), where trafficking is defined as, "the recruitment,

factors, including recruitment, deception, and coercion, as "secondary."[18]

Frequently, research in the area of human trafficking makes the trafficker the centerpiece and principal subject of the work, and therefore marginalizes the victim's experience. A portion of these shortcomings must be attributed to the typical focus on the state of servitude (echoing the TVPA's rationale), which frequently comes at the expense of a consideration of the state of the victim prior or subsequent to the actual enslavement. Extending D. Scharie Tavcer's sentiments,[19] every component of trafficking must be examined in order to act preventatively or prescriptively – and this includes consideration of the trafficked person's vantage point and experience, *in toto*. Moreover, the circumstantial and idiosyncratic characteristics of a particular case must be methodically considered when assessing whether it meets the elements of the crime. In other words, the subjectivity of the act must be duly balanced with the objectivity of the law. If this balance is not achieved, the subject will be doubly victimized – first by the trafficker, and second by the law.[20]

A thorough examination of a trafficked person's experience must begin with the query: *What conditions facilitate the influx of traffickers, and subsequently, the proliferation*[21] *of trafficking?* Poverty, the lack of economic opportunity at home,[22] and demand abroad[23] create fertile ground for traffickers to exploit persons in dire need of income, particularly women.[24] Ultimately, work abroad as a domestic-worker – far from family and familiarity, in a foreign land and culture – is too often the lone option for categorically marginalized and destitute women, "[T]he feminization of poverty; declining public health; new

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harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."

18. *See* 2005 TIP REPORT, *supra* note 10, at 9-10 ("The means by which people are subjected to servitude – their recruitment and the deception and coercion that may cause movement – are important factors but factors that are secondary to their compelled service. It is the state of servitude that is the key to defining trafficking.").

19. *See* Tavcer, *supra* note 11, at 4.

20. My intent here is not to equate the gravity of the experience of being trafficked with the law's dismissal of "marginal" acts of trafficking, but to illustrate the subject's concomitant victimization.

21. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 12 ("There has been a proliferation of illegal or unlicensed recruiters, which can be attributed to the often very restrictive, complicated, time-consuming or very costly procedures involved in legal migration.").

22. *See* SLAVERY AROUND THE WORLD, *supra* note 2, at 3 ("Slavery always victimizes the most vulnerable element of society, the poorest of the poor.").

23. *See* AMERICAN BAR ASSOCIATION-CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, *Introduction* to THE HUMAN TRAFFICKING ASSESSMENT TOOL: AN ASSESSMENT TOOL BASED ON THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME 2 (2005), [hereinafter ABA-CEELI TRAFFICKING ASSESSMENT TOOL] ("women are overwhelmingly susceptible to trafficking given their unequal status in many countries, the demand for cheap and unprotected labor, and the increase in sex tourism.").

24. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 11, 18.

forms of organized crime have all increased the number of women and girls being victims of prostitution and trafficking."[25] The acutely gendered landscape that is poverty, and, even more so, trafficking, is also met with a greater degree of violence experienced by women.[26] Intersecting with poverty are the prevailing patriarchal systems that subordinate women, and thus, squarely compound their indigence and circumscribe employment options.[27] Furthermore, women trafficked to work as domestic-workers are overwhelmingly uneducated, unexposed to divergent cultural and normative systems, and most importantly, have had no formal educational or vocational training. Domestic work is theoretically an extension of work they perform at home:

> "It is important, first of all, to recognise that although women are increasingly part of the labor force, much of the work they do is unpaid (housekeeping, housewifery, child care, elder care). . . . And stereotypical of certain societies, husbands are still perceived as the family's breadwinners and women as the housekeepers and child minders;. . .some societies are hesitant in accepting new forms of gender roles and therefore the cyclical nature of the feminization of poverty continues."[28]

Trafficked to equally patriarchal, and oftentimes xenophobic, destinations (such as Lebanon,), the victim's geographic and cultural transition[29] is too often met with another more arduous transition: that from trafficked-in-domestic worker, to slave.

This piece surveys the germane bodies of law which address the trafficking

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25. Tavcer, *supra* note 11, at 6. *See also* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 18:

> Women tend to be more likely than men to make use of illegal recruitment and migration channels because of: Their limited access to accurate and reliable information; Their lack of time to search for legal channels; very restrictive, complicated, time-consuming or very costly procedures involved in legal migration. Some countries may attempt to 'protect' women and girls by banning or restricting their employment abroad. However, restrictive migration policies often have the consequence of pushing women and girls into seeking illegal recruitment channels and making them more vulnerable to entrapment by traffickers; Their lack of financial resources to pay the legal recruitment fees; The nature of the work and the forms of migration open to women often force them to rely on fraudulent and dubious recruiters and agents; Illegal, unscrupulous recruiters may also actively seek out women as being more gullible than men.

26. Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 59 (1998) ("In astonishingly large numbers, women migrate great distances across international boundaries to engage in poorly remunerated labor. This labor isolates them in a subordinate position within a private realm and exposes them to acute risks of physical or psychological violence and expropriation of their economics gains.").

27. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

28. Tavcer, *supra* note 11, at 7-8.

29. *See* EMEBET KEBEDE, INT'L LABOUR OFFICE, ETHIOPIA: AN ASSESSMENT OF THE INTERNATIONAL LABOUR MIGRATION SITUATION, THE CASE OF FEMALE LABOUR MIGRANTS 7 (2001), *available at* www.ilo.org/public/english/employment/gems/download/swmeth.pdf ("In countries where they do not speak the language, do not have much understanding of the culture and in situations where they are illegal migrants, trafficked women are subjected to severe abuses of human rights.").

of domestic-workers (for purposes of forced servitude), but also seeks to integrate a particular strand of the illegal "maid trade" into mainstream human rights and rule of law discourse: namely, the experience of Ethiopian domestic-workers trafficked into Lebanon. The Middle East is not only a destination for trafficked domestic-workers, but also for prostitutes, child laborers, and camel jockeys,[30] who are similarly relegated to slave-like conditions and status. Academic reviews or policy assessments either generically or over-comprehensively examine this area, resulting in research that departs too far from the on-the-ground experience of illegally trafficked domestic-workers. My objective is to humanize a particular community of illegally trafficked domestic-workers —Ethiopian women trafficked into Lebanon [31]—and by doing so, to expose the personal sacrifice, human rights abuses, and legal shortcomings that are universally and collectively experienced by the entire class of trafficked servants (not withstanding country of origin or transit destination). In conclusion, this piece will also examine potential prescriptions, many of which are already underway or being examined, which seek to blockade this particular channel of the maid trade.

The reader may question: *what makes the experience of Ethiopian domestic-workers trafficked to Lebanon comparatively unique so as to merit exclusive attention?* First, a comprehensive examination of trafficked domestic-workers *in toto* would undermine the primary aim of this piece – namely, the aspiration to present the narrative, and articulate the oft-silenced voice, of a particular class of domestic-workers. Expanding the number of different subjects minimizes the acuity of presenting this narrative and voice. Second, the influx of Ethiopian women into Lebanon is increasing at an unprecedented rate; faster than the increase among domestic-workers of other nationalities entering Lebanon, namely Sri Lankan,[32] Filipino or Indonesian maids. The national governments of the latter groups have drastically improved protection and monitoring efforts,[33] while the same cannot be said of Ethiopia because the

30. *See* Mattar, *supra* note 6, at 729 ("Children, however, are trafficked to countries of the Middle East to serve as camel jockeys, and often placed into situations of compulsory or forced labor in slave-like conditions, which are frequently accompanied by physical abuse. Reports indicate that children as young as three are either sold by their parents in exchange for as little as US $500, or kidnapped."). *See also* 2005 TIP REPORT, *supra* note 10, at 12. The trafficking and exploitation of South Asian and African children as camel jockeys has burgeoned in the Gulf states, which, with the discovery of oil and the associated surge in wealth, transformed camel racing from a traditional Bedouin sports pastime to a multi-million dollar activity. Today, thousands of children, some as young as three or four years of age, are trafficked from Bangladesh, Pakistan, and countries in East Africa, and sold into slavery to serve as camel jockeys.

31. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2003, at 413 (2003) ("The [International Confederation of Free Trade Unions] ICFTU also highlighted Lebanon, where it said domestic workers, especially women from Ethiopia, 'suffer[ed] badly from their lack of legal protection,' with many of them 'held in conditions of near slavery.'").

32. *See* SLAVERY AROUND THE WORLD, *supra* note 2, at 7 ("There are approximately 60,000 Sri Lankan domestic servants in Lebanon.").

33. *See* INTERNATIONAL LABOUR ORGANIZATION, PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE – BOOKLET 2, DECISION-MAKING AND PREPARING FOR EMPLOYMENT ABROAD 37, *available at*

trafficking of Ethiopians into Lebanon is, relatively, in its embryonic stages. This proliferation, combined with the lack of legal safeguards provided by the Lebanese and Ethiopian governments, makes Lebanon a most precarious destination:

> "Few women migrate to the Middle East through legal channels. Most women migrate through traffickers/illegal agents and data certainly does not take into account the number of women migrant workers who are trafficked out of the country. For example, according to the 1999 Report of the Pastoral Commission on Afro-Asian Migrants, 14,000 Ethiopian women are domestic-workers in Beirut. In its November 4, 1999 issue, the *Al-Hayat* newspaper stated that the number of Ethiopian migrant women in Lebanon reached 17,000 in the year 1999, at the rate of 1,000 girls arriving each month."[34]

More recent reports confirm an increase in migration.[35] Third, Lebanon is comparatively far less wealthy, and economically stable, than other Arab Gulf States (particularly the oil-rich states) where trafficking and servitude are prominent.[36] As a result, living quarters are smaller and frequently more modest, and remuneration is substantially less as well. These conditions arguably make for a higher frequency of violence and abuse.

The final reason is a personal one – as an Arab of partially Lebanese descent, I witnessed first hand the abusive treatment and dehumanization routinely endured by these women.[37] The disturbing images remain stark in my mind and have fueled the process of preparing this article.[38]

II.
FROM ADDIS ABABA TO BEIRUT: A NEW PASSAGE IN THE MAID TRADE

As far as Ethiopian migrants are concerned Beirut is not really the dazzling capital of Lebanon; it is the city of untold misery and despair, of endless stories of ignominious horror and injustice. For your Ethiopian girls who end up there looking for a future, some future, Beirut is the Embassy of hell on earth.[39]

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http://www.ilo.org/public/english/employment/gems/download/mbook3.pdf [herinafter DECISION-MAKING AND PREPARING FOR EMPLOYMENT ABROAD] ("The nature of the procedures and clearances migrant workers have to go through differ from country to country. Some countries of origin, such as the Philippines, Indonesia, and Sri Lanka, have adopted comprehensive rules and regulations covering labour migration of their nationals.").

34. KEBEDE, *supra* note 29, at 3.

35. *See Focus on Trafficking in Women*, *supra* note 1 ("In Lebanon alone there are about 25,000 Ethiopians working there. In Beirut it is estimated that a 1,000 [sic] Ethiopian girls are recruited monthly.").

36. Including Saudi Arabia, Kuwait, or Bahrain, for instance. For a comparative study of the economic wealth of Arab states, please refer to Imad Limam, A Socio-economic Taxonomy of Arab Countries, http://www.arab-api.org/wps9801.pdf.

37. See 2005 TIP REPORT, *supra* note 10, at 42 (Lebanon is ranked as a "Tier 2" human trafficking destination state).

38. My most recent travels to Lebanon were during the summer of 2004, when I lived in Beirut for several months.

39. *Ethiopian Domestics in Beirut*, THE ETHIOPIAN REPORTER, Sep. 29, 1999.

Lebanon, the Arab World's entertainment and tourist hub, has also become the region's capital of prostitution,[40] sex tourism,[41] and unrestrained adventure. Throngs of tourists from the region, and the remainder of the world, converge in Beirut to enjoy sunny beaches, glamorous night life, and liberal fancies that are either taboo or outlawed in more conservative, neighboring states. Fueled by the vision (and private investments) of former Prime Minister Rafiq Hariri,[42] after the end of Civil War[43] (which spanned two decades) and the ratification of the *Taif* Accord,[44] Beirut reclaimed its post as the "Riviera" of the Arab World, and sought to restructure its economy by revitalizing its once robust tourism industry. While tourists escaped to Lebanon for leisure and adventure, the Lebanese reinvested their liras[45] into inexpensive "domestic servants," many of whom today are trafficked from Ethiopia.[46] Intersecting with the maid trade is the ripe culture of racism in Lebanon,[47] which makes for a most brutal landscape for generally brown and black domestics. "Lebanese commonly refer to Africans using the derogatory term '*abid*.[48] Householders in Lebanon refer to their foreign maids by their nationalities. They do not say, 'my maid,' but rather 'my Sri Lankan' [or 'my Ethiopian']. National identity has thus become reduced to a signifier of class, status and power relations."[49] In other words, Lebanon's divided racial and sectarian landscape, combined with its political instability, makes it a most troubling destination for Ethiopian domestic-workers. Alarmingly, these workers exist at an extremely dangerous sociopolitical intersection in Lebanese society, as black, female, foreign and illegal.

Roughly 1,700 miles southwest of, and worlds away from, Beirut's Mediterranean beaches and extravagantly refurbished downtown centers are the

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40. Prostitution is legal in specially zoned sections of Beirut's *al-Hamra* (or Red) District. Prostitution is legal in Lebanon. Women in prostitution must be registered and must undergo medical examinations (*See* National Law of February 6, 1931).

41. *See* 2005 TIP REPORT, *supra* note 10, at 8 ("Sex tourism draws men from wealthy countries to less developed countries where they can take advantage of economically vulnerable women and children and weak criminal justice systems.").

42. Scott Wilson, *Blast Kills Ex-Premier in Lebanon*, WASH. POST, Feb. 15, 2005, at A1 (Hariri was a Lebanese-Saudi businessman, and later politician, recognized for refurbishing and restructuring downtown Beirut. He was assassinated in February of 2005 "when a powerful car bomb exploded on Beirut's fashionable waterfront.").

43. For a descriptive and comprehensive study on the Lebanese Civil War, *see* ROBERT FISK, PITY THE NATION: THE ABDUCTION OF LEBANON 77 (1990).

44. *Id.* at 638-39.

45. The official currency of Lebanon.

46. A sizeable number of domestics also come from Sri Lanka, the Philippines, and less so today, Indonesia.

47. *See generally* Mark Perry, *Perceptions of Race in the Middle East, in* PERCEPTIONS OF BLACKNESS AND WHITENESS IN THE MIDDLE EAST 1, 19 (2002) [hereinafter "Mark Perry"], *available at* http://inhouse.lau.edu.lb/bima/papers/Perry.pdf. The race, and particularly the phenotype, of the domestics is efficient for their employers because, "[a]s in the slave society of America, the recruitment of foreign workers with darker skin color is a practical advantage for Lebanese employers because it allows the easy identification and control of the work force." *Id.*

48. Which literally translates as "slave."

49. Perry, *supra* note 47, at 17.

old-world thoroughfares and deserts of Ethiopia. Ethiopia is a poor and underdeveloped state. With an area of over 1.1 million km and a population of 65 million inhabitants, it ranks as the second most populated area in Sub-Saharan Africa.[50] The Ethiopian economy is based on smallholder agriculture, with more than 85 percent of the population living in rural areas in very basic conditions.[51] Women and children constitute about three-quarters of the population, and the country is plagued by a high birth rate and widespread poverty.[52] Addis Ababa, the capital, is the only modern center in Ethiopia. Furthermore, since education[53] and income levels[54] are very low, especially among women, the only employment opportunity open to women is usually back-breaking, physical labor, or domestic work abroad. Moreover, entrenched patriarchal norms significantly limit the education and training opportunities for women (particularly in rural areas).[55] As a result, women's access to employment is much more tenuous than men's.[56] Roughly 85 percent of Ethiopian women live in remote or rural areas, and work in small-scale agriculture.[57] It has been observed that, "given their lack of skills and training, the only viable source of income outside the household for most Ethiopian women is the informal labour market. Complicated procedures of licensing and allocation of marketplaces constrain women from moving into more formal labour markets."[58]

Poverty, a lack of viable employment alternatives, and desperation establish fertile ground for traffickers' exploitation of despondent Ethiopian women.[59] Once the birthplace of mankind, Ethiopia today serves as a cradle for traffickers pursuing profit and Lebanese nationals seeking cheap labor - a virtual one-stop shop for inexpensive and convenient servitude: "[Y]oung Ethiopian women are trafficked to Djibouti and the Middle East, particularly Lebanon . . . for involuntary domestic labor. A small percentage are trafficked for sexual exploitation, with some women reportedly trafficked onward from Lebanon to Europe."[60] As a result, "[T]rafficking has become an important political issue in Ethiopia, largely due [sic] pressure by EWLA [Ethiopian Women's Legal Association, an Ethiopian Lawyer's Network/NGO] and extensive media attention on the plight of abused migrant domestic-workers. . . . [N]ewspaper

50. *See* KEBEDE, *supra* note 29, at 1.
51. *Id.*
52. *Id.*
53. *See* U.S. DEP'T OF STATE, BUREAU OF AFRICAN AFFAIRS – BACKGROUND NOTE: ETHIOPIA (Jan. 2006), *available at* http://www.state.gov/r/pa/ei/bgn/2859.htm. (stating a 35% literacy rate).
54. *Id.* (per capita income for 2004 is $116).
55. *See* KEBEDE, *supra* note 29, at 1.
56. *Id.*
57. *Id.*
58. *Id.* at 2.
59. *Id.* at 5 ("Feminization of poverty, lack of access to resources and the growing rates of unemployment and insecurity have expanded the pool of recruits for trafficking.").
60. 2005 TIP REPORT, *supra* note 10, at 103 (Ethiopia is classified by the Report as a "Tier 2" source country).

headlines have cited 67 cases of 'suicide' of Ethiopian women working in Lebanon between 1997-1999."[61]

Although the economic benefit for Ethiopia[62] and the demand in Lebanon have long muted the official response on both sides, burgeoning media attention combined with the concern of human rights and women's groups are making both governments more accountable. After years of nonfeasance, the Lebanese government finally ratified the Trafficking Protocol in October of 2005.[63] However, with the international human rights community and law enforcement devoting more effort and resources to anti-trafficking, traffickers themselves have become more vigilant and inventive in seeking avenues to circumvent the law. Perpetrators are creative, employing fluid and deceptive tactics to beat the law. Attorneys and advocates representing culprits sometimes attend trafficking seminars, organized by governments and NGOs, in order to keep informed of the law so that they can find loopholes.[64] In order to keep pace with traffickers and their agents, innovative legal and programmatic efforts must be strengthened: first, at the country of origin level (Ethiopia) to prevent and curb trafficking; and second, at the destination-state level (Lebanon) to effectively monitor trafficking and human rights abuses, and subsequently, prosecute traffickers and their criminal networks. Furthermore, customary reform within Lebanese households must simultaneously take place to lessen the illegal demand for trafficked domestic workers.

III.
THE EVOLUTION OF ANTI-TRAFFICKING LAW AND THE CURRENT INTERNATIONAL LEGAL REGIME

The international human rights movement provides the legal basis to mobilize the campaign to abolish slavery and human trafficking. The evolution of international law governing human trafficking was initiated in 1904 with the International Agreement for the Suppression of the White Slave Traffic.[65] The agreement, however, only protected the trafficking of white slaves, thus condoning the trade in "slaves of color" for another seventeen years. "In 1921, the International Convention for the Suppression of the Traffic in Women and Children [hereinafter "ICSTWC"] extended the protections delineated in previous treaties to minors of either sex as well as to all women and children regardless of race."[66] Following World War I and during the height of

61. ELAINE PEARSON, SECTOR PROJECT AGAINST TRAFFICKING IN WOMEN, STUDY ON TRAFFICKING IN WOMEN IN EAST AFRICA 21 (2003), *available at* http://www.antislavery.org/homepage/traffic news/EastAfrica.pdf.

62. Ethiopian families often rely on the remittances sent back by those employed abroad.

63. *See* Signatories of the Trafficking Protocol, http://www.unodc.org/unodc/crime_cicp_signatures_trafficking.html.

64. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 2.

65. International Agreement for the Suppression of the "White Slave Traffic," Mar. 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

66. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 5 (citing International

European colonialism in Africa and the Middle East, the ICSTWC did not prevent the scrambling European states from exploiting the natives "of color" in their newly claimed colonies and mandates, particularly in Africa. In 1933, the International Convention for the Suppression of the Traffic in Women of All Ages criminalized the acts of "procur[ing], entic[ing], or le[ading] away" of adult women for "immoral purposes" to a foreign country.[67] The law was extended by the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which also mandated specific administrative, social and enforcement measures directed at aiding trafficked persons.[68] Critics argued that the 1949 Convention on Traffic in Persons was too vague and thus, ineffectual. "[T]he 1949 Convention did not provide a clear definition of the specific crime of trafficking, adequate enforcement mechanisms, or protective measures for the victims of trafficking." Thus, trafficked persons remained exposed to the threat of deportation.[69] In 1979, the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), the centerpiece body of international law governing women's rights, was signed. CEDAW also addresses trafficking in persons but does not comprehensively provide combative, prescriptive or preventative measures in this area.[70] However, CEDAW's foremost influence is its mobilization of state-sponsored campaigns, as well as non-governmental efforts, championing the universal equality and progress of women. The movement has not yet fully engaged itself in the defense of trafficked domestic-workers in the Middle East. Nevertheless, CEDAW has been immeasurably successful in creating forums where trafficking, especially the trafficking of women, has been addressed and brought to the attention of influential transnational actors and governments.

The centerpiece of today's legal regime governing human trafficking is the Trafficking Protocol,[71] which supplements the United Nations Convention against Transnational Organized Crime[72] (hereinafter "Transnational Organized

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Convention for the Suppression of the Traffic in Women and Children art. 2, Sept. 30, 1921, 9 L.N.T.S. 416).

67. International Convention for the Suppression of the Traffic in Women of Full Age, art. 1, Oct. 11, 1933, 150 L.N.T.S. 431.

68. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 29, 1949, 96 U.N.T.S. 271, *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4df04302c3a58508c1256966004b3691?Opendocument.

69. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 5.

70. Convention on the Elimination of All Forms of Discrimination Against Women, art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* https://www.unchr.ch/html/menu3/b/e1cedaw.htm.

71. *See generally* TRAFFICKING PROTOCOL, *supra* note 8.

72. *See generally* United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/Res/55/25 (Jan. 8, 2001), *available at* http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf. It has been signed by 147 states, 118 of which have ratified it. The Transnational Organized Crime Convention came into force on September 29, 2003. *See* Signatories to the UN Convention against Transnational Crime and its Protocols, *available at* https://www.unodc.org/unodc/en/crime_cicp_signatures.html [hereinafter Transnational Organized Crime Signatories].

Crime Convention"). The Trafficking Protocol defines "trafficking" as follows: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[73] Furthermore, departing from its legal progeny, the Trafficking Protocol also calls upon its State-Parties to criminalize trafficking, prosecute the act, protect and aid those who were trafficked, and implement preventive measures against trafficking:[74]

> The Trafficking Protocol is unique in that it requires its State-Parties to follow this three-tiered approach (prosecution, protection, and prevention) *at a minimum*, and encourages them to pay heed to other elements of the international anti-trafficking regime that are incorporated within the Protocol and within its host Convention. Evident from its title, the Protocol borrows certain key provisions from the Transnational Organized Crime Convention in order to ensure the implementation of its commitments. . . . [To date,] 117 nations have signed the Trafficking Protocol and 95 of them have become States Parties by depositing ratification instruments and passing domestic legislation mirroring the Protocol's obligations. The Protocol entered into force on December 25, 2003.[75]

Only states that ratify the Convention qualify to ratify the Trafficking Protocol.[76] Moreover, it is crucial for states that ratify the Convention and the Protocol to observe the obligations of both instruments and to jointly construct the language of the two since they are, substantively and functionally, part and parcel of one another.[77]

Lebanon is a signatory to, and has ratified,[78] the Transnational Organized Crime Convention[79] and the Trafficking Protocol.[80] Ethiopia is only a signatory to the Transnational Organized Crime Convention,[81] and has yet to

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73. *See* TRAFFICKING PROTOCOL, *supra* note 8, art. 3(a).

74. *Id.* arts. 5-6, 9.

75. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 5-6 (citing James Puleo, Senior Adviser on Migration Policies and Migration Management, Address at the MIDSA Workshop on Extra-Regional Irregular Migration and Migrant Smuggling to, Through, and From the SADC Region in Johannesburg, South Africa (June 25-27), *in* PRELIMINARY REPORT AND RECOMMENDATIONS TO THE MIDSA WORKSHOP ON EXTRA-REGIONAL IRREGULAR MIGRATION AND MIGRANT SMUGGLING TO, THROUGH, AND FROM THE SADC REGION, *available at* http://www.sarpn.org.za/documents/d0000735/index.php).

76. *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, SUMMARY OF THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, *available at* http://www.unodc.org/unodc/en/trafficking_convention.html ("Each country is required to become a party to the Convention in order to become a party to the [Trafficking] Protocol.").

77. "The Protocol is not a stand-alone instrument. It must be read and applied together with the parent Convention, and each country is required to become a party to the Convention in order to become party to the Protocol." *Id. See also* TRAFFICKING PROTOCOL, art. 1 ("This Protocol supplements the United Nations' Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.").

78. *Id.*

79. Lebanon signed the Convention on December 18, 2001, and ratified it on October 5, 2005. *See* Transnational Organized Crime Signatories, *supra* note 72.

80. Lebanon signed the Protocol on December 9, 2002, and ratified it on October 5, 2005. *See* Protocol Signatories, *supra* note 16.

81. Ethiopia signed the Convention on December 14, 2000. *See* Transnational Organized Crime Signatories, *supra* note 72.

ratify it. Ethiopia has also failed to either sign or ratify the Trafficking Protocol.[82] Both governments must now take the necessary measures to implement the Protocol into their domestic law, and subsequently take formal steps in other areas of the law to protect these victims. The Ethiopian government's nonfeasance regarding both instruments fundamentally turns a knowing, but blind eye, to traffickers looking to exploit its citizenry.

The collective international legal regime that governs trafficking, however, will do little to stop trafficking and assist victims if its signatories fail to incorporate it into their domestic laws and policies. Furthermore, Lebanon's failure to integrate international measures against trafficking—coupled with Lebanese constitutional, criminal and labor regimes that deny protection to illegally trafficked persons—maintains a circumstance ripe for their exploitation and abuse.

IV.
EXAMINING THE EXPERIENCE OF TRAFFICKING FROM THE VANTAGE-POINT OF THE TRAFFICKED DOMESTIC-WORKER

The need for state intervention to protect migrant workers arises not only when they encounter problems in countries of employment. In many countries it already exists at the recruitment stage, where fraudulent practices are very common. Jobseekers often fall victim to swindlers, who may offer in exchange for considerable sums of money non-existent jobs abroad, false job contracts that would not otherwise be accepted, or fake travel documents and visas. There are various unscrupulous schemes for obtaining money from jobseekers, such as requiring all applicants to make advance deposits or overcharging them for air tickets, medicals tests and the like.[83]

In search of inexpensive domestic labor to meet their clients' needs, traffickers and their agents descend into Ethiopia to court young, poor, and largely uneducated women whom they bring back to Lebanon.[84] Young Ethiopian females who are "recruited" to be trafficked into Lebanon are often unaware of what their commitment entails, and the imminent risks and hazards they will likely endure during migration and "employment:"

> The recruitment process can involve a number of dangers and risks for migrants, especially for women who lack access to reliable and timely information. The dangers and risks they face include: overcharging of fees; debt bondage; falsification of documents; deception with regard to the nature and conditions of employment, including contract substitution and the mail-order bride trade; exploitation and abuse while waiting for the job to materialize or to be sent

82. *See* Protocol Signatories, *supra* note 16.

83. RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 8, at 17 (quoting M.I. Abella, *Sending Workers Abroad: A Manual for Low- and Middle-Income Countries* (Geneva, ILO, 1997), p. 75).

84. *Id.*

> abroad; lack of preparation for employment abroad, including lack of pre-departure training; forced/coerced recruitment, including being kidnapped or sold to illegal recruiters or traffickers; hazardous journey to the country of destination.[85]

Conversely, traffickers are only concerned with making profits, even at a mortal cost. With high Lebanese demand for cheap labor, legal channels for procuring a maid (conducted generally through Sri Lankan or Filipino, and less so today, Indonesian, agencies) have become too costly.[86] As a result, unskilled, trafficked women from Ethiopia have become the most accessible and affordable for patrons, and most lucrative for traffickers. Illegal trafficking from Ethiopia is nothing short of big business. Culprits that look to exploit Ethiopian girls and women can expect to earn seven thousand Ethiopian Birr (More than US $800) for each subject they send to Lebanon, the most popular destination.[87] As a result of the rapid influx of these victims being sent to Lebanon, Ethiopia opened a consulate in the nation's capital, Beirut, to address the problem and create a domestic presence.[88] The International Organization of Migration (hereinafter "IOM") reports that girls between the age range of 18 and 25 are the primary targets of traffickers, who recruit at colleges, poor villages and urban areas.[89] However, children are not always spared.[90] Traffickers generally employ deception and fraud, and leverage their positions of power, to exploit vulnerable Ethiopian women, tactics criminalized by the Trafficking Protocol.[91] Traffickers employ a broad arsenal of strategies to "recruit," and subsequently traffic, Ethiopian women – including advertising, approaching them directly[92] or employing an agent (as I discuss below)[93]— shaping their recruitment approach according to the targeted subject: "Criminals are inventive! Criminals work in a context of intense competition, they must be flexible, and they must adapt quickly or (at times literally) die. . . . They have already mounted large-scale operations to traffic and enslave people utilizing the attributes of the newly globalized world economy."[94] In addition, recruiters effectively *sell* the job but remain vague as to its precise description, requirements and expectations in order to lure women abroad.[95] Furthermore, traffickers often recruit women to

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85. *Id.*
86. *Id.*
87. *Focus on Trafficking in Women*, *supra* note 1.
88. *Id.*
89. *Id.*
90. *Id.* The youngest girl targeted by traffickers to be shipped to Lebanon was just 14 years old.
91. *See* TRAFFICKING PROTOCOL, *supra* note 8, arts. 3(a), 5(1).
92. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 22 ("The recruiters advertise these jobs in the local media or they may approach the women or their families directly with attractive job offers.").
93. *See* PEARSON, *supra* note 61, at 18-19 ("Trafficked women are usually introduced to agents through a friend or relative, or agents may approach women directly themselves. . . . According to an IOM study, the recruitment fee for illegal agents may range from 1,000-7,000 birr [roughly $117-819 USD]. EWLA state the fee may be as high as 10,000 birr.").
94. *See* Bales, *supra* note 4, at 323.
95. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 22:

work as maids, but later force them into prostitution. Given the absence of legal protection available for trafficked women, the former institution often collapses into the latter,[96] and many domestic-workers are forced to wear both hats.

In order to strengthen their efforts, traffickers routinely hire repatriated domestic-workers to work as their liaisons, who reaffirm the grandiose, but false, promises made by traffickers:

> Large numbers of Ethiopian women have become victims of trafficking, lured by false promises of good jobs, high salaries and a comfortable life. Most of these women end up as modern day slaves. The process of recruitment for most victims of trafficking is similar. The women are first introduced to traffickers through friends, neighbours and relatives or are approached by the traffickers themselves. Traffickers typically own travel agencies, import-export businesses, have contacts in the Middle East or who travel to this region regularly for various reasons. Trafficked women themselves have been instrumental in recruiting other migrants through the help of their families who act as the agents at this end.[97]

Capitalizing on the testimony of formerly trafficked domestic-workers, which affirm the traffickers' guarantees of quality work and pay, young women are successfully lured into Lebanon not only because they come to believe in the string of fraudulent promises and misrepresentations, but also because of the familiarity and empathy shown by their countrywomen employed as agents of traffickers.[98] Foreign, usually Lebanese, agents' tall sales pitches may be spurned by prospective Ethiopian domestic-workers, yet are more likely to be entertained, and later accepted, when delivered by their countrywomen.[99] Such women misrepresent their own experiences abroad and their identities, lying in order to deceive prospective domestic-workers.

Women are often bought, trafficked, and then sold upon arrival to Lebanon. This arrangement is nothing short of full-fledged slavery. According to Article 3(a) of the Trafficking Protocol, "another type of illicit means used by traffickers is the giving or receiving of payments or benefits to achieve the

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> Recruiters may not provide potential migrant workers with a clear picture of the job they will actually be doing. They paint a rosy picture of good earnings and relatively easy working and living conditions. The women are lured by these job offers. Many are already seeking a chance to migrate when they are enticed with false promises of well-paid jobs in foreign countries.... They are not given detailed information about: the actual duties involved in the job; the working hours and rest periods; the method of payment and the deductions for various expenses; whether there is a bonus and overtime for extra hours of work; medical/accident/life insurance benefits; leave entitlement and paid holidays; the procedures for leaving a job; and the amount of debt to be paid back to the recruiter or employer and the terms of the debt.

96. *See* PEARSON, *supra* note 61, at 17 ("All those interviewed agreed trafficking for prostitution also occurs.... The [EWLA] and IOM both state that most women ending up in prostitution in Gulf countries are either trafficked and deceived as to the work they will do [sic]. More often, women who escape abusive situations of domestic labour end up in prostitution due to a lack of alternatives.").

97. KEBEDE, *supra* note 29, at 6.

98. *See* PEARSON, *supra* note 61, at 8 ("Traffickers in East Africa that recruit women and girls are frequently women. Such traffickers in many cases may have previously been trafficked themselves or are currently sex workers.").

99. *Id* at 9.

consent of a person having control over another person."[100] That is, "[a] trafficker can subjugate victims by offering financial or other compensation to persons who have control over such potential victims. Parents, other family members, and boyfriends essentially end up 'selling' their sons, daughters, and loved ones to the traffickers."[101] Again, because traffickers only target the most destitute subjects, the "purchasing" of persons is oftentimes the only avenue for families to earn income in Ethiopia, and "[M]any impoverished rural families are willing to send their daughters away to work without regard for the risks and consequences."[102] Either selflessly looking to provide their families with much needed income[103] or smitten by the opportunities and promise of riches abroad,[104] Ethiopian women are sometimes easily lured into the transaction (although consent on the part of the victim is immaterial pursuant to Article 3 of the Protocol)[105] because of their difficult and destitute standards of living.

In addition to these factors, an entrenched normative basis exists which (in part) explains this phenomenon,

> It is a long-standing African tradition for parents of poorer rural families to send their children to go live (and work) with wealthier families, often in urban centres. This was once a kind of 'fostering' arrangement. Today, that practice has been exploited by traffickers so that many such children are in fact child domestic workers with no access to education, no freedom of movement and working long hours in poor conditions for little or no pay.[106]

Collectively, destitution and the lack of opportunity at home, the assurances of good work abroad, and the tradition of poor families sending their children away for work, makes the horror stories of work abroad a risk worth chancing. Women are not only trafficked, *per se*, from their home countries – that may only be the first phase in a longer string of trafficking and re-trafficking. Trafficked women usually experience a subsequent or secondary trafficking (and sometimes, subsequent phases as well) from the original destination country (Lebanon in this case):

> There is also second stage trafficking, where women may migrate legally or illegally, but to escape an abusive employer, may use another broker or agent to find a job. There are reportedly more than 200 agents recruiting Ethiopian women in this way to Lebanon. In such cases, women are more vulnerable to trafficking and abuse at the hands of the second employer, due to their illegal status.[107]

With and without the aid of traffickers, women have capitalized on

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100. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 38 (quoting TRAFFICKING PROTOCOL, *supra* note 8, art. 3(a)).

101. *Id.*

102. PEARSON, *supra* note 61, at 7.

103. *See* SLAVERY AROUND THE WORLD, *supra* note 2, at 4 ("Among adults (especially women) the hope of earning enough money to help their families survive economically is the driving force behind a growing phenomenon of mass migration in search of work.").

104. *See* Fitzpatrick & Kelly, *supra* note 26, at 61.

105. TRAFFICKING PROTOCOL, *supra* note 8, art. 3(b).

106. PEARSON, *supra* note 61, at 3.

107. *Id.* at 17.

religious pilgrimages as a medium en route to their final destinations. In addition to leaving Ethiopia with illegal traffickers, women also use the *Oumra* and *Hagi* (Moslem pilgrimages) as a pretext to go to Saudi Arabia and then to other Arab countries, where they are set to work, "[A]ccording to a statement issued by the Saudi Arabian Consulate in Addis Ababa, 11,000 people got visas for Saudi Arabia to go to the year 2000 Oumra and Hagi. . . . As women are not allowed to travel alone on such a pilgrimage, they pay men who are traveling there to pose as their husbands and process visas for them."[108] Clearly, this is an option open only to Muslim women. However, women of other faiths (primarily Orthodox Christianity) have converted to exploit the Islamic pilgrimages as a vehicle for reaching their ultimate destination, Lebanon.[109] It is not uncommon for traffickers to facilitate, and even encourage, sham conversions for the purpose of trafficking, but also to better market domestic-workers to Muslim patrons in Lebanon.[110]

Lebanon's Code of Labor excludes trafficked "domestic servants" from legal protection.[111] In fact, the Lebanese government only ratified the Trafficking Protocol in October 2005, approximately three years after the instrument was signed.[112] In order to legally work in Lebanon, foreigners must obtain a permit from the Ministry of Labor. However, the Ministry does not have the resources or the manpower to effectively implement this measure, and personnel are often bribed into allowing trafficked women past the point of entry.[113] The Lebanese Code of Labor extends foreign workers who come in legally and successfully obtain a work permit full social rights.[114] However, the law is malleable and enables employers to circumvent it and not register their maids with social security or health insurance.[115] In addition, the falsification of documents, including the work permit, passports, visa, medical reports, and a residence permit, is also prevalent.[116] Oftentimes, the victim is unaware that her documents were fraudulently procured. Yet, the victim alone is punished if the authorities seize falsified documents.[117] Therefore, when a traveling

108. *See* KEBEDE, *supra* note 29, at 4.

109. *Id.*

110. Many Lebanese, and more so Gulf-state, nationals explicitly request a Muslim domestic. For the patron, cultural affinity is a primary reason for the request, but it is also considered a sign of prestige as well.

111. *See* Labour Code of 23 September 1946, art. 7(1) [hereinafter Lebanese Labour Code] ("Are exempted from the present law: domestic servants employed in private houses.").

112. Transnational Organized Crime Signatories, *supra* note 72; Protocol Signatories, *supra* note 16.

113. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 21 ("Women, particularly those from rural areas, may rely on the recruitment agent to arrange for the various documents needed. The danger is that some of these documents may be inappropriate, falsified or stolen. . . . The forging of travel documents is big business.").

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 21-22 ("The women may not even be aware that their documents – for which they have been charged and often overcharged – are forged, and when they arrive in the destination country, they are caught by the authorities. And since their documents are forged, they are deported

domestic-worker is seized at the airport, or later by police, they are generally completely unaware of the illegality of their documents. The trafficker is sometimes content with only making the money charged to the subject for "travel" and "document" fees, and is fully aware of the probability that the trafficked women will not get past the point of entry.[118] Either way, the trafficker will come away with a healthy profit. Lebanon's refusal to legally acknowledge domestic-workers in Lebanon has exacerbated both their trafficking and their mistreatment. Culprits and conspirators engage in trafficking free from the possibility of penalty or imprisonment, despite the formal language of the recently ratified protocol: "[A]rticle 5 of the Trafficking Protocol outlines the obligations of its State Parties to adopt legislation and to implement other necessary measures in order to criminalize trafficking in persons and other related activities."[119] In October 2005, Lebanon took a major first step by ratifying the Trafficking Protocol, but must next develop supplementary domestic legislation and programs to combat the influx of illegally trafficked Ethiopian women, and laborers at large.[120]

A. Employment Contract of Counterfeit?

[The agent] made a contract with [the maid] under which she agreed to give the agency the entire first three months' salary from her job, and then from the fourth month onwards, 50% of [the maid's] wage would go to the agency. [The maid] had to give her passport to [the agent], who kept it the entire time she was working.[121]

An employment contract, like any contract, must be executed with a "meeting of the minds," and be free of fraud and adhesive material terms. These are universally agreed upon elements of a legitimate contract.[122] In other

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back to their home countries and may even face jail sentences in the destination or home countries.").

118. *Id* at 23.

119. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 53. *See also:* TRAFFICKING PROTOCOL, *supra* note 8, art. 5, which states the following:

> 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally. (2) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

120. *See* ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 62 ("States should enact domestic provisions that would enable them to confiscate the assets of traffickers . . . and, where applicable, repeal conflicting legislation.").

121. PEARSON, *supra* note 61, at 18.

122. *See generally* UNIDROIT Principles 2004 (serving as the most prominent code of international contracting and dealing), particularly Chapters I-III, *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf

words, no party to a contract, particularly the more vulnerable party, need abide by a contract that is only actualized because of a material misrepresentation, coercion, or intimidation—the choice methods for securing the contracted labor of Ethiopian domestic-workers.

The Lebanese government has done little[123] to prevent their nationals from engaging in deceptive contracts, and excludes trafficked Ethiopian women from legal protection. Consequently, illegal contracts are not only rampant but also used as instruments to intimidate and compel trafficked domestic-workers into servitude. By definition, Article 2 of the Lebanese Code of Labor encompasses domestic-workers, defining a "worker" as "any man, woman or adolescent who works for consideration of a wage or salary in an employer's premises."[124] A reform in Lebanese law, expressly extending protection to trafficked domestic-workers, will significantly diminish illegal contracting and human rights abuses, but it will cause a tremendous sociopolitical quandary. In undertaking such reforms the Lebanese government will be challenging an engrained social norm under which relegation of such women is customary and widespread. As a result, Lebanese would have to hire Ethiopian domestic-workers through legal means, which is far more expensive and "inconvenient."

Providing some cause for optimism, the Ministry of Labor has been successful in combating deceptive labor practices, mistreatment of domestic-workers, and fraudulent contracts for victims hired through legal means (many of whom are South Asian or Filipino). Between 2003 and 2004, the Ministry of Labor closed eleven employment agencies for fraudulent practices or mistreatment of workers and took administrative actions against another eighteen. In addition, it adjudicated thirty-five contract disputes, twenty-three in favor of the workers. However, trafficked domestic-workers from Ethiopia (who lack legal status) are not afforded the same rights as their legal counterparts, and thus are routinely and regularly exploited through sham contract schemes. [125]

Article 12 of the Lebanese Code[126] of Labor mandates that an employment contract must be either written or orally agreed upon, with the latter being a source of prospective calamity for the domestic-worker.[127] Furthermore, the

123. *See generally* International Service for Human Rights, Working Group on Contemporary Forms of Slavery, 29th Session (Geneva Jun. 28 – Jul. 2, 2004), *available at* http://www.ishr.ch/About%20UN/Reports%20and%20Analysis/subwg/WGCFS/WGCFS29thsession.pdf ("Franciscans International spoke of the plight of migrant workers in Lebanon who often find themselves in slavery-like conditions when their contracts are altered on arrival. The representative from Lebanon responded to the statement by stating that the Government condemns such '*despicable*' behaviour and is acting to help the victims of slavery in Lebanon. He reported that Lebanon had signed agreements of understanding on slavery with Sri Lanka and the Philippines," but not Ethiopia.).

124. *See* Lebanese Labour Code, *supra* note 112, art. 2.

125. *See* 2005 US TIP REPORT, *supra* note 9, Lebanon Country Narrative, "Prosecution" section.

126. *See* Lebanese Labour Code, *supra* note 112, art. 12.

127. Given the starkly asymmetrical relationship of the parties.

Code ambiguously holds that a contract "may" be translated into the native language of the party(s).[128] Even domestic-workers legally working in Lebanon are not guaranteed a translation of the contract into their language. The "may" language of Article 12 furnishes the employer with the power to either include or refuse inclusion of a translation of the contract into the national's native language.[129] There is no negotiation between the trafficker and the prospective domestic-workers, and the former has complete control over the terms and arrangement of the contract. Hence, the probability of a trafficker issuing an accurate translation of the contract to a prospective migrant is slim to none.[130] The overwhelming majority of trafficked women never see a translation of the fine print before leaving for Lebanon, much less engage in a comprehensive agreement before departure:

> In many cases, migrant women do not sign employment contracts before departure. The only information the migrants have is that they will work as housemaids and will earn monthly salaries between USD 100-125. The agents paint a picture of relatively easy working and living. Once they reach their destination, some are made to sign contracts in languages they do not understand, thereby unknowingly forfeiting their rights. They sign contracts based on what their agent tells them are included, quite often, not the real terms of the contract. For example, an employment contract that was found in a travel agency that had been conducting labour trafficking from Ethiopia clearly stated that the worker was not allowed to leave the house of employment for the entire duration.[131]

It is also quite common for trafficked domestic-workers not to be paid for the first three months because their employers insist that they will have to determine whether or not they are suitable for the post before paying them their salaries, a practice that contravenes Lebanese law.[132] In addition to violating Lebanese labor law, this practice violates countless human rights instruments by contracting away freedom of movement, postponing pay, and engaging in a contract based on the false translation of a biased, if not conspiring, third party. Moreover, "[T]here are also reports that employees do not necessarily sign a contract of employment upon arrival at the country of destination, but, rather,

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128. *See* Lebanese Labour Code, *supra* note 112, art. 12 ("The work contract may be either written or oral. In both cases it is submitted to the authority of Common Law. The written contract is to be worded in Arabic; it may however be translated into a foreign language if the foreign employer or wage-earner or salary-earner does not know Arabic.").

129. *See* Lebanese Labour Code, *supra* note 112, art. 12.

130. *See* DECISON-MAKING AND PREPARING FOR EMPLOYMENT ABROAD, *supra* note 33, at 26 ("There is often non-payment or unauthorized deductions from the wages that the women migrants are supposed to receive. There are also cases where the women migrants receive much lower salaries than promised by the recruiter.").

131. KEBEDE, *supra* note 29, at 6-7.

132. *See* Lebanese Labour Code, *supra* note 112, art. 47:

> The pay, if it is not in kind, must be paid out in official money notwithstanding any clause to the contrary. It is to be paid at least once a month to employees and twice a month to workers. For all piece work the execution of which is to last more than fifteen clear days, the date of payment may be fixed by mutual agreement, but the worker must receive down payments on account every fifteen days and be fully paid up within the fortnight following delivery of the piece of work. Payment is to be effected on work days and in the work premises.

that the deal is made between the employer and the agent."[133] Contract substitution,[134] or switching, has also been documented and is widespread.

The monthly salaries of domestic-workers are well below the legal minimum wage,[135] and the work hours tolled weekly grossly exceed the legally mandated workweek.[136] A ten, twelve, or fifteen hour workday,[137] typical for most domestic-workers, is another gross violation of the Lebanese Code of Labor;[138] as is the absence of a "weekend" or extended week-break.[139] This Code, however, does not cover illegally trafficked domestic workers.

Abuse is facilitated by the Lebanese Labor Code, which fails to put forth legally viable contract guidelines that are based on consensual agreement, universal contract principles and human rights standards. The International Labor Organization recommends that a model domestic-employer contract should be appended to all labor agreements and should be translated into language that all parties—including the domestic worker — can understand.[140] In order to monitor and mandate fair contracting, governments of sending countries should establish strict standards "so that prospective migrant workers can use them to assess the adequacy of the terms of employment they have been offered by the recruitment agent or employer."[141]

Domestic-workers are often stripped of their freedom of movement. Many victims are virtually imprisoned in their employer's homes. Lebanese employers limit the movement of the victim, often locking them indoors for fear of their fleeing. In one instance, a maid was reportedly imprisoned in the house of her employer for three consecutive years until she managed to escape.[142] Another trafficking victim testified to being confined to her employer's house for three years, working eighteen-hour days without a break.[143] To prevent

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133. KEBEDE, *supra* note 29, at 7.

134. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 23 ("This is the practice whereby, despite having signed an authorized contract prior to departure, upon arrival in the country of employment, the worker is issued with a new contract specifying lower conditions of work, pay or clauses prejudicial to her.").

135. *See* FOUNDATION FOR HUMAN AND HUMANITARIAN RIGHTS (LEBANON), THE STATE OF HUMAN RIGHTS IN LEBANON - 2002, *available at* http://freelebanon.org/articles/a317.htm ("The government sets a legal minimum wage, which was raised in April 1996 to 300,000 L. (about $200 US), per month.").

136. *See* Lebanese Labour Code, *supra* note 112, art. 31 ("Forty-eight hours is the maximum duration of work per week.").

137. KEBEDE, *supra* note 29, at 9.

138. *See* Lebanese Labour Code, *supra* note 112, art. 34 ("A rest-time of unbroken nine hours is to be allowed wage-earners and salary-earners every twenty four hours, except in cases where the circumstances of work compel otherwise.").

139. *Id.* art. 36 ("All wage-earners and salary-earners are to be granted a weekly rest which must not be under thirty-six unbroken hours. The employer is to select the day of this rest or distribute it among the wage-earners and salary-earners in sympathy with the requirements of the work.").

140. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 30.

141. *Id.* at 32.

142. *Focus on Trafficking in Women*, *supra* note 1.

143. *See IRIN Focus on Trafficking*, Feb. 28, 2001, United Nations Integrated Regional Information Networks (IRIN News), *available at* www.hartford-hwp.com/archives/33/084.html

escape, it has become common practice for employers to seize the domestic-worker's legal documents, threaten her with various punishments, and work her to physical exhaustion.[144] Furthermore, a standard $3,000 (USD) penalty is levied if the domestic-worker leaves the position before the life of contract expires, or if she returns to Ethiopia.[145] Hence, a well-orchestrated system is in place to curtail a victim's ability to flee or "break" the contract, and in turn to scare and tire her into submission.

The physical and professional dynamics between, and the lexicon related to, the employer-domestic-worker relationship more closely resembles a relationship of enslavement than one of conventional employment:

> Colloquial language in Lebanon refers not to a foreign worker's employer but rather his or her 'owner' (*sahbu*).[146] One hears the question, 'Who is her owner?' This linguistic construction prevents the worker from being understood as a worker. . . Such language reinforces the relationship between foreign worker and employer not as one not contracted freely in an open labor market, but rather as an arrangement between a powerful individual and a feudal vassal, indentured servant or slave.[147]

Trafficked domestic-workers are functionally slaves and generally perceived as such in Lebanese society – stripped of their humanity through action, words, and perception. Regardless of whether the domestic-worker is secured through a legitimate contract or purchased, their social status is one and the same.

B. The Work Experience and its Discontents

Human rights violations and abuses during the employment phase are the most horrific and thus most documented experiences suffered by the domestic-worker. Trafficking is one component of the string of subsequent offenses endured by the domestic-worker, most of which are experienced under custody of the employer. Such abuses have been documented as including: threats; physical violence; sexual violence; mental abuse; involuntary detention; working without pay; confiscation of travel documents; and forced abortions.[148] As discussed earlier, trafficked women may further experience a "second," or subsequent, trafficking once in the destination country. Although it cannot be said that all cases of trafficked women working in Lebanon rise to "slavery-like" proportions, numerous accounts expose cases that merit, if not supersede, that

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[hereinafter *IRIN Focus on Trafficking*].

144. KEBEDE, *supra* note 29, at 7.

145. *See IRIN Focus on Trafficking*, *supra* note 143 ("But the report [2001 IOM Report] highlights the fact that many women have to sign a document stating they will pay a penalty of US $3,000 if they leave the job or return to Ethiopia.").

146. Arabic.

147. *See* Perry, *supra* note 47, at 17.

148. ABA-CEELI TRAFFICKING ASSESSMENT TOOL, *supra* note 23, at 56; ANGELIKA KARTUSCH, REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW: WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE 48 (2001), *available at* http://www/osce.org/odihr/?page=publications&div=intro&subdiv=at_refguide.

label.[149] Furthermore, considering the institutionalized inequality against women in Lebanon that places even Lebanese women at a high risk of violence,[150] the incidence of violence against Ethiopian domestic workers is amplified within this context.[151]

Since the trafficking of Ethiopian women is a "black market activity," it is likewise impossible to precisely track the influx, rate, proportion and gross number of Ethiopian women, and other undocumented nationals, who are employed as domestic-workers in Lebanon.[152] The IOM has reported that, "[I]t is almost impossible to tell how many girls are shipped overseas. Most become difficult to trace because once they land they have to change their Christian names to Muslim names."[153] As a result, this makes it difficult to monitor and evaluate curative efforts. Likewise, unless they are also operators of a legitimate business (e.g. a travel agency) the identity and whereabouts of traffickers are generally unknown to the victims.[154] Considering the undetectable character of trafficking, the culprits and victims of which fly below the radar screen, research cannot provide a full illustration of the reality that takes shape inside the private walls of abusive Lebanese households. Every horrific tale that garners press attention is likely coupled with tens of similar experiences that are left concealed due to the illegal status of these all but invisible women. This "invisibility" equips both their traffickers and employers with the means to exploit them at will, leaving foreign domestic-workers defenseless and alone.

Exploitation and abuse of a domestic-worker is often carried out not only by the principal employer, but often the entire family. Generally, the principal employer, often the patriarch, but sometimes the family's matriarch, establishes the tone of how the domestic-worker will be treated by the extended family – the latter will follow the former's suit.[155] Yet, this is not a bright line rule. It is not uncommon to find households where family members are kind and professional toward the domestic-worker, while others take the opposite approach.[156] This

149. *See IRIN Focus on Trafficking*, *supra* note 143 ("The report of the IOM findings noted that at least 67 women migrants died whilst working in the Arab countries from 1997-1999. The study was based on extensive interviews with 26 female returnees from Beirut to Bahrain.").

150. *See* IRIN, *Lebanon: Lack of Protection for Women's Rights Fuels Sex Trade, Says Women's Group*, REUTERS, March 13, 2004, at 2.

151. *Id.* at 1-2.

152. Mariam Karouny, *Lebanon's Foreign Maids Face Beatings, Abuse*, DAILY TIMES (Pakistan), at 4, *available at* www.dailytimes.com.pk/default.asp?page=story_1-10-2002_pg4_10 ("Lebanese Labour Ministry Statistics show that in 2000, more than 54,000 foreign workers were registered in the country. Unofficial estimates put the figure closer to 150,000 workers, 80 percent of whom hail from Sri Lanka, the Philippines and Ethiopia, and most of whom work as domestic maids.").

153. *See Focus on Trafficking in Women*, *supra* note 1.

154. KEBEDE, *supra* note 29, at 6.

155. *See* Samih Farsoun, *Family Structure and Society in Modern Lebanon*, pages 257-307 *in* Louise Sweet (ed.), PEOPLES AND CULTURES OF THE MIDDLE EAST II 257-301 (Louise Sweet, ed. 1970) (This position varies depending on the composition of a particular Lebanese household. Lebanese family structures vary, and it is not uncommon for grandparents to live with the larger family. In many instances, the eldest male or female hold the most authority in the family).

156. *Id.* at 261.

makes it more difficult to objectively assess the living and working conditions of some domestic-workers. Scenarios involving sexual violence or rape tend to be the most complex. Generally, the patriarch or his son is the culprit, and less frequently, an external member of the family such as a cousin or uncle.[157] Even if the abuse or the rape is discovered by another family member, the employer may order or bribe the domestic-workers into suppressing news of the incident for fear of shaming the family; not only because she is a domestic-worker, but perhaps more importantly, because she is black.[158] However, it is often the case that the victim is condemned and accused of "enticing" or "seducing" the family member, is labeled a "whore" and subsequently fired.[159] As noted above, there have been cases where the rape results in the victim's pregnancy – and is followed by a forced abortion.[160] Yet, the incidence of sexual violence and abuse, namely rape and forced abortion, is cast behind several impenetrable shadows, including employer suppression and sometimes the victim's decision to keep quiet.[161] More critically, silence flourishes upon the undetectable terrain that surrounds the illegal trafficking of domestic-workers in Lebanon. When the government handles crimes like sexual abuse and murder in trafficking cases, the culprits are seldom punished.[162] As a result, victims have little confidence in the Lebanese authorities and seldom report to them when they are in trouble.[163]

The workday for an Ethiopian domestic-worker in Lebanon ultimately hinges on the disposition of the employer. To assert that the majority of Lebanese employing trafficked Ethiopian domestic-workers utterly dehumanize, rape or enslave them would be gross hyperbole. Rather, the work and life of a trafficked domestic-worker can span from horrific to normal. Given the lack of accurate empirical research pertaining to Ethiopian domestic-workers, examining the anecdotal accounts taken from interviews with domestic-workers in Lebanon are the only readily available barometer of the situation. For example, the Kanlungan Centre Foundation, Inc.'s "Destination: Middle East, A Handbook for Filipino Women Domestic Workers," provides testimony that a worker's typical day requires, on average, nineteen hours of work.[164] The

157. *See* 2005 TIP REPORT, *supra* note 10, at 143.

158. *See generally* Mark Perry, supra note 48. Again, Blacks in Lebanon, and the Arab World at large, are often referred to as '*abid (see supra* note 49*)*, a derogatory term which in Arabic means "slave."

159. *See* "Work is Torture for Sri Lankan [and other] Maids," *available at* http://news.bbc.co.uk/2/hi/south_asia/3204297.stm

160. *Id.*

161. *See id.*

162. *Id.* ("Similarly, the government has not investigated reports of suspicious deaths of Philippine and Ethiopian domestic workers. The government has not prosecuted or punished any abusive employers, despite evidence of physical and sexual abuse of domestic workers.").

163. KEBEDE, *supra* note 29, at 10. *See also* Nahla Atiyah, *The Discrete Charms of the Domestic Workers*, THE DAILY STAR, November 14, 2005 ("That one of out every three Lebanese employers beat his or her domestic worker who then remains without adequate protection from the authorities.").

164. *See* DECISON-MAKING AND PREPARING FOR EMPLOYMENT ABROAD, *supra* note 33, at

workday for a trafficked Ethiopian domestic-worker in Lebanon, at best, is nineteen hours.[165] The fraudulent contracts that bind trafficked domestic-workers enable the employers, for all practical purposes, to enslave the domestic-worker.

C. Debt Bondage: Forcing Labor Through Intimidation, Fear and Sham Debts

"[Bonded laborers] are non-beings, exiles of Civilisation, living a life worse than that of animals, for the animals are at least free to roam about as they like," explained a former Chief Justice of a nation[166] *where debt-bondage is still prominent.*[167]

Debt bondage, widely prevalent in Lebanon, is a strategy premised on the accumulation of primarily sham debts, placing the debtor/domestic-worker into the position of forced labor without remuneration.[168] It is a crime that is often part and parcel of trafficking. Often, the victim and sometimes her family will borrow money from the trafficker/recruiter in order to pay for the preparation and travel expenses. Such debt is generally expected to be settled monetarily, but generally comes in the form of compelled servitude since oftentimes the victim is unable to pay:

> A person enters debt bondage when their labour is demanded as a means of repayment of a loan, or of money given in advance. Usually, people are tricked or trapped into working for no pay or very little pay (in return for such a loan), in conditions which violate their human rights. Invariably, the value of the work done by a bonded labourer is greater than the original sum of money borrowed or advanced.[169]

Women often work, without pay, until the *balance* of their debt is completely paid off; a process which usually takes several years, if not more.[170]

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> 5 a.m. – Wake up, prepare breakfast for children, and prepare clothes and school bags for children; 6 a.m. – Escort children to school bus and wash/clean employer's car (unless there is a driver); 7 a.m. – Clear breakfast table, wash dishes, and make the beds, clean children's room; 8 a.m. – Do the laundry, clean the toilets and bathrooms, clean the house, and clean the carport/garage; 11 a.m. – Assist employer/cook prepare lunch; 1 p.m. – Serve lunch; wash dishes, pots and pans; clean the kitchen; and eat own lunch (sometimes at same time as employers or much later, at 4 p.m.); 3 p.m. – If guests arrive, serve tea or coffee and light meal and clean up and wash the dishes; 6 p.m. – Iron the clothes; 9 p.m. – Assist in preparing supper; 10 p.m. – Serve supper/eat supper; 11 p.m. – Wash the dishes, pots and pans, clean the kitchen and continue ironing clothes; Midnight – Sleep.

165. *See supra* note 127.

166. Justice PN Bhagvati of the Indian Supreme Court.

167. *See* SLAVERY AROUND THE WORLD, *supra* note 2, at 2.

168. *See* AMY O'NEILL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 5 (1999), *available at* http://www.cia.gov/csi/monograph/women/trafficking.pdf.

169. *See* SLAVERY AROUND THE WORLD, *supra* note 2, at 4.

170. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 21 ("There are also situations where women and girls are 'sold' or surrendered to traffickers because

However, the accumulation of debt does not only take place during the migration phase, but also continues to toll during her employment as well.[171] This practice significantly diminishes, if not altogether eliminates, her pay and her ability to send money home to her family.[172] Again, the inflated migration costs are considerable, thus placing the domestic-worker in bondage for months, if not years.[173]

Moreover, domestic-workers must routinely pass a "trial period" of approximately three-months in order to merit long term employment and/or payment of wages.[174] Migrants endure abusive working conditions so that they can earn money to repay family debts. Repatriated victims reported that their employers held the right to send them back to their agents during their three months of work, if they were not content with their services. Furthermore, it is usual for domestic workers to go unremunerated during this "three month trial period."[175]

Employers also generally hold the right to terminate the contract whenever they please, but the converse is not true. If a domestic-worker chooses to leave, a $3,000 fine will be levied.[176] Firings are usually arbitrarily executed with no rational justification, oftentimes leaving the domestic-worker unemployed, far from home, with incurred debts that cannot be paid off.[177] Going back home is not an option; these victims cannot go home, for their considerable debts bind them to their agents. Repayment of the debt can take several years or more, and the debt amount is often arbitrarily structured to bind the victim in long-term servitude. After the traffickers subtract their "commissions" and the victims pay for necessities and send money back to their families in Ethiopia, there is often no money left.[178] Again, researchers from aid organizations and the media have little access to reliable information about the lives of, and the abuses endured by, trafficked domestic-workers. What has been documented provides a small window into the nature of human rights violations suffered by Ethiopian women

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their families are in debt to them.").

171. *See* Martina Vandenberg, *Complicity, Corruption, and Human Rights: Trafficking in Human Beings*, 34 CASE W. RES. J. INT'L L. 323, 331 (2002).

172. *See* DECISON-MAKING AND PREPARING FOR EMPLOYMENT ABROAD, *supra* note 33, at 26 ("By the time the women migrants send remittances home, pay for their own personal expenses (many report that their employers do not provide them even basic amenities and they have to pay for their own toiletries, etc.), they have hardly nothing left to save.").

173. *Id.* at 25:

> Recruitment fees are (exorbitantly) high, especially when charged by private recruitment agents. . . . Travel costs, charges for passports, visas and other travel and employment documents are often not included in cost calculations made by the potential migrant. Yet the amounts can be substantial.. . . It usually takes the migrant at least four to twelve months (or even longer) to pay off the debts of costs incurred during the processing of an overseas employment contract—during which time she may not receive any wages.

174. KEBEDE, *supra* note 29, at 8.

175. *Id.*

176. *Id* at 10.

177. *Id* at 9.

178. *Id.* at 8-9.

in Lebanon. Foreign and local organizations must be proactive to generate pressure in Lebanon for employers to act more responsibly.

V.
SUSTAINED, OR BAND-AID, REFORM? ABOLITION EFFORTS OUTSIDE THE INTERNATIONAL TREATY FRAMEWORK

The failure of Ethiopia and Lebanon to implement formal and enforceable legal injunctions prohibiting trafficking has undermined the likelihood of the de facto abolition of this channel of human trafficking. The considerable economic value for elements on both fronts of human trafficking has suppressed efforts to combat the trafficking of domestic-workers in Ethiopia and especially Lebanon. As a result, there are too few campaigns addressing the trafficking of Ethiopian domestic-workers in Lebanon , and those that do exist are disjointed and poorly coordinated. In addition, international human rights organizations and foreign governments have paid relatively little attention to this type of human trafficking, dedicating their energy and resources instead to the trafficking of prostitutes and children. In a political landscape devoid of legal protection for these victims, where the governments at issue do little to promote change, grassroots and civil society campaigns must be the catalyst for building a truly full-scale, multi-sector movement.

A. Toward a More Proactive Regime for the Protection of Exploited Ethiopian Domestic-Workers in Lebanon

Although Lebanon finally ratified the Trafficking Protocol in October 2005, the failure of the Labor Code to include a rights regime specific to the needs of domestic-workers offers no formal improvement in the assistance available to trafficking victims. Supplementary domestic programs assisting victims are virtually non-existent. Although Lebanon has taken a formal first step in ratifying the Protocol, it must add substance to its position. The 2005 US State Department TIP Report observes, "Lebanon does not have specific legislation criminalizing trafficking. . . The Ministry of Justice and the Office of the State Prosecutor lag behind in acknowledging and actively combating trafficking."[179] Optimism remains that with the ratification of the Trafficking Protocol and the observance of Article 6, Lebanon will implement a comprehensive system to assist victims of trafficking. However, the Lebanese government will have to genuinely tackle the entrenched sociopolitical taboos, and forgo the economic benefits gained from trafficking.

In Article 6, the Trafficking Protocol puts forth critical measures for achieving an effective decline in the number of women trafficked. For example, Article 6(2) of the Protocol holds that, "[E]ach State Party shall ensure that its domestic legal or administrative systems contain measures that provide

179. 2005 TIP REPORT, *supra* note 10, at 143.

assistance to victims of trafficking in persons." Thus, the logical next step for Lebanon is the re-drafting of the Lebanese Labor Code to provide such protection. In its current iteration, neither legal nor administrative assistance would be available to a legally unacknowledged class of people.

Although Article 6 will meet political and social resistance, the Lebanese government is now under an international legal obligation to implement laws that assist victims of trafficking in more than just rhetorical terms. Arguably, the most pivotal reform required by Article 6(6) would provide victims of trafficking with the opportunity for judicial redress. The courts would provide an ideal forum for victims, and anti-trafficking activists, to expose and raise awareness about the horrors endured by these victims.[180] Equipping domestic-workers and their allies with this kind of platform, however, would bring unwelcome attention to the Lebanese government's failure to respond to the problem.

In the face of Lebanon's inaction, the Ethiopian government initiated efforts in the late 1990's by way of drafting new laws, opening a consulate in Beirut, and implementing new programs to combat trafficking of its nationals.[181] The government further commissioned a task force to focus squarely on preventing the trafficking of its nationals:

> In 2004, the government formed an inter-agency anti-trafficking task force that began developing a national plan for combating trafficking. The task force also formed three subcommittees for legal issues, data collection, and public awareness that analyzed existing studies on the issue and publicized relevant messages through local media.[182]

However, more vigilant efforts are needed because the task force's influence is still small, and the new consulate in Beirut works in isolation. Trafficked women are particularly vulnerable where their own governments fail to adequately protect them.[183] However, the 2005 TIP Report claims that "[P]rotective services for victims greatly increased over the last year" primarily because "staff of Ethiopia's consulate in Beirut increased from two to six persons," with all the new staff "primarily devoted to supporting Ethiopians trafficked to Lebanon."[184] Nevertheless, a staff of six can hardly be expected to serve the needs of thousands of victims. The consulate is still in its infancy, however, and is likely to expand in number and influence. Many advocate for direct government handling and overseeing of maid recruitment and referrals, which would drastically circumscribe fraud and exploitation:

> In general, it could be expected that where the State directly organizes

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180. However, the courts would have to provide witness protection measures to properly protect the identities of victims who came forward and testified.

181. *See Focus on Trafficking in Women*, *supra* note 1 ("The Ethiopian government has tried to combat the problem by introducing laws in 1998 to create private migrations firms which could regulate the flow. The law also introduced stiff penalties for recruiters and set up a committee to address the problem.").

182. *See* 2005 TIP REPORT, *supra* note 10, Country Narratives: Ethiopia.

183. *See* KEBEDE, *supra* note 29, at 8.

184. 2005 TIP REPORT, *supra* note 10, at 104.

> recruitment of its nationals for employment abroad, there would be little risk of fraud or abuses – as compared to recruitment through private intermediaries. . . . The State can be directly involved in recruitment through its foreign employment offices or via public employment offices that undertake recruitment, introduction and placement activities. The State should, of course, work closely with employers' and workers' organizations to ensure an efficient and transparent migration system.[185]

B. Repatriation for Domestic-Workers

"In Ethiopia, the need is not for more research, but for reintegration assistance for trafficked women who return to Ethiopia, especially in terms of skills training and employment opportunities."[186]

The victim/hero narrative is the paradigm in which the media generally illustrates the "rescue" of the abused domestic-worker, typically portraying her as the former and her "rescuers" the latter. However, a more thorough understanding of this experience would naturally reveal that *her* (here, I am using "her" in the collective sense) status as hero is more fitting and more deserved.

> [Rescue] often means having a television camera thrust into your face, as those who conduct the raids prepare to garner publicity and additional funding. And in the most corrupt countries, 'rescue' can mean being handed back to your traffickers for a fee. The language of 'rescue' is dangerous in this particular context. Not only does it strip trafficking victims of agency – they do not 'escape,' but are 'rescued' by others – but it fails to acknowledge that the risk does not vanish once a victim has left the trafficker's immediate control.[187]

The portrayal of the escaping domestic-worker as "the rescued" is also detrimental because victims exist in a political vacuum where governmental assistance and protection was never extended.

In addition, returning domestic-workers generally receive no assistance from their parent government. Although Ethiopia is fully aware that its nationals are working abroad under terrible circumstances, and often flee because their lives are endangered, there is no established governmental program to assist returnees.

> Returnees have no support from the Government or any other organization upon their return to rehabilitate them back to Ethiopian society. Most return unemployed. They bring little back because most leave their employment under poor circumstances. Those who come back with psychological trauma have no access to counseling unless their families can afford to pay for such services. They are not organized to create jobs for themselves or to help each other reintegrate in the community.[188]

As a result of so few opportunities, many of the returnees either go back to

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185. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 10.
186. PEARSON, *supra* note 61, at 14.
187. Vandenberg, *supra* note 171, at 332.
188. KEBEDE, *supra* note 29, at 11.

Lebanon (i.e., the process of "recycling," or re-trafficking) or else travel to other Arab states (generally Gulf countries) or Europe, hoping that conditions there will be more agreeable. In addition, as discussed in Section III A, *supra*, repatriated domestic-workers often find employment as recruiting agents for traffickers.

C. Orienting Prospective Domestic-Workers for Employment in Lebanon

Orientation courses[189] aimed at training prospective domestics have been established in other source countries for legal domestics.[190] The Philippines, for instance, has a comprehensive program ("Orientation Course for Filipino Migrant Workers"), conducted by *Unlad Kubayan* (also know as "Migrant Services Foundation, Inc."), geared at familiarizing women with the nature of the work, the cultural and social climate in which they will work, and the potential hazards that might arise. The orientation program thoroughly exposes the women to each phase of the migration and work process before they depart, including: recruitment, pre-departure, the journey, arrival and placement, work, termination, and re-entry.[191] Such training would be of tremendous value to Ethiopian women traveling to Lebanon. The only registered agency in Ethiopia, *Meskerem*, obliges its employees to undertake a comprehensive orientation program before leaving for Lebanon, but it is the exception.

A comprehensive and candid illustration of the migration process and domestic work in Lebanon would not only provide prospective domestic-workers with an objective portrayal of domestic work in Lebanon, but a more accurate account that counteracts the lofty marketing pitches sold by traffickers and recruiters. Generally, women make their determination to travel to Lebanon based on the information they receive from traffickers, or agents of traffickers. The absence of neutral information outlets and legal advice, for potential victims arms traffickers with a virtual intelligence monopoly on portrayals and accounts of domestic work in Lebanon. Therefore, government-provided data will, likely, make women think twice before embarking to Lebanon. Many repatriated victims stated that they would never have left for Lebanon if they had accurate information about the working experience before leaving. However, other migrants planning to work in Lebanon stated that, regardless of the dire situation they might experience in Lebanon or any other destination country, the lack of opportunity at home left them no choice but to travel abroad and, if you will, press their luck.[192] In addition to providing information to potential migrants, it

189. Courses such as the one offered by Meskerem, the lone legal private agency for Ethiopian domestic workers in Lebanon, should be made standard. *See* KEBEDE, supra note 30, at 32.

190. States home to a large pool, or market, of migrant domestics.

191. *Id.* at 18 ("Information on the migration process should explain to potential female migrant workers the specific characteristics of regular (or documented) and irregular (undocumented) migration for employment and draw their attention to the kinds of irregularities that can occur in the migration process.").

192. KEBEDE, *supra* note 29, at 8.

would also be of benefit to have similar courses for their families, spouses and children.

Entry into a foreign culture, without training or sensitization, is frequently highlighted as the most arduous part of trafficked women's experience.[193] Lebanon's religious and sectarian breadth is one of the most diverse in the region, and exposure to not only Islamic and Lebanese culture but other prominent traditions would be of significant value to prospective migrants working in a setting drastically foreign to the one to which they are accustomed (the overwhelming majority of whom will be traveling outside of Ethiopia for the first time).

> Lack of a basic understanding of the language and culture is a problem for migrant women once they reach their destination.... According to returnees, cultural and religious differences contribute to the creation of tensions between migrant workers and their employers. For example, returnees stated that they found it difficult to wear the traditional long (Islamic) robes required by some of their employers.... They had no idea that the culture in some of the receiving countries dictates a certain dress code. Migrants express a need for cultural awareness training before departure to help their integration into the new society.[194]

Considering that the majority of Ethiopian domestic-workers are Christian (Orthodox), cultural difficulties generally arise in Muslim households. Therefore, exposure to Islamic culture, custom and holidays, together with universal Arab practices, is essential background knowledge every prospective domestic-worker should be versed in before departure.[195]

The Ethiopian government, in conjunction with civil society organizations, should also hold trainings informing prospective migrants of their legal rights prior to departure. Many of the abuses experienced by women are facilitated by a lack of awareness of international protections and fundamental human rights. Prospective migrants desire to be educated about their rights, and have them protected, before embarking on the journey to Lebanon.[196] Their legal and cultural ignorance greatly magnifies the horror of the abuse they experience. Again rape, sexual exploitation, prostitution, and constrained freedom of movement were among the most common manifestations of abuse.[197] For many surveyed victims, contacting police was futile because they were unable to communicate in Arabic, or to contact someone in a position to intercede on their

193. *See generally* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7.

194. *Id.* at 9.

195. This also holds true for domestics hired to work in Christian households, since they will be living in a society where Islamic culture is ubiquitous.

196. *See* RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD, *supra* note 7, at 4.

197. *See* "Afrol News: Ethiopia Profile," http://www.afrol.com/html/Categories/Women/ethiopia_women, 4 ("Lebanon is the most popular destination [for Ethiopian domestic workers]... There were credible reports that hundreds of the approximately 15,000 Ethiopian domestic workers in Lebanon were subjected to abusive conditions, including sexual exploitation. ... Pictures appeared in the local press [Lebanese-English newspaper, "The Daily Star"] of workers returning bruised and beaten.").

behalf.[198] Moreover, many women do not trust the police because they believe that the police will protect the interests of their countrymen over those of foreign workers.[199]

Orientation programs regarding health issues are another demand frequently made by returnees. Besides health concerns related to violence or abuse, exposure to chemicals or other harmful materials while performing routine (or unconventional) domestic tasks is a serious issue.

> One returnee said that she was on the same flight as an Ethiopian woman sent home because she had become blind after using a cleaning chemical. Returnees, as well as migrant women about to leave, express the importance of receiving orientation on health issues to enable them to protect themselves from health risks they might be exposed to in the course of their employment abroad.[200]

Trafficked domestic-workers do not have health insurance and therefore, sick women are either forced to work through their ailment, or are summarily sent home if too ill and unable to work. "Sick days" or vacation time is not an option for the majority of domestic-workers, since the Lebanese Labor Code does not govern their work. Hence, it is not uncommon for women to be completely unaware of an affliction or, if aware, to hide the fact that they are sick, fearing dismissal or some form of punishment, which only exacerbates their condition.[201] The former can be substantially alleviated by health-oriented orientation programs, while the latter is a far more difficult challenge, requiring large-scale legal and structural reform in Ethiopia, but more so in Lebanon.

The IOM, with funding from the United States, has initiated a prevention program aimed primarily at young Ethiopian schoolgirls.[202] Ethiopia is helping initiate a formal program to warn grown women of the risks and dangers of pursuing work abroad, which is being run by IOM with Ethiopia's Ministry of Labor and Social Affairs, and the Women's Affairs Office. The program advises prospective domestic-workers to pursue work abroad in an informed way and to use legal channels for locating such work. In addition, the program also seeks to give practical information about how to prepare for the departure experience, and who to contact if an emergency arises.[203] This and similar programs are vital because they are proactive and forward thinking, and create an awareness among the potential victims at an early age. Ultimately, such programs may eventually permeate Ethiopian culture so that families will urge caution, rather than encourage their daughters to travel abroad for work.

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198. KEBEDE, *supra* note 29, at 10.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Focus on Trafficking in Women*, *supra* note 1, at 1-2 ("It is now targeting young schoolgirls—through a US government funded programme—to warn of the potential dangers. Through radio and the media they target the girls at school, particularly girls aged around 16 who face difficulties in the job market. . . . These are the susceptible ones.").
203. LISA SCHLEIN, CHORA-ETHIOPIAN CENTER FOR EDUCATION INFORMATION, ETHIOPIAN WOMEN WARNED OF DANGERS WHEN WORKING ABROAD (2002), http://chora.virtualave.net/women-migration.htm.

D. Abolishing the Trafficking of Ethiopian Domestic-Workers into Lebanon from the Ground Up

Grassroots and indigenous civil society campaigns, not governments or transnational NGO's, have spearheaded the movement to abolish the trafficking of Ethiopian domestic-workers in Lebanon. There have been a handful of instances where the Lebanese government has cooperated with and assisted the efforts of NGOs to combat human trafficking in Lebanon. "[The Lebanese government] signed a Memorandum of Understanding with international NGO's 'CARITAS' and 'International Catholic Migration Commission' for the opening of a safe house for trafficking victims."[204] However, efforts on the ground in Lebanon need to be invigorated, and government programs aimed at assisting legal domestics must be expanded to achieve real impact while legal protections are extended to trafficked victims as well.

Institutions and activists combating the trafficking and abuse of Ethiopian victims in Lebanon should replicate successful programs used in other regions where trafficking is prevalent. One such program is a hotline, counseling and shelter network—composed of NGO's committed to anti-trafficking. *La Strada*, a collective of Eastern European organizations, is an exemplary model of such a network:

> In Eastern Europe and the former Soviet Union, anti-trafficking activists established a network of organizations, the La Strada network. La Strada, with organizations in Ukraine, Bulgaria, Bosnia and Herzegovina, Moldova, the Czech Republic, Poland, and Macedonia, provides services for victims of trafficking, including psychological counseling, hotlines, medical care, and shelter. . . . La Strada has a hotline in each of these countries and has received hundreds of calls from women trapped in slavery-like conditions in the Balkans, in Eastern Europe, [and] in the Middle East.[205]

Currently, only employees of *Meskerem* have ready access to counseling and a hotline service, and these employees comprise only a fraction of the total number of domestic-workers in Lebanon. The vast majority of Ethiopian domestic-workers in Lebanon are trafficked into the country illegally, and therefore do not have access to these services because they do not exist. However, *La Strada* offers a model that can be replicated to assist trafficked domestic-workers in Lebanon. The proximity of the new Ethiopian Consulate in Beirut presents an ideal center to implement an emergency hotline for those in need. With the assistance of Ethiopian and Lebanese NGO's focusing on trafficking, a universally accessible emergency hotline will drastically improve the working and living conditions of domestic-workers in Lebanon. Furthermore, it can function as a collector of data that can subsequently be used in a preventative and educational capacity. The lack of a civil society presence in Lebanon addressing this issue, requires an Ethiopian, or transnational organizational catalyst to engender more awareness and support amongst

204. 2005 TIP REPORT, *supra* note 10, at 143.
205. Vandenberg, *supra* note 171, at 332.

sympathetic Lebanese actors. A bilateral Lebanese and Ethiopian civil society campaign would be most effective in spreading both national and international awareness.

Moldova, an origin country for victims of trafficking, provides a useful example of comprehensive NGO intervention in the absence of government action:

> [The Center for the Prevention of Trafficking of Women (hereinafter "CPTW")] specializes in victim representation in trafficking cases. They publish and distribute monthly bulletins, preventative materials regarding the dangers of trafficking and the type of information one should know before agreeing to work overseas, emergency contact information in case persons are trafficked, as well as pamphlets delineating the legal rights of victims. Every victim who is referred to CPTW receives this information and lawyers specialized in trafficking issues aid them in several ways. CPTW offers general representation for the purposes of identifying the status of the victim, assistance in obtaining documents that a victim may need in order to be integrated in society, and representation in court when a victim testifies against his/her trafficker, seeks damages, or is a defendant in criminal proceedings.[206]

Combative and preventive efforts in Ethiopia have modestly increased, but no indigenous organizations offer the comprehensive range of services that CPTW extends to its Moldovan victims. Ethiopian organizations are limited by their resources and the government's moderate commitment to human trafficking, and thus, only specialize in one (i.e., public education), or at best a few areas to combat trafficking.

Preventive public education efforts by indigenous Ethiopian NGO's, namely the EWLA, have initiated a culture of awareness in Ethiopia. For example,

> The Ethiopian Women Lawyers Association (EWLA) has launched campaigns related to illegal recruitment practices. The exploitative situation of trafficked Ethiopian women in the Arab countries came to the attention of the EWLA through cases reported to its legal aid clinic around the end of 1996. EWLA uses the media as well as forums such as workshops to publicize cases of trafficking and to drive home the point that trafficking is a serious problem in Ethiopia. It also works closely with the police by referring cases involving trafficking for further investigation.[207]

The EWLA's work has encouraged other NGO's, both internationally and domestically based, to act as watchdogs and monitor wrongdoing. Their work has publicized the dangers and atrocities of work in Lebanon to prospective migrants who otherwise would not have been privy to this much-needed information.[208] Moreover, the EWLA's work has pressured the Ethiopian government to act more proactively and responsibly, and the organization must be partially credited for the government's opening of a consulate in Beirut.

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206. *See* AMERICAN BAR ASSOCIATION-CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, THE HUMAN TRAFFICKING ASSESSMENT TOOL REPORT: MOLDOVA 81 (2005), *available at* http://www.abanet.org/ceeli/publications/htat/mol_ht_assessment_2005_eng.pdf.

207. *See* RECRUITMENT AND JOURNEY FOR THE EMPLOYMENT ABROAD, *supra* note 7, at 50.

208. *Id.* at 50-51.

Nonetheless, the EWLA's work is centered within Ethiopia, and thus their work functions almost exclusively in a preventative and educational capacity. Increased work has to be done inside of Lebanon to assist those domestic-workers currently working, either from organizations based in, or international organizations having a significant presence in, Lebanon.

Unilateral efforts by countries of origin for trafficking victims, like Ethiopia, however, will achieve only limited success because they merely preempt trafficking, but do little for those already in Lebanon or those who are trafficked despite prevention efforts. In order to effectively combat trafficking, and monitor and prevent abuse abroad, destination countries like Lebanon must work closely with source countries. Both governments must make human trafficking a priority by implementing policies and programs to combat it on their respective terrain.

VI.
CONCLUSION

"Outside the UN, when facts about debt bondage are revealed, diplomats representing countries which give high priority to human rights in their foreign policy have been conspicuously quiet when it comes to criticizing the abuses or insisting on remedial action. Perhaps this is not because they condone this form of slavery, but because the global economy depends on endless supplies of cheap labor to keep it going. Richer, importing countries are loath to cast the first stone, and poorer, exporting countries are unwilling to take any action which might reduce their competitiveness."[209]

Macroeconomic factors largely explain the proliferation of trafficking and contemporary forms of slavery, but political decisions (or indecision) play a key role as well. In a globalized world, where the exchange of goods and ideas and international travel are becoming more fluid, the outlook for trafficked persons is growing dimmer. Slavery has migrated into every point of the globe's ever-porous borders, even in nations where anti-trafficking and anti-slavery efforts are extremely vigilant and the mere notion of slavery is considered absurd by its citizenry.[210]

The images of one typical July night in the *al –Dahia*[211] district of Beirut are forever etched in my mind. Two Ethiopian maids were catering to the needs of my grandmother, an eighty-six year old Lebanese matriarch, bedridden and

209. *See* SLAVERY AROUND THE WORLD, *supra* note 2, at 18.

210. Melissa Trujillo, *Indictment: Saudi Pair in Colorado Kept Slave*, ASSOCIATED PRESS, June 10, 2005 ("A Saudi Arabian couple was in custody Friday, accused of turning a young Indonesian woman into a virtual slave. . . . The woman was controlled by a climate of fear and intimidation that included sexual abuse and the belief that she would suffer serious harm if she did not perform her tasks. . . . Authorities said the couple owed the woman nearly $93,000 in unpaid wages.").

211. A prominent Shi'ite enclave in west Beirut.

senile, on the cusp of taking her last breath. It was the first time I had seen my ailing grandmother since 1988 - the year my family fled Beirut and the war. I sat next to her bed, along with my uncle Ahmed, who summoned the "Ethiopian" and "Sri Lankan" to gather some food and water for my grandmother. The two women obediently entered the room, dressed meagerly and visibly underfed, and it appeared after a mutually excruciating exchange with my uncle that neither of the women spoke, nor understood, Arabic. Yet, they understood his aggressive hand gestures and projected voice—the common form of exchange between maids and their masters, I came to learn. One woman, very likely from a poor village in Sri Lanka who could not have been more than twenty years old, and the other, an Ethiopian teenager, perhaps a schoolgirl misled or defrauded by a Lebanese trafficker outside of Addis Ababa, traveled from distant points of the globe only to meet in this cramped, old apartment. The former was the more senior domestic-worker, and thus the latter's superior. The more senior Sri Lankan maid was likely legal, and maybe even hired through an agency, which was very clearly not the case for the younger, disheveled Ethiopian girl. After leaving my grandmother's bedside, I approached the Ethiopian maid and tried to engage her – simply seeking to understand her story at the most basic level. Attempts to communicate in basic Arabic, and then English, failed—perhaps this disconnect was a fitting commentary on the state of information-exchange and research in this area of human rights law? Or perhaps it was simply fear? Both interpretations highlight the acuity of this and likeminded endeavors. The acuity needed, however, will only be achieved through a demonstrated commitment by both the Ethiopian and Lebanese governments, and the continued, but galvanized, efforts by civil society and non-government actors. Only a concerted movement will prove successful in making this passage of slavery, like its more universally recognizable predecessors, a dark chapter in human history.