ARTICLES

FOLLOWING A Sigmoid Progression: SOME JURISPRUDENTIAL AND PRAGMATIC CONSIDERATIONS REGARDING TERRITORIAL ACQUISITION AMONG NATION-STATES

John C. Duncan, Jr.

[pages 1–58]

Abstract: This article analyzes methods and doctrines used by States to acquire territories. The role of the United Nations in resolving disputes between nations and the inhabitants directly affected by the disputes is also addressed, including the jurisdictional, jurisprudential, and practical considerations of territorial acquisition. Finally, traditional territorial acquisition doctrines are applied to extraterrestrial and outer space acquisition. As Western civilization etched out territories and borders across its known world, international norms of diplomatic behavior appeared in the form of customs. These customs eventually grew into codifications, which in turn grew into the elaborate international system enjoyed and protested today. Laws emerged among international States to formalize the growing body of norms of interaction across them. Modern territorial sovereignty provides the State an “exclusive right” to perform State functions within that territory, but with a realization that no State may exercise its authority within the territorial limits of other States.

LOVE IT OR HATE IT, BUT FOR THE RIGHT REASONS: PRAGMATISM AND THE NEW HAVEN SCHOOL’S INTERNATIONAL LAW OF HUMAN DIGNITY

Hengameh Saberi

[pages 59–144]

Abstract: This Article presents a novel understanding of pragmatism in the New Haven School of international law. The New Haven Jurispru-
dence is wrapped in layers of mystification and the scant accounts of its pragmatism in the literature are either entirely mistaken or only partially helpful, betray a vernacular or truncated understanding of pragmatism, and fail to engage with the internal, epistemic structure of the policy-oriented jurisprudence. In response, this Article uncovers a contradictory form of foundationalist pragmatism in the Yale Jurisprudence in a peculiar relationship between its contextualist and problem-solving promises and its unreflective normative commitments to a set of postulated values of human dignity. In doing so, it foregrounds a “foundationalist antifoundationalism” and its crippling impact on the pragmatist promises of policy-oriented jurisprudence. Against the worn-out accusations of the New Haven Jurisprudence of U.S. imperialism or disguised affinity with natural law, understanding its foundationalist pragmatism offers a new appreciation of both the genius of Yale’s policy-oriented approach and the promises of pragmatism for policy thinking in international law.

ESSAY

SOCIAL MEDIA, POLITICAL CHANGE, AND HUMAN RIGHTS

Sarah Joseph

[pages 145–188]

Abstract: In this Essay, the role of social media in progressive political change is examined in the context of the Arab Spring uprisings. The concept of social media is explained, and Clay Shirky’s arguments for and Malcolm Gladwell’s arguments against the importance of social media in revolutions are analyzed. An account of the Arab Spring (to date) is then given, including the apparent role of social media. Evgeny Morozov’s arguments are then outlined, including his contentions that social media and the Internet can be tools of oppression rather than emancipation, and spreaders of hate and propaganda rather than tolerance and democracy. The United States’ policy on Internet freedom is also critiqued. Finally, the role, responsibility, and accountability of social media companies in facilitating revolution are discussed.
NOTES

Shielding the Public Interest: What Canada Can Learn from the United States in the Wake of National Post and Globe & Mail

Jason D. Burke

[pages 189–222]

Abstract: In Canada and the United States, freedom of the press is among the most fundamental rights of citizens; yet, the exact contours of this freedom are still hotly debated. One contested question concerns the right of a journalist to protect the identity of his or her confidential sources. In Canada, two recent Supreme Court decisions established that a journalist may have a privilege to protect the identity of his or her confidential sources. This Note argues that the case-by-case determination with a presumption in favor of disclosure that these two cases establish is insufficient to protect the strong interest in a free press, which is bolstered by the ability to use confidential sources. Rather, Canada should legislatively enact a shield law based on those of many U.S. states in which the privilege is extended broadly and is nearly absolute, with only limited circumstances in which the state can compel disclosure.

Wanted: A Practical Application of the Foreign Sovereign Immunities Act to Foreign Reward Offers

Timothy E. Donahue

[pages 223–252]

Abstract: In 1976, Congress sought to codify the application of sovereign immunity with the passing of the Foreign Sovereign Immunities Act (FSIA). As foreign governments began to routinely act as participants in international commerce, Congress intended that the FSIA waive sovereign immunity when a foreign government engages in commercial activity that has a “direct effect” in the United States. This exception permits suits against foreign governments in U.S. courts when there is a breach a commercial contract that directly affects economic interests in the United States. Under U.S. contract law, a binding unilateral contract may form when one party performs the acts requested in an open offer, such as providing the whereabouts of a wanted fugitive in return for a reward. A recent Eleventh Circuit case, Guevara v. Republic of Peru, displayed the court’s
inconsistent application of the FSIA’s commercial activity exception to fugitive reward offers, and prohibits the judicial enforcement of these contracts, even when offered by a foreign government and entered into on U.S. soil. The *Guevara* decision illustrates the unsettled interpretation and application of the FSIA by U.S. courts, and may have very damaging effects on U.S. participation in the pursuit of international fugitives.

**Delayed Fight: The World Trade Organization Dispute Settlement Mechanism, Negotiation, and the Transatlantic Conflict over Commercial Aircraft**

_Ron Kendler_

[pages 253–296]

**Abstract:** For over thirty years, the United States and the European Union have waged a bitter and seemingly eternal political battle over the manufacture and trade of large commercial aircraft. In 2005, they brought this dispute to the World Trade Organization by litigating through its Dispute Settlement Mechanism. With the arrival of decisions from the WTO Dispute Settlement Body, this long-running conflict enters a new phase. This Note proposes that DSM litigation will result in a negotiated settlement between the two parties. Starting with the histories of both the DSM and the LCA industry, it delineates how the WTO has created a system that continually encourages states to settle through the DSM’s textual provisions and extrinsic effects. The Note analyzes why and how a negotiated settlement will come about, building upon the settlement-oriented nature of the DSM and the industry’s history.

**This Is Gun Country: The International Implications of U.S. Gun Control Policy**

_Laura Mehalko_

[pages 297–330]

**Abstract:** Mexican drug trafficking organizations are the largest providers of illicit drugs to the United States. They have also grown to rely on advanced, high-power weaponry and to use their nearly military-grade armament to maintain control over smuggling corridors, and local drug production areas. Cartels are also linked to nearly 40,000 deaths over the last five years, many of which were committed with guns originating in the United States. The United States is likely the most prevalent
source of weapons for the increasingly violent cartels. The U.S. government estimates that nearly ninety percent of all weapons used in the drug war originate in the United States. An analysis of current gun control policy in the United States and Mexico suggests this is likely the case; Mexico has particularly strict gun control laws in contrast to the relatively lenient gun control regulation in the United States. Both countries have implemented domestic policies aimed at reducing the southward flow of arms into Mexico, yet so far have had little success. This Note argues that arms trafficking has been facilitated by current U.S. gun control policy, and it will likely continue without a foundational shift in either U.S. or international policy.
FOLLOWING A SIGMOID PROGRESSION: SOME JURISPRUDENTIAL AND PRAGMATIC CONSIDERATIONS REGARDING TERRITORIAL ACQUISITION AMONG NATION-STATES

JOHN C. DUNCAN, JR.*

Abstract: This article analyzes methods and doctrines used by States to acquire territories. The role of the United Nations in resolving disputes between nations and the inhabitants directly affected by the disputes is also addressed, including the jurisdictional, jurisprudential, and practical considerations of territorial acquisition. Finally, traditional territorial acquisition doctrines are applied to extraterrestrial and outer space acquisition. As Western civilization etched out territories and borders across its known world, international norms of diplomatic behavior appeared in the form of customs. These customs eventually grew into codifications, which in turn grew into the elaborate international system enjoyed and protested today. Laws emerged among international States to formalize the growing body of norms of interaction across them. Modern territorial sovereignty provides the State an "exclusive right" to perform State functions within that territory, but with a realization that no State may exercise its authority within the territorial limits of other States.

INTRODUCTION

Before lands were “possessed” and nation-states emerged, there was territory. For millennia, people have organized themselves into groups, tribes, and nations for community-level protection, kinship, and com-

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common identity. The laws that emerged in these high-context social structures codified the accepted, informal standards of interaction. National boundaries, a relatively recent innovation in human history, characterize the nation-state and organize the world as we know it; they are purely symbolic but strict limits on identity and connection to higher-order social groups. Indeed, as fields of social regulation, both international relations and international law depend heavily on specific definitions in order to function in arenas of ambiguity and fluid inference.

As Western civilization etched territories and borders across the known world, international norms of diplomatic behavior appeared in the form of customs. These customs were eventually codified and grew into the elaborate international system we know today. Eventually, laws emerged within societies to formalize this growing body of norms of international interaction. In the fourteenth century BC, for example, treaties between Egypt and its neighbors reveal that even hundreds of years ago principles of mutual sovereignty and equality among political entities were firmly entrenched. The Greeks developed a similarly complex system of international laws to regulate interactions among their city-states.

International rules of territorial acquisition, in their modern form, are largely a product of the last five centuries. This history suggests their peculiarly European origins; indeed, modern international law of territorial acquisition is almost exclusively a product of Western civilization, rather than an equitable interaction among all civilizations. To be sure, the concept of diplomatic immunity was influenced by Islamic civilizations and the practices of the Ottoman empire, but this influ-

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2 See id. at 24.
3 See I.A. Shearer, Starke’s International Law 172 (11th ed. 1994).
5 Zane, supra note 1, at 418.
6 See id. at 419.
7 See id. at 24.
9 Id. at 9.
10 Shearer, supra note 3, at 7–8.
11 Id. at 7–9. For a comprehensive discussion and categorization of the world’s civilizations, see generally Arnold J. Toynbee, A Study of History 51–128 (2d ed. 5th impression 1951). For a formulation of Toynbee’s categories within the context of international relations per se, as well as a very insightful update to Toynbee’s categories to conform to the modern day, see generally Samuel P. Huntington, The Clash of Civilizations?, Foreign Aff., Summer 1993, at 22.
ence registered relatively late in the evolution of established European rules of international conflict avoidance that formed during the periods of most European expansion.12

Encounters between Europeans and the indigenous societies of the Americas did not immediately create the basis for determining the rules of intercivilizational interaction, but rather clarified for Europeans the need to establish rules for minimizing conflict among European Powers.13 The European Powers thus adopted rationales that served their interests without regard for the rights or well-being of the indigenous societies that already occupied lands “discovered” by European explorers.14 The Europeans’ insistence on adopting universal rules of international interaction is therefore significant; it reflects a departure from the earlier practice of extending hegemony over foreign peoples.15 This motivation to build universal rules of international law prevailed in international relations far beyond those rules’ immediate utility in managing relations among European powers.16 In this regard, the Europeans’ strong desire to formulate universal rules—rather than those that simply served national interests—is remarkable.17 In later centuries, this logic was extended to practices of members of the world community, at times to the detriment of members of Western civilization who would have preferred to forego hegemonic interests altogether rather than to flout the objective of universal rules of international interaction.18

Self-serving rules from the era of post-Renaissance European hegemonic expansion grew into tenets of international law that exist today.19 Even so, parties to modern discussions of international law fail to recognize the fact that international law is a product of European civilization’s unique perceptions of the “natural” order of the world, instead clinging to the notion that universality is inherent in rules of international interaction.20 Ultimately, modern international law is the outgrowth of an unwavering adherence among the Western European powers to the purported universality of the rules they adopted to fore-

13 See id. at 45.
14 See id. at 46.
16 See id.
17 See id.
18 See id.
19 See id. at 13–14.
20 See id. at 39.
stall conflict among themselves as they pursued their respective hegemonic ambitions. To be sure, had such rules of international law preserved those tenets that were fundamentally generalizable only to European powers—for example, the Papal differentiation between Christian peoples and all others—there would be no perceptions of universality in international law today. In the present era, the United Nations (U.N.)—a product of conflicts primarily within and affecting Western civilization—evidences the commonly accepted concepts of equality of States, particularly in light of the legacy of the League of Nations.

Although the notion of “sovereignty” generates much debate, this Article addresses the term only with regard to territorial acquisition, with an eye to emphasizing the prominent role of Western civilization in establishing the rules of international law that dominate the world today.

Although early civilizations were less conscious of territorial boundaries than of common identity, the necessity to hold territory and defend it against threats inevitably led to defined territories established according to the nation-state formula familiar in modern times. To be sure, it is an observable fact that civilizations tend to try to extend their boundaries as far as possible. Under these conditions, civilizational expansion originally involved the seizure of territory without regard to whether the territory already belonged to indigenous societies. Nevertheless, norms that now guide international behavior began as norms to guide intercivilizational behavior, namely between the Egyptian civilization and its Sumeric and Babylonic neighbors.

Territorial sovereignty grants the State an exclusive right of authority and control within that territory. The corollary is that no State has any right to exercise its authority within the territory of any other State. Implicit in this definition is the principle that the limits of a State’s duties and privileges correspond to the geographic boundaries

22 See id. at 39.
23 See id. at 30–31.
24 See Peter Malanczuk, Akehurst’s Modern Introduction to International Law 17–18 (7th ed. 1997). Throughout the past century, international political cooperation has placed some restrictions upon a State’s sovereignty, as States have become less autonomous than they were in the eighteenth and nineteenth centuries. See Shearer, supra note 3, at 90.
25 See Malanczuk, supra note 24, at 147–153.
26 See id.
27 Id.
28 See Fenwick, supra note 8, at 5.
30 Id.
of its territory. A State’s territory includes the land itself and all that exists above and below it. In addition, a State’s territory includes as much as twelve miles of sea extending from any coastal border.

The Island of Palmas arbitration provides exceptional insight into the role of ancient doctrines in international territorial governance and possession. The arbitration involved a dispute between the Netherlands and the United States, both of which claimed sovereignty over the Island of Palmas. The United States acquired the island from Spain, which claimed title dating back to 1648 under the doctrine of discovery. Nevertheless, the Netherlands claimed title via active possession and the effective exercise of sovereign rights over a sufficient time to evoke contest. The dispute was heard by the Permanent Court of Arbitration, which held that the island belonged to the Netherlands. The resolution of this dispute placed the burden of contest on any State seeking to claim territory actively possessed by another State. Following the passage of a sufficiently reasonable time period, a failure to contest constitutes acquiescence to possession by the sovereign that actively controls the disputed territory.

From its origins in early civilizations, territorial acquisition has evolved through the millennia from relying primarily on the use of brute force to dominate weaker powers to an idealized concept of self-determination and peaceful transfers that eschews conquest and the use of force to acquire territory. This Article reviews the manner of territorial acquisition in the twenty-first century, focusing on the develop-

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31 See Shearer, supra note 3, at 90. As Shearer states, “[t]he basic rights most frequently stressed have been those of the independence and equality of states, of territorial jurisdiction and of self-defense and self-preservation.” Id. These rights contrast with several duties imposed upon a State, including: avoiding war, completing treaty obligations, and “not intervening in the affairs of other states.” Id.

32 Id.

33 Id.

34 See Island of Palmas, 2 R.I.A.A. at 835.

35 See id. at 831.

36 Id. at 837.

37 Id.

38 Id. at 871.

39 See id. at 870.

40 See Island of Palmas, 2 R.I.A.A. at 868.

41 Morton H. Halperin & David J. Scheffer, Self-Determination in the New World Order 16–17 (1992). There are two different concepts of self-determination. Id. at 16. The first—“external self-determination”—provides “that people have the right to choose their own sovereignty—that is, to be free from external coercion or alien domination.” Id. The second concept simply requires that people have a meaningful role in the political process. Id. at 17.
opment of various means of acquisition. Beginning with methods developed millennia ago, this Article charts the shifts in international policies and socially acceptable standards of territorial acquisition in modern times, particularly as they are relevant to the role of the International Court of Justice (ICJ) in the settlement of international disputes over territory.

The European discovery of the Americas in 1492 fueled the formation of international standards of acquisition. European States quickly attempted to establish themselves in this new, mostly open expanse. Partly as a result of the power struggle prompted by the discovery of the vast natural resources available on the new continent, European States developed mutually recognizable standards for the acquisition of territory. By establishing a pattern of reciprocal benefits, these international rules naturally worked to the advantage of European States alone. Avoiding conflict among European States enabled each to better exploit the new lands in the Western Hemisphere. As long as they abided by the standards established under the newly emergent doctrine of discovery, each State could devote its efforts to conquering and colonizing territories without undue concern about interference from other, equally powerful States. These standards persisted and generally remained the primary methods for acquiring territory until World War II.

The motive to possess and maintain territory depends on the perspective of the would-be possessor. Whereas States have significant interests in maintaining territorial integrity, the interests of international governing bodies are geared more to preserving stability and equality. As a result of the modern standards of territorial acquisition...

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42 See discussion infra Parts I, III.
43 See discussion infra Part I.
44 See Lindley, supra note 4, at 27–28 (discussing commissions bestowed on European discoverers as "good evidence of the fact that Conquest or Cession was regarded as the normal method of acquiring territory already in the possession of native tribes").
45 See id.
46 Korman, supra note 12, at 47–48.
47 See id.
48 See id. By working together, the Europeans, through the doctrine of discovery, were able both to reduce the costs of such acquisitions by not fighting with each other, and further to ease their expansion by effectively creating an oligopoly over terra nullius in the Americas. See id. at 42–44.
49 Id.
50 See id. at 135–36.
51 Shearer, supra note 3, at 90.
52 U.N. Charter art. 1, para. 1 (indicating that one purpose of the U.N. is "to maintain international peace and security . . . ").
ition—which have become, for the most part, internationally accepted norms of behavior for States—individual States’ ability to acquire new territory is limited. Modern standards, at least since the great wars of the twentieth century, focus primarily on questions of human rights and international treaties to determine territorial title and have done away with the archaic doctrines of conquest and discovery.

Yet, conflicts continue to arise and territories continue to shift from State to State. There are several motivations for unilateral deviations from international norms, including ethnocultural, religiophilosophical, and even merely geographic differences, which strain the integrity of traditional borders at various times under the continually evolving social conditions of the planet’s complex infrastructure of human habitation and interest. Self-determination, the central principle of modern acquisition, provides that certain peoples should have a say in the creation of their own governments. Modern examples of the exercise of self-determination abound. For example, Palestinians have obtained recognition from a majority of the world’s States; factions within Québec continue to mitigate for secession from Canada; the people of Darfur demand autonomy from Sudan; and Puerto Rico’s independentistas continue to advocate peacefully for the island’s independence from the United States. Before considering the relative legitimacy of each peo-

54 See Korman, supra note 12, at 133.
55 See Lea Brilmayer, Essay, Secession and Self-Determination: A Territorial Interpretation, 16 Yale J. Int’l L. 177, 177 (1991) (noting several modern-day secessionist movements that have attempted to redraw political boundaries and create internationally recognized States).
56 See Malanczuk, supra note 24, at 157, 338. In discussing territorial disputes, Malanczuk notes that “legal and political arguments are often used side-by-side. . . . The main political arguments which are used in territorial disputes are the principles of geographical contiguity, of historical contiguity and of self-determination.” Id. at 157. Additionally, “[t]he problems of minorities and of the special category of indigenous peoples . . . have led to a vivid discussion as to whether such groups have a right to self-determination or whether a new definition of self-determination is required to accommodate extreme situations.” Id. at 338.
57 See Brilmayer, supra note 56, at 177.
ple’s claims, however, it is essential to understand the methods of territorial acquisition that have evolved from ancient origins.

Part I addresses the legacy methods used by States in acquiring territory under traditional doctrines of occupation, prescription, cessation, and conquest. Part II discusses contemporary issues regarding territorial acquisition, including self-determination and specific international agreements through efforts by the League of Nations and the United Nations. Part III address contemporary jurisprudential and pragmatic considerations for territorial acquisition under the principles of self-determination and self-defense, the doctrine of *uti possidetis*, and methods for territorial dispute resolution. Finally, this article concludes with future considerations for territorial acquisition, including acquisitions of extraterrestrial land and outer space.

I. THE LEGACY OF PAST METHODS OF ACQUISITION

As Lassa Oppenheim has written, “because the new law has developed out of the old . . . the old is necessary to an understanding of the new.” A basic appreciation of the legacy modes of acquisition is necessary to understand the geocentric, modern-day justifications for territorial acquisition. Moreover, despite international regulation, many of the ancient methods of acquisition remain. Although newer, more humane methods may supplant the now-antiquated legacy modes of acquisition, twenty-first century modes of acquisition still reflect aspects of the archaic models.

Throughout the millennia, the most powerful States have sought to expand their empires by seizing new land. Such takings were more than a simple acquisition of property; rather, when a State laid claim to additional increments of territorial jurisdiction, it imposed “a right of political control, of ultimate authority,” as opposed to a “right of property.” As international codes of conduct have developed over the past five centuries, European States—and, more recently, States across all civilizations—began cooperating to identify ways to agree upon the establishment of title to lands in a manner that worked to the mutual

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62 Oppenheim’s International Law, supra note 70, § 242.
63 See Korman, supra note 12, at 250–55.
64 See discussion infra Part III.
66 Fenwick, supra note 8, at 403 (emphasis added).
benefit of those parties affected by each such case.\textsuperscript{67} The concept of \textit{title} in this Article thus describes the legal claim to territory by a State.\textsuperscript{68} As these customs evolved, five doctrines of acquisition developed:\textsuperscript{69} the doctrines of occupation; prescription; cession; accretion (or accession);\textsuperscript{70} and conquest.\textsuperscript{71} To be sure, this categorical approach often oversimplifies the complexities of territorial acquisition and tends to obscure the reality of political cross-purposes that have generated most

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item Seokwoo Lee, \textit{Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal}, 16 Conn. J. Int’l L. 1, 2 (2000). Lee’s paper is an interesting and base analysis of the utilization of legacy modes of acquisition. See id. The paper also discusses \textit{uti possidetis} and self-determination, and their potential application to modern international law. See id. at 11. Touching upon many of the same issues as this Article, Lee provides similar, yet alternative, views on territorial acquisition over time. See id. at 2.
\item Although accretion is beyond the scope of this Article, it is useful to understand the basic doctrine. Accretion describes a geographical process where new land attaches to existing land. \textit{Shaw, supra} note 15, at 498. New formations may be naturally occurring or artificial. 1 \textit{Oppenheim’s International Law} § 258 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Examples of natural accretion include land formed at river deltas, other newly formed islands and river beds that remain after water ceases to flow. \textit{Id.} §§ 260–262. Examples of artificial accretion include “embankments, breakwaters, dykes, and the like . . . .” \textit{Id.} § 259.
\item In \textit{Nebraska v. Iowa}, the U.S. Supreme Court applied the doctrine of accretion (and its sister doctrine of avulsion) to settle a border dispute between two states:
\begin{quote}
It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as “accretion,” the riparian owner’s boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. . . .

It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, “avulsion.” . . .

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel. . . .

. . . .
\end{quote}

Such is the received rule of the law of nations on this point, as laid down by all the writers of authority.
\end{enumerate}
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\textsuperscript{143} U.S. 359, 360–62 (1982) (internal quotations omitted).

\textsuperscript{71} Seokwoo, \textit{supra} note 69, at 2.
significant territorial conflicts over the past five centuries. Moreover, some traditional modes of acquisition are archaic by today’s standards and are unlikely to emerge as justifications for future title acquisitions. In fact, judicial proceedings in both international and national courts tend to identify more than one mode of acquisition, and different categories of justification rarely reinforce one another; instead, they tend to generate vexingly conflicting conclusions in each case. In order to ascertain title, and thus recommend granting it to a single party, it is necessary for a tribunal to disentangle all of the categories and determine which category governs the facts. Hence, in the present discussion, some cases arise in multiple sections, and a discussion of each category of acquisition is necessary for a full understanding of the implications of each case. Moreover, an understanding of traditional categories provides a useful basis for discussing modern acquisitions.

A. The Doctrine of Occupation

For practical purposes, the doctrine of occupation depends intimately on the doctrine of discovery. Occupation requires settlement of non-appropriated territory by a State, with the intent of incorporating the territory into the national domain and exercising sovereignty over it. Although European powers permitted simple discovery by other European States into the eighteenth century, title claims eventually required occupation of discovered lands. States often manifested occupation by installing a defensible fort on the land to demonstrate their ability to safeguard the land from indigenous societies and foreign

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73 See id.
74 Id.
75 Id.
76 See id.
77 Cf. Lindsay G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands 127–37 (2005) (discussing how the U.S. Supreme Court wrestled with reconciling the doctrines of discovery and occupation through disputes regarding Native American title to land). From the discovery of previously unknown territories came significant rights to title, including rights of occupation. See Shaw, supra note 15, at 504.
78 Fenwick, supra note 8, at 405.
79 Id. at 404–05.
invaders.\textsuperscript{80} Simply planting the State’s flag on the unoccupied land, however, could suffice to effectuate occupation.\textsuperscript{81}

This doctrine has become an obsolete form of territorial acquisition\textsuperscript{82} for the simple reason that no habitable land remains open for possible occupation or discovery.\textsuperscript{83} While searching for a new route to India, Christopher Columbus “discovered”—at least, from a European perspective—the Americas, and the doctrines of discovery and occupation emerged as integral parts of exploration and acquisition.\textsuperscript{84} The original theory of discovery as a justification for territorial acquisition depended on a civilization-centric theory of information.\textsuperscript{85} That is, the question of prior habitation depended on information available to members of Western civilization—namely, the European powers.\textsuperscript{86} In the hands of a non-Western civilization—such as the Islamic, Sinic, or Far Eastern\textsuperscript{87}—such information did nothing to influence European perceptions on the matter of this important tenet of international law.\textsuperscript{88} An alternative expression of this fact is that, at the time, international law was fundamentally European law—and, indeed, only Western European law.\textsuperscript{89} If a non-European power ultimately adopted the same theory, it could by such means gain legitimacy vis-à-vis the Europeans and possibly benefit in terms of its own quests for territorial expansion.\textsuperscript{90} For example, the Russian Empire—categorized by Arnold J. Toynbee as part of the Orthodox civilization distinct from Western civilization\textsuperscript{91}—eventually adopted this theory.\textsuperscript{92} Despite its obsolescence,
an understanding of the doctrine of occupation is crucial to the modern resolution of territorial disputes.\[^{93}\]

1. Colonization and the Doctrine of Occupation

a. The Americas

The European discovery of the Americas in the late fifteenth century presented novel challenges to the European powers’ pursuit of territorial acquisition that would minimize conflicts with other European powers.\[^{94}\] The enduring legacy of the boundaries drawn during the original European occupation of the Americas has had an enormous effect on the identity and geography of the resulting States due to the use by the former colonies of the doctrine of *uti possidetis* to formalize their boundaries upon independence.\[^{95}\] In many cases in the Americas, the European powers relied on the doctrine of conquest to acquire new territory and assert authority over indigenous societies; however, conquest alone was insufficient to establish title to the lands.\[^{96}\]

The doctrine of discovery permitted Europeans to take control of land in the Americas by giving "title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."\[^{97}\] If a

\[^{93}\] See Mabo v Queensland (No. 2) (1992) 175 CLR 1 (Austl.). In *Mabo (No. 2)*, the High Court of Australia faced the question of occupation in determining aboriginal rights to the Murray Islands, a dispute with origins dating back to Great Britain’s first colonization of Australia. *See id.* at 20, 75. The United States may face a similar issue regarding title to the North Pole; while such possibility is rare, recent developments involving Russia could lead the United States to claim sovereignty over the North Pole based on the doctrine of discovery. *See* Luke Harding, *Kremlin Lays Claim to Huge Chunk of Oil-Rich North Pole*, *Guardian* (U.K.) (June 18, 2007), http://www.guardian.co.uk/world/2007/jun/28/russia.oil; Press Release, Comm’n on Limits of the Cont’l Shelf, Russian Federation First to Move to Establish Outer Limits of its Extended Continental Shelf, U.N. Press Release SEA/1729 (Dec. 21, 2001), available at http://www.un.org/News/Press/docs/2001/sea1729.doc.htm. Unfortunately, as of the time of this writing, the matter is still in early stages of development, and as such, credible information is somewhat sparse.


\[^{95}\] John Duncan, *Uti Possidetis: Is Possession Really Nine-Tenths of the Law? The Acquisition of Territory by the United States: Why, How, and Should We?* 38 McGeorge L. Rev. 513, 515–18 (2007). *Uti possidetis* ("so you possessed") is interpreted in the present-perfect tense in English ("so you have possessed") and implies *uti possidetis* ("so you shall [continue to] possess"). *Id.* at 516. The doctrine suggests that "administrative boundaries will become international boundaries when a political subdivision or colony achieves independence." *Black’s Law Dictionary* 1686 (9th ed. 2009).

\[^{96}\] Korman, *supra* note 12, at 44.

European State discovered *terra nullius*, that State had a claim to the territory against all other European States and could take title to the land by way of the doctrine of occupation.98 “It was a right which all [European States] asserted for themselves, and to the assertion of which, by others, all assented.”99 Hence, title could be established upon discovery by building some form of settlement in the territory.100

After the European discovery of the Americas, Papal grants and the doctrine of discovery were the initial means of providing rights of acquisition for *terra nullius*, or “no man’s land.”101 *Terra nullius* is land that is, at least in theory, not possessed by another State.102 To the European powers, it referred generally to land free from the possession of other European powers.103 In 1492, the Pope granted the right to conquer the Western Hemisphere to Portugal and Spain, defining for each State a general area of dominion.104 Under the authority of the Donation of Constantine, the Pope claimed the power to establish for Christian rulers the right to acquire territory from and rule over the “heathens and infidels” that sparsely populated the Western Hemisphere.105 Many resisted this Papal power, however; indeed, several European States ignored the grants of territory and made forays into new continents despite of the Papal edicts.106 Eventually, the doctrine of discovery developed to regulate the problems with Papal grants.107

The ability to claim land through simple discovery quickly led to a proliferation of claims by mere sightings from marine vessels.108 To address this potential issue, beginning in the eighteenth century European States refused to recognize title by discovery alone.109 European leaders realized that to continue to avoid mutual conflict, it would be necessary

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98 See id.
99 Id.
100 Lindley, supra note 4, at 141.
101 Id. at 124–25.
102 Korman, supra note 12, at 43.
103 Id.
104 Lindley, supra note 4, at 124–26.
105 Id. at 124.
106 Id. at 126–28; Lesaffer, supra note 94, at 42. Certain European powers and indigenous societies in the newly discovered territories did not concur with the European concepts of *terra nullius*. See Lindley, supra note 4, at 127; Lesaffer, supra note 94, at 42. Indeed, the Incan response to these Papal grants was “that the Pope must be crazy to talk of giving away countries which do not belong to him.” Lindley, supra note 4, at 127 (internal quotations omitted).
107 See Lindley, supra note 4, at 129–30.
108 See id. at 130–31.
109 See id. at 132.
to condition title on something more than a mere sighting by sea. Accordingly, occupation became a requirement for a legitimate claim of title. The doctrine of discovery remained important, though: discovery of terra nullius permitted a State to claim temporary title, adverse to other States, until it was feasible to establish occupation.

The guiding requirement for recognition of occupation was that there be "sufficient governmental control to afford security to life and property." In the early days of European colonization, this often required building a defensible fort, but as the period continued, more was necessary. Often, acquisition by occupation was possible only if the occupying power built and maintained a colony. Once the territory was sufficiently occupied, it fell under the sovereignty of the occupying power, and claims by other European States were barred thereafter.

b. Africa

Drawing from their experiences in colonizing the Americas, the European powers applied the same doctrines of acquisition to the colonization of Africa. The Final Act of the Berlin Conference formalized the doctrines of acquisition. However, the Final Act bound only the parties to the agreement and applied only to new cases of occupation on the coasts of Africa. The Final Act enumerated three criteria for effectuating title by way of the doctrine of occupation: (1) furnishing notice to interested powers, (2) physical possession of the territory, and (3) establishment of a government sufficient to protect the rights of citizen-subjects. The third criterion required the signatory States to establish authorities to ensure the freedom of trade and transit. As in the

110 See id.
111 See Fenwick, supra note 8, at 404.
112 See Malangzuk, supra note 24, at 149. The permitted grace period before the necessity for occupation varied depending upon the circumstances. See Fenwick, supra note 8, at 406-05. International tribunals also adjudged the necessary degree of occupation on a case-by-case basis. See id. Given the practical concerns that arise from acquiring territory across the Atlantic, a long grace period was a manifest requirement. See id.
113 Lindley, supra note 4, at 141.
114 Id. at 140.
115 Id. at 141.
116 Id. at 129-30.
117 Fenwick, supra note 8, at 255.
118 See Lindley, supra note 4, at 144.
119 Id. at 145.
120 Id. at 144, 147. The rights protected by the Final Act appear to be those already possessed by private individuals, as well as the rights of governments. Id. at 147.
121 Id. at 144.
Americas, international law permitted a period of time between the original discovery and the establishment of effective occupation. When necessary, reliance on the doctrine of cession—as opposed to the doctrine of conquest commonly invoked during the colonization of the Americas—often effectuated the transfer of title from indigenous societies. Acquisitions under the doctrine of cession involved the transfer of territory by treaty. Eventually, the doctrine of occupation, as the European powers came to understand it, extended beyond the coastal regions and governed the acquisition of territory in the African interior.

c. Greenland

As recently as 1933, acquisition by occupation played an important role in determining sovereignty over a portion of Greenland. In Legal Status of Eastern Greenland, decided by the Permanent Court of International Justice (PCIJ), the court determined that the degree of occupation necessary to exercise a claim of title over any land was...
measured by whether a State exerted “effective authority” over the disputed territory.\textsuperscript{127} In the case, Norway claimed title based on the doctrine of discovery, arguing that the territory at issue was terra nullius because Denmark refrained from establishing manifest occupation, and enunciating its intent to occupy.\textsuperscript{128} Denmark objected, claiming that the reason it refrained from colonizing the land was that the nature of the terrain itself prevented colonization.\textsuperscript{129} It claimed that it had indeed exercised sovereignty by way of continuous, peaceful, and undisputed protective authority over the land:\textsuperscript{130} Denmark had explored the coasts, established a trading settlement, and mentioned its ownership of Greenland in treaties with Norway.\textsuperscript{131} On the basis of these contacts, Denmark proved effective authority and convinced the PCIJ to rule in its favor, thereby defeating Norway’s claim of terra nullius.\textsuperscript{132}

2. Rights of Indigenous Peoples Under the Doctrine of Occupation

A necessary facet of the doctrine of occupation is the discovery of uninhabited terra nullius.\textsuperscript{133} The concept of terra nullius, however, was veritably a legal fiction.\textsuperscript{134} Specifically, terra nullius reflected only the Europeans’ perception of “no man’s land.”\textsuperscript{135} Indeed, a great number of indigenous residents often occupied the lands purportedly “discovered” by the European powers.\textsuperscript{136} History shows that the presence of indigenous peoples failed to dissuade the European powers from staking claims to these lands as terra nullius.\textsuperscript{137} To prevail on a claim of discovery and occupation of terra nullius, disputants fashioned creative arguments to distinguish terra nullius from occupied areas, and thereby to determine the rights of indigenous societies.\textsuperscript{138}

\begin{flushleft}
\textsuperscript{127} See id. at 75.
\textsuperscript{128} Id. at 44.
\textsuperscript{129} See id. at 49.
\textsuperscript{130} Id. at 44–45.
\textsuperscript{131} Id. at 33, 44.
\textsuperscript{133} See Lindley, supra note 4, at 2.
\textsuperscript{134} See Mabo (No.2) (1992) 175 CLR at 40–42.
\textsuperscript{135} See Lindley, supra note 4, at 18, 20.
\textsuperscript{136} See id. at 24–44 (examining the practices of States seeking to occupy already-inhabited lands).
\textsuperscript{137} See id. at 26, 34.
\textsuperscript{138} See generally Robertson, supra note 77 (offering a comprehensive analysis of the European discovery and occupation of the United States and early interpretations of the rights of Native Americans by the U.S. Congress, the U.S. Supreme Court, and various U.S. States). In his study of the facts surrounding Johnson v. McIntosh, Robertson paints a detailed picture of the circumstances surrounding the case as it transpired through the U.S.
\end{flushleft}
When the European powers landed in the Americas, they encountered indigenous people. These societies differed significantly from those in Western Europe, and Europeans quickly devised an array of approaches for dealing with them. Some early approaches, including those of Franciscus a Victoria, conceded that the indigenous societies had sovereignty over their territory. If, however, the indigenous societies hindered religious teachings or the buildup of European colonies, the King of Spain had the right to acquire sovereignty over them through the doctrine of conquest. In 1493, Pope Alexander VI granted Spain and Portugal the right to conquer indigenous societies in the Americas. The Pope proposed an alternative argument—namely, that if the indigenous societies lacked a territorially defensive governmental structure, then those societies had no rights to their territories. Other approaches set forth the concept of a “Family of Nations.” To be a member of the Family, indigenous societies had to have a form of government that advanced beyond a tribal level. The indigenous government and society had to exist within defined, defended territory in accordance with the European model of territorial definition.

Under this definition, however, the European powers precluded many tribes in the Americas from claiming territorial sovereignty despite claims that they possessed a governmental structure that delimited court system. See id. at 5–23. Robertson discusses, at length, the amount of detail and concern that went into the case, as it relates to terra nullius and tribal rights. See id. at 95–116.

See id. at ix. The discovery of the Americas launched a vast desire on the part of the European sovereigns to colonize the region. See id. The European powers, however, eventually found it necessary “to adapt their traditional worldview to accommodate the Columbian landfall.” Id. The Europeans’ response to this affront on their worldviews was to “devis[e] rules intended to justify the dispossession and subjugation of the native peoples of the Western Hemisphere. Of these rules the most fundamental were those governing the ownership of land.” Id. at ix.

See Fenwick, supra note 8, at 406 (noting that at the time “international law did not recognize the title of wandering tribes or even of settled peoples whose civilization was regarded as below the European standard”).

See Lindley, supra note 4, at 12 (identifying Victoria as one of several scholars who held this view).

See id.

See Fenwick, supra note 8, at 405.

See id. at 18–20.

See Lindley, supra note 4, at 18–19.

See id.

See id. at 19 (quoting Portuguese and English publicists who noted that “native chiefs, half or wholly savage . . . [did] not possess any continued sovereignty, that being a political right derived from civilization.”) (internal quotations omitted).
and defended specifically defined territory.148 International law in Europe emerged as an understanding among nation-states circumscribed by political boundaries; it has never condoned granting official recognition of title to “wandering tribes or even [to] settled peoples whose civilization was regarded as below the European standard.”149 In essence, this meant that if a people never adopted a formal practice of precisely delimiting the boundaries of their territory in the European manner of possession, then the territory was considered by European States not to be possessed.150

Given the difficulties inherent in any objective attempt to determine the nature of foreign indigenous society’s government and territorial philosophy, the European powers ultimately determined that occupation was, by definition, a right for them to wield over all foreign peoples.151 The European powers reasoned that the concept of strictly delimited boundaries, subject to a concomitant burden of active defense, constituted a uniquely Christian political philosophy.152 Any lands that fell outside the domains of “a Christian prince” constituted “‘territorium nullius’ subject to acquisition by Papal grant or by discovery and occupation without regard to the wishes of the native inhabitants.”153 The Europeans, thus, leveraged this doctrine unilaterally and without regard for the wishes of indigenous societies.154 Over time, the occupation of lands deemed terra nullius expanded vastly, as the European powers recognized only a limited number of non-European governments.155 To the Europeans, implicit in the very concept of civilization was the European philosophy of territorial integrity.156 No society without a similar philosophy could be counted as a member of the Family of Nations, or the community of civilized peoples.157 On this

148 Fenwick, supra note 8, at 406.
149 Id.
150 Id.
151 See id.
152 See Lindley, supra note 4, at 26.
153 Korman, supra note 12, at 42 (internal quotations omitted). Some scholars argue, however, that actual European practice in the Americas more closely resembled cession or conquest, which necessarily acknowledged the existence of indigenous societies but refused to recognize their rights to sovereignty. See id. at 42–44.
154 Id. at 41.
155 See Malanczuk, supra note 24, at 12. The only governments so recognized were those in India, the Ottoman Empire, Persia, China, Japan, Burma, Siam (currently Thailand), and Ethiopia. Id.
156 See Lindley, supra note 4, at 18–19.
157 See id. at 20.
basis, the Europeans concluded that such people lacked any moral right to self-determination.\footnote{158 See id.}

In later centuries, the doctrine of occupation, premised on the fictitious association between civilization and territorial delimitation, became obsolete as undiscovered territories became scarce; European hegemonies occupied all known lands that lacked a powerful defender.\footnote{159 See Jennings, supra note 82, at 20.} Despite the eventual obsolescence of the doctrine of occupation, the concept of terra nullius survives today, and has appeared in modern cases involving prior takings of land.\footnote{160 See Lindley, supra note 4, at 28.} In Western Sahara, the ICJ issued an advisory opinion regarding whether territory was terra nullius when it was established as a Spanish colony.\footnote{161 Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 1 (Oct. 16).} On behalf of Algeria, Ambassador Mohammed Bedjaoui argued that terra nullius “effectively constituted the legal spearhead of European colonization.”\footnote{162 Korman, supra note 12, at 42 n.5.} In its determination of the validity of the occupation, the ICJ ruled that “a cardinal condition” to support any claim to territory by way of the doctrine of occupation is that the land in question be terra nullius—a territory belonging to no-one—at the time of the act alleged to constitute the ‘occupation.’”\footnote{163 Western Sahara, 1975 I.C.J. ¶ 79.} Restricting the meaning of the term terra nullius, the ICJ held that the land in question was not terra nullius when Spain sought to occupy it, because one or more peoples, “which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them,” already dwelled there.\footnote{164 Id. ¶ 81. The court also noted: “[A]uthority in the tribe was vested in a sheikh, subject to the assent of the ‘juma’a’, that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law.” Id. ¶ 88.} This represented a fundamental shift between the Eurocentric and geocentric conceptions of the doctrine of occupation; it was the first time international law was interpreted explicitly to eschew the Eurocentric philosophy requiring territorial delimitation and the burden of defense to establish a people’s rights to self-determination.\footnote{165 See Shaw, supra note 15, at 503.}

More recently, in Mabo v Queensland (No. 2), the High Court of Australia decided a highly publicized terra nullius case in which it determined that title to land claimed by the British actually remained with indigenous societies unless the British or a successor government (Aus-
tralia in this case) had properly extinguished the indigenous title.166 The issue arose when members of the indigenous societies argued that the land in question, which the Australian government had claimed was *terra nullius*, actually constituted an inhabited area.167 The High Court of Australia held that title remained in the indigenous societies’ hands unless the government had explicitly extinguished that right.168 This case, therefore, established a compromise precedent between the original Eurocentric premise of territorial delimitation and burden of defense, and the radically new premise of political organization introduced in *Western Sahara*.169 Specifically, the difference now lies in whether the occupying power formally (de jure) enunciated the extinction of the indigenous people’s right to a defined territory.170 This compromise legitimated the Eurocentric theory that justified European conquest in past centuries on the theory that no meaningful opportunity existed for further conquest.171

Acquisition via the doctrine of occupation remains an integral part of the system of international law that emerged from Western civilization’s preference for hegemony.172 Though antiquated as a mode of accumulating territory, the doctrine, which has evolved over the centuries, is very much alive in long-standing modern territorial disputes.173 From the early stages of the doctrine’s evolution, that allowed vast claims of title regardless of whether the expansive power actually colonized the land, to later stages, that required colonization followed by a burden to determine whether the affected peoples constituted a preexisting society recognizable in European territorial theory, the doctrine eventually evolved to include more generalizable considerations of the right of self-determination for indigenous societies.174 Issues regarding prior takings of territory by occupation continue to arise in modern courts, and courts today must adjudicate the meaning and breadth of occupation as a justification for territorial acquisition.175

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166 *Mabo (No. 2)* (1992) 175 CLR at 119.
167 See id. at 2.
168 See id. at 119.
170 *Mabo (No. 2)* (1992) 175 CLR at 119.
171 See id.
172 See Brownlie, supra note 72, at 123.
173 See Fenwick, supra note 8, at 412–419.
174 See id. at 404–406; Jennings, supra note 82, at 82–83.
175 See Jennings, supra note 82, at 20.
B. The Doctrine of Prescription

Prescription involves “[t]he effect of the lapse of time in creating and destroying rights.”\textsuperscript{176} Prescriptive title arises when there is no evidence of title under the doctrines of occupation, conquest, or cession; the territory in question has been under continuous and undisputed control long enough to effectively establish a new State; and, the international community has come to accept the government as legitimate in practice.\textsuperscript{177} Three criteria are necessary to establish prescription. First, there must be effective control.\textsuperscript{178} Second, this control must be present for a sufficient period to constitute general acceptance of the control among members of the international community.\textsuperscript{179} Third, neither the original State nor third-party States must contest this control.\textsuperscript{180} If “immemorial possession” occurs, such that the origin of title is unclear, then title is generally presumed to be valid.\textsuperscript{181}

Prescriptive title may also be established when title is defective or unlawful.\textsuperscript{182} If a State has effectively and peaceably controlled the territory for a sufficient period, the doctrine of prescription can remedy defects in title.\textsuperscript{183} The crucial distinction between the doctrines of occupation and prescription is that under the former the territory must originally have constituted \textit{terra nullius}, while under the latter the territory formerly belonged to another State.\textsuperscript{184} Although the doctrine of prescription closely resembles the doctrine of adverse possession, they differ in that under the doctrine of prescription the original title holder must have acquiesced.\textsuperscript{185} Under the doctrine of prescription, the claim to territory must be uncontested.\textsuperscript{186} If a third State disputes the claim of the State claiming title by prescription, title to the territory is imperfectible.\textsuperscript{187} For example, in \textit{Chamizal} the International Boundary Commission determined that the United States lacked a basis upon

\begin{footnotes}
\item[176] Black’s Law Dictionary, supra note 95, at 1302.
\item[177] See Lindley, supra note 4, at 178; Malanczuk, supra note 24, at 150.
\item[178] Malanczuk, supra note 24, at 150.
\item[179] See Lindley, supra note 4, at 179.
\item[180] Malanczuk, supra note 24, at 150.
\item[181] Lesaffer, supra note 94, at 11.
\item[182] Jennings, supra note 82, at 21.
\item[183] Id.
\item[184] Malanczuk, supra note 24, at 150.
\item[185] Id.
\item[186] See Lesaffer, supra note 94, at 51.
\item[187] See id.
\end{footnotes}
which to claim territory via the doctrine of prescription because Mexico refused to acquiesce to the claim of the United States.\textsuperscript{188}

The archetypal example of acquisition under the doctrine of prescription is the case of Island of Palmas.\textsuperscript{189} In its opinion, the Permanent Court of Arbitration determined that, although Spain had some claim to the island as a result of having discovered it in 1648, title actually belonged to the Netherlands.\textsuperscript{190} Here, Spain had discovered the island and received inchoate title, but never actually occupied it.\textsuperscript{191} Thus, although Spain claimed ownership, the Netherlands established a sufficiently substantial settlement on the island to constitute occupation.\textsuperscript{192} That is, under the doctrine of prescription the Netherlands established “continuous and peaceful display of State authority” on the island.\textsuperscript{193} In the eyes of the Permanent Court of Arbitration, it was sufficient for purposes of establishing title for the Netherlands to display occasional artifacts of direct and indirect authority over the island, despite the fact that such activity fell short of the definitional requirement of continuous and numerous displays.\textsuperscript{194} The difference between the Spanish and Dutch claims to the Island of Palmas thus consisted of Spain’s mere claim to title compared with the Netherlands’s manifestation of title to any third party that might go so far as to observe the island’s self-evident ascription.\textsuperscript{195}

The doctrine of prescription was also relevant in Legal Status of Eastern Greenland.\textsuperscript{196} Here, the PCIJ determined that, in order to show title via the doctrine of prescription, it was necessary to demonstrate two conditions: first, a party must show “the intention and will to act as sovereign,” and, second, it must show “some actual exercise or display of such authority.”\textsuperscript{197} Denmark provided persuasive evidence of both conditions.\textsuperscript{198} The shift away from the necessity for substantial occupa-

\textsuperscript{188} Chamizal (Mex./U.S.), 11 R.I.A.A. 309, 328 (Int’l Boundary Comm’n 1911).

\textsuperscript{189} See Island of Palmas (Neth./U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); Lesaffer, supra note 94, at 51.

\textsuperscript{190} See Island of Palmas, 2 R.I.A.A. at 867–69. Although the dispute in Island of Palmas was between the Netherlands and the United States, it was necessary for the court to determine Spain’s rights to the islands, as Spain ceded the territory to the United States in 1898. \textit{Id.} at 837.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{See id.}

\textsuperscript{193} \textit{See id. at 870.}

\textsuperscript{194} \textit{See id. at 867.}

\textsuperscript{195} \textit{See Island of Palmas,} 2 R.I.A.A. at 870.

\textsuperscript{196} \textit{See 1933 P.C.I.J.} at 45–46, 48.

\textsuperscript{197} \textit{Id.} at 45–46.

\textsuperscript{198} \textit{See id. at 34–36, 48.}
tion and toward the necessity to produce an unambiguous display of ascription relied on the limiting characteristics of the lands in question. In both Island of Palmas and Legal Status of Eastern Greenland, the land in question posed obvious obstacles—geological, climatological, and geographical—to substantial occupation, such that the courts needed an alternative theory that accommodated these natural limitations while preserving the burden of demonstrable commitment to ownership on the part of the claimants.

Although a State with a claim to territory generally must consent before it is possible to grant prescription to the land, a State cannot wait indefinitely to object. In the 1959 case of Sovereignty over Certain Frontier Land, the Boundary Commission of 1843 had previously determined the allocation of territory among the relevant States. Later, at the Convention of 1892, Belgium asserted sovereignty over some disputed territory. Although the Netherlands had notice of this claim, it refrained from repudiating it until 1922. As a result of this delay, the ICJ found for Belgium. By comparison, the Chamizal opinion found that the United States had no legitimate basis to exercise prescription over territories that Mexico also claimed. In Chamizal, the United States and Mexico disputed their common border in certain places. When the United States claimed prescriptive title based on “undisturbed, uninterrupted, and unchallenged possession,” Mexico disputed this and showed that it had already challenged the boundaries in diplomatic circles. The arbitrators thus denied prescriptive title on the grounds that Mexico had already challenged the U.S. claim.

C. The Doctrine of Cession

Acquisition under the doctrine of cession occurs when one State transfers land to another State via treaty. It may occur by purchase, as

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199 See id. at 50–51.
200 See id.; Island of Palmas, 2 R.I.A.A. at 867.
201 See Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 229–30 (June 20).
202 Id. at 222.
203 Id. at 229.
204 Id. at 229–230.
205 See id. at 230.
206 See id.; Chamizal, 11 R.I.A.A. at 329; Lesaffer, supra note 94, at 51.
208 Id. at 328–29.
209 See id. at 329.
210 See Fenwick, supra note 8, at 422.
occurred with the Louisiana Purchase.\(^{211}\) It can also occur by exchange, as evidenced by the 1890 cession by Great Britain of the island of Helgoland to Germany in exchange for territory adjoining German East Africa.\(^{212}\) Alternatively, a peace treaty may govern the transfer of land, such that the value-in-exchange consists of the agreement to a permanent cessation of hostilities.\(^{213}\) Cession creates “the formal transfer from one state to another of the sovereignty over a definite area of territory.”\(^{214}\) The doctrine of cession is the only mode of acquisition that requires the enunciated intentions of at least two States.\(^{215}\) The receiving State must manifestly intend to receive the land and subsequently establish sovereignty.\(^{216}\) Likewise, the ceding State must manifestly intend to transfer the land and relinquish all claims of sovereignty.\(^{217}\) This form of title is derivative, not original.\(^{218}\) Thus, the validity of the receiving State’s title is dependent upon the validity of the ceding State’s title.\(^{219}\) *Nemo plus juris ad alium transferre potest quam ipse habet*: No party has the power to transfer a right to another that is greater than that which he actually possesses.\(^{220}\)

In past centuries, a transfer made under duress—that is, under the threat of force—was a valid manner of transferring title.\(^{221}\) For a time, tribunals even considered the doctrines of conquest and cession as alternative, coexisting justifications for territorial acquisition.\(^{222}\) The 1969 Vienna Convention on the Law of Treaties (Vienna Convention), however, declared that, “[a] cession by treaty is void where the conclusion of the treaty has been procured by the threat or use of force . . . .”\(^{223}\) The author posits that this also constituted a point of departure between the former Eurocentric elaborations of international law for the purpose of forestalling conflict among the members of Western civilization, and the modern recognition that the era of Eurocentric international law had ended for the sake of the universality of the law.

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\(^{211}\) *Id.* at 423.

\(^{212}\) See *id*.

\(^{213}\) See *id*.

\(^{214}\) *Id.* at 422.

\(^{215}\) See JENNINGS, supra note 82, at 16.

\(^{216}\) See 1 OPPENHEIM’S INTERNATIONAL LAW, supra note 70, §§ 244–245.

\(^{217}\) See *id*.

\(^{218}\) JENNINGS, supra note 82, at 16.

\(^{219}\) See *id*.

\(^{220}\) Translated by the author.

\(^{221}\) See JENNINGS, supra note 82, at 19.

\(^{222}\) Cf. *id*. (suggesting that cession resulting from coercion coexists with, rather than erases, title by conquest).

D. The Doctrine of Conquest

The doctrine of conquest is one of the earliest and most prominent doctrines of acquisition.\textsuperscript{224} Title by conquest was perfectible if the conquering State declared an intention to conquer, took the territory by force, and had the ability to govern it.\textsuperscript{225} Most States in past centuries considered this a valid method of acquisition.\textsuperscript{226} The European powers colonized Asian territories largely via the doctrines of conquest and cession.\textsuperscript{227} The British acquisition of India, the Dutch acquisition of the Caribbean islands known as the East Indies, and the Russian acquisition of most of northern and central Asia are just a few examples.\textsuperscript{228} Moreover, the strongest European States continued to pursue the conquest of the European continent, controverting Eurocentric international law.\textsuperscript{229}

The doctrine of conquest gave the victorious State sovereignty over the conquered territories and their indigenous societies.\textsuperscript{230} Winning in battle alone, however, was insufficient to transfer title.\textsuperscript{231} Annexation was also necessary to establish sovereignty, and established an expectation that unambiguous artifacts of annexation would be manifested.\textsuperscript{232} The conqueror must intend to govern the territory, have effective possession and control, and no exiled government or allies thereof may exist to contest control.\textsuperscript{233} International law recognized title as valid if the conquered State was totally destroyed (\textit{debellatio}), through a peace treaty granting cession, or if the failed State acquiesced.\textsuperscript{234} If the land failed to pass through cession and a peace treaty, however, claimants to the land resorted to the doctrine of \textit{uti possidetis}.\textsuperscript{235} Further, in the absence of a treaty, it was necessary to show that the war had completely ended, and the defeated society must have surrendered and submitted

\textsuperscript{224} See Zane, supra note 1, at 32. Referring to tribes around 10,000 B.C., Zane notes that “[f]ierce fighting must have gone on among these various tribes . . . for the acquisitive instinct . . . came into play.” Id. at 32–33. Further, Zane notes that the concept of property developed when humans originally began hunting for food supplies. Id. at 33. It was common practice for tribes to acquire personal hunting grounds, upon which “[a]ny encroachment by another tribe would be repelled by force.” Id.

\textsuperscript{225} See Lindley, supra note 4, at 160.

\textsuperscript{230} See id.

\textsuperscript{227} Korman, supra note 12, at 64.

\textsuperscript{231} See id. at 66.

\textsuperscript{228} Id. at 64.

\textsuperscript{232} See id. at 160–61.

\textsuperscript{229} See Lindley, supra note 4, at 160.

\textsuperscript{233} Id. at 164.

\textsuperscript{234} See Korman, supra note 12, at 9.

\textsuperscript{235} Lindley, supra note 4, at 160; see supra text accompanying note 95.
to the new authority.\textsuperscript{236} It was necessary to show by evidence that resistance by the opposing society, and any of its allies, had ceased.\textsuperscript{237}

The conquering State’s intention is crucial in considerations of title under the doctrine of conquest. Although intent may often be inferred from the State’s actions, only some cases of conquest result in annexation.\textsuperscript{238} During World War II,\textsuperscript{239} the members of the Western-Orthodox alliance\textsuperscript{240} “expressly disclaimed the intention of annexing Germany, although they had occupied all of Germany’s territory and defeated all of Germany’s allies.”\textsuperscript{241} Thus, in addition to conquering the territory, extension of civil administration and incorporation of the territory into the acquiring State is necessary for the completion of title.\textsuperscript{242}

The doctrine of conquest has become an obsolete justification for acquisition.\textsuperscript{243} International law has either entirely extinguished or heavily restricted recognition of title under this doctrine.\textsuperscript{244} These restrictions on territorial rights under the doctrine of conquest result from shifts in moral views during the twentieth century, as human rights have become more influential in policy determinations.\textsuperscript{245}

\section*{II. Segue into Modernism}

World War I, a Western civilizational conflict, was devastating both for European States and for peripheral States affected by the hostilities.\textsuperscript{246} After the war, the international diplomatic community—which,

\begin{footnotes}
\item \textsuperscript{236} See Lindley, supra note 4, at 161.
\item \textsuperscript{237} Korman, supra note 12, at 109–11.
\item \textsuperscript{238} See id. at 120.
\item \textsuperscript{239} World War II may be construed as a broad, intercivilizational war as it actively involved three civilizations: Western, Far East, and Orthodox (predominantly Russian). See 1 Toynbee, supra note 11, at 51. Furthermore, operations extended into territories of the Islamic, Sinic, and Hindu civilizations (North Africa and Southeast Asian island nations, China, and India, respectively). See id.; John Graham Royde-Smith, World Wars, in Encyclopedia Britannica 986–96 (Philip W. Goetz ed., 15th ed. 1983).
\item \textsuperscript{240} The Western-Orthodox alliance—also known as the Allied powers—was dominated by British, U.S., and Russian forces. See 1 Toynbee, supra note 11, at 51. The opposition, known as the Axis, also included Western civilizations, and can be construed as a Western-Japanese alliance. See id.
\item \textsuperscript{241} Malanczuk, supra note 24, at 151–52.
\item \textsuperscript{242} Korman, supra note 12, at 9.
\item \textsuperscript{243} See id. at 133.
\item \textsuperscript{244} Id. at 191–92.
\item \textsuperscript{245} See id. at 238–44.
\item \textsuperscript{246} World War I originated in the Balkan States, which comprise a potentially volatile mix of three civilizations, including the Islamic, Western, and Orthodox. See 1 Toynbee, supra note 11, at 51; Samuel R. Williamson, Jr., The Origins of World War I, 18 J. Interdisc.
\end{footnotes}
at the time, consisted primarily of Europeans—determined that allowing territorial acquisition as a result of war was an open invitation to further conflict.247 States began a series of reforms to disclaim annexation as a means of resolving conflict, and they proceeded to advance the doctrine of self-determination as the basis for forming a political State. To realize this goal, international organizations like the League of Nations were established and tasked with promoting peace.249

As States began to embrace the doctrine of self-determination as the peaceful, and, therefore, proper justification for territorial transfer, the legacy doctrines of acquisition quickly began a decline into obsolescence.250 Possession, a common element of the legacy modes, has made its way into modern doctrines. Specifically, “effective possession and control” are requirements for the doctrines of both prescription and occupation. Although the latter did not require immediate possession to establish rights to a territory, occupation was required for title to be perfected. Under the doctrine of prescription, “the intention and will to act as a sovereign” was an absolute necessity. Under the doctrine of conquest, title could only be legitimated by actual possession of the land or by way of the doctrine of cession. Even in the case of cession, many authorities required some form of effective control to justify recognition of the acquisition.

States continue to advance legacy modes of acquisition to support their claims to territory. The rationale for this is simply that modern courts continue to look to effective possession as a determinative factor in the resolution of a case. In Minquiers and Ecresos, the ICJ looked to

Hist. 795, 795 (1988). Germany lay at the center of both conflicts in Europe, however the role of non-Western civilizations was more clearly peripheral in WWI than in WWII. See Gerhard L. Weinberg, A World at Arms: A Global History of World War II 6–7 (1994).

247 See Korman, supra note 12, at 150–51.
248 Id. at 152–56; see Woodrow Wilson, Address to Congress: The Fourteen Points (Jan. 8, 1918).
249 Korman, supra note 12, at 151.
250 See id. at 133.
251 Jennings, supra note 82, at 23.
252 Id.
253 See Malanczuk, supra note 24, at 149–50.
254 Id. at 150.
255 See Lindley, supra note 4, at 160.
256 Shearer, supra note 5, at 146.
257 See Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47, 50–51 (Nov. 17).
258 See id. at 57.
numerous treaties to determine possession. 259 France and Britain contested title to fishing islets in the English Channel. 260 After reviewing numerous treaties and negotiations concerning the islets that dated from feudal times, the ICJ looked to which State could demonstrate the most effective possession. 261 Ultimately, having determined that its actions better demonstrated effective possession, the ICJ ruled for Great Britain. 262

Relatiely, former ICJ Justice de Visscher suggested a non-traditional mode of acquisition, namely, consolidation of title. 263 Under this theory, claim to title is a determined by a variety of factors, and the judicial authority would attempt to identify a coherent logic across possibly conflicting doctrines. 264 Tribunals would consider evidence of recognition, estoppel, and acquiescence. 265 This complex relationship had “the effect of attaching a territory . . . to a given state.” 266 Possession is a heavy consideration in consolidation of title. 267 Under the theory, possession “is the foundation and the sine qua non of this process of consolidation,” as long as the possession is of sufficiently long duration. 268 In this context, possession is different from the requirements for possession under the doctrine of prescription, as no requirement exists that possession be manifestly peaceful or uncontested. 269

In the Eritrea-Yemen arbitration, a proceeding to resolve a title dispute over the Red Sea Islands, there was very little evidence of which State controlled governmental functions on the islands. 270 The tribunal thus applied the theory of consolidation of title, specifically examining evidence of the “demonstration of use, presence, display of governmental authority, and other ways of showing a possession which may gradually consolidate into a title.” 271 In making its ruling, the tribunal stated

259 See id. at 54.
260 Id. at 49, 57.
261 Id. at 57.
262 Id. at 72.
264 Cf. Shaw, supra note 15, at 507 (differentiating consolidation from more limited theoretical bases for acquisition).
265 Id.
266 Id.
267 See Jennings, supra note 82, at 25–26.
268 Id. at 26.
269 Id. at 25.
270 Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) (Eri./Yemen), 22 R.I.A.A. 211, 274 (1998).
271 Id. at 311–12.
that under modern international law, “an intentional display of power and authority over the territory . . . on a continuous and peaceful basis” is critical for territorial acquisition.\textsuperscript{272}

Under the legacy doctrine of occupation, effective possession is required to perfect title, as this enables a powerful State to exert control over a smaller nation or tribe.\textsuperscript{273} Today, traditional modes of acquisition are increasingly becoming obsolete; effective possession, however, persists as a central consideration for almost all acquisitions.\textsuperscript{274} The obsolescence of the doctrine of occupation thus fails to nullify the benefits of controlling territory.\textsuperscript{275} Instead, powerful States retain their ability to exercise control in acquiring territory; only the rationales behind the acquisitions have shifted.\textsuperscript{276}

\textbf{A. Self-Determination and the End of the Doctrine of Conquest}

With the advent of international agreements intended to end war as a means of resolving disputes, the doctrine of conquest began a decline.\textsuperscript{277} International organizations like the League of Nations, the U.N., and the World Trade Organization (WTO)\textsuperscript{278} have made acquisition by “threat or use of force” invalid by international mandate.\textsuperscript{279}

The victorious European powers founded the League of Nations based in part on U.S. President Woodrow Wilson’s Fourteen Points, which he proposed in his address to a joint session of the U.S. Congress on January 8, 1918.\textsuperscript{280} The Fourteen Points sought simply to encourage lasting peace.\textsuperscript{281} The final Point called for an international association to guarantee “political independence and territorial integrity to great and small states alike.”\textsuperscript{282} The League’s purpose is manifest in Article 10;

\begin{itemize}
  \item \textsuperscript{272} Id. at 268.
  \item \textsuperscript{273} See supra text accompanying notes 83–89.
  \item \textsuperscript{274} See Shaw, supra note 16, 502–07 (discussing how States continue to gain control over territory through effective control).
  \item \textsuperscript{275} See id.
  \item \textsuperscript{276} See id.
  \item \textsuperscript{277} See Korman, supra note 12, at 133.
  \item \textsuperscript{278} The WTO was originally the General Agreement and Tariffs and Trade (GATT), an outgrowth of the Bretton-Woods conferences on establishing standards for the revival of a viable world monetary condition. See Shaw, supra note 15, at 1285–87.
  \item \textsuperscript{279} U.N. Charter art. 2, para 4; see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 187, 189 (June 27).
  \item \textsuperscript{280} See Wilson, supra note 248.
  \item \textsuperscript{281} See id.
  \item \textsuperscript{282} Id.
\end{itemize}
namely, that the body of States should cooperate “[i]n case of any such aggression or in case of any threat or danger of such aggression.”

Article 10 of the League of Nations Covenant pronounced that member States would “respect and preserve as against external aggression the territorial integrity and existing political independence” of the other member States. The international community generally agreed that Article 10 prohibited acquisition by force and made no exception for circumstances, like cases of self-defense, in which the use of force would otherwise be acceptable. The language of Article 10 carried forward to the current Article 2(4) of the U.N. Charter, which requires all members of the U.N. to refrain from utilizing the “threat or use of force” in any “manner inconsistent with [p]urposes of the United Nations.”

Questions have arisen as to whether it is ever proper to acquire territory from an aggressor State that loses a war. Great Britain argued that Article 10 only abolished acquisition by conquest generally, but did not prohibit it in all situations—it argued, for example, for an exception justifying the acquisition of territory as punishment for aggressions. Others argued that if the Council or PCIJ recommended an adjustment of borders, then it would be necessary to permit the use of force to enforce the judgment. Another view was that annexation at the end of a conflict was permissible if a League of Nations covenant justified the war. Finally, many authorities read Article 10 as banning all acquisitions of territory by force under any circumstances.

The purpose of these post-World War I reforms was to restrict the benefits that States stood to receive from war. Despite these reforms, the members of the Western-Orthodox alliance controlled the disposition of German territories. The victorious powers left Germany largely intact and established the Weimar Republic from the German prov-

283 League of Nations Covenant art. 10.
284 Id.
285 See Korman, supra note 12, at 181–86.
286 U.N. Charter art. 2, para. 4.
287 Korman, supra note 12, at 182.
288 Id. at 186.
289 Id. at 187.
290 Id.
291 Id. at 182–83.
292 Id. at 185–86.
inces.\footnote{Id. at 7.} Under the Treaty of Versailles, the League of Nations controlled Germany’s colonies through the Mandates System.\footnote{See League of Nations Covenant art. 22.}

The Mandates System appointed a “Mandatory State” to administer the colonies under a prescribed set of terms, while the League of Nations retained ultimate authority.\footnote{See id. (establishing the framework of the Mandates System).} The Mandatory State acted as trustee of the former colonies when the members of the League of Nations deemed the colonies unable to protect themselves politically.\footnote{See id. (establishing the framework of the Mandates System).} Despite disdainful protests from the international community about acquisition by way of the doctrine of conquest, the League of Nations effectively permitted such action through the Mandates System by simply providing formal legitimacy.\footnote{“[T]he Allied victory seemed merely to represent a new peak of imperial expansion conducted by the victors at the expense of the vanquished.” See id. at 7.} The League of Nations suffered a failure in the form of rejection by the U.S. Senate—the same fate suffered by the Treaty of Versailles.\footnote{See id. (noting that the United States failed to ratify both the League of Nations and the Treaty of Versailles).} Nevertheless, the United States insisted that it was entitled to participate in the system of mandates established by the new international organization in had declined to join.\footnote{See generally Churchill, supra note 293 (discussing in great detail the historical circumstances after World War I that led to World War II).} 

**B. Annexation Issues During World War II**

World War II was the result of a plethora of socioeconomic, political and other factors that combined to stifle German recovery after World War I.\footnote{A major factor traces its origins to World War I, namely,}
the taking of German territories as sanctions for its role in that war. In addition to the effect of heavy monetary sanctions, the loss of land was devastating to the German people. Rumors exist to the effect that, shortly after signing the Treaty of Versailles, French Marshal Ferdinand Foch, an advocate of heavy sanctions on Germany, stated: “This is not Peace. It is an Armistice for twenty years.” Sir Winston Churchill was also critical of the methods by which the Armistice sought to achieve peace. Specifically, he believed that a “cardinal tragedy was the complete break-up of the Austro-Hungarian Empire.” Regarding Mein Kampf, Churchill stated that Hitler desired the expansion of Germany in order to restore the nation’s prior greatness.

1. The Kellogg-Briand Pact in World War II

Between World War I and World War II there were several international attempts to discourage war. Prominent among these efforts, the Kellogg-Briand Pact of 1928 (the Pact), also known as the General Treaty for the Renunciation of War, renounced warfare as a means of resolving international controversies. Although the Pact failed to specify that self-defense was an exception, arguably it implied as much. Moreover, the Pact withdrew protection from States that breached the Pact. Further, the Pact permitted the annexation of territory as a sanction against an aggressor State if the international community determined such action was warranted. World War II, however, was supposedly the outgrowth of justified actions under the Pact, and yet it fell short of prohibiting the imposition of forcible territorial changes upon an aggressor.

At the close of World War II, the members of the Western-Orthodox alliance redistributed the conquered territories. The United States put the Pacific Islands under a “strategic trust,” and the Soviet

303 See id. at 54. The French occupation of the Ruhr in 1923 provides just one example of how Germany effectively lost their lands following World War I. Id.
304 See id. at 7.
305 See id.
306 See id. at 10.
307 Id.
308 See Churchill, supra note 293 at 57.
310 See Korman, supra note 12, at 193.
311 Id. at 198.
312 Id.
313 See id. at 199.
314 See id. at 161–62.
Union annexed parts of Poland, the former Prussia, and the Sakhalin Islands to the north of Japan.\textsuperscript{315} The Atlantic Charter encouraged the concept of self-determination while suggesting that the members of the Western-Orthodox alliance disclaim any rights to the territory that they had captured.\textsuperscript{316} Poland also annexed a portion of Germany in order to provide a “short and more easily defensible frontier between Poland and Germany.”\textsuperscript{317} The distribution and annexation of territory after World War II seems to indicate that the Kellogg-Briand Pact permitted the international community to effect territorial changes.\textsuperscript{318} Although the Pact prohibited individual cases of conquest for territory, the manner in which the victorious powers annexed Germany after World War II is strong evidence that annexation is permissible if the international community agrees to it.\textsuperscript{319}

2. The Role of the U.N.

It is human nature to pursue ways to improve one’s comfort and security. Applied on a national scale, this tendency can lead to a desire to reach out and conquer territory unilaterally, taking from another for the unilateral betterment of one’s own State regardless of the expense to the affected party.\textsuperscript{320} In the period of European colonial expansion, a common purpose was the acquisition of resources.\textsuperscript{321} Prior to this period, and again after it, the purpose was largely security—for example, the Soviet Union’s dominance of Eastern Europe was intended to secure resources and shore up national security.\textsuperscript{322} The founding members of the U.N. developed that institution to unify States and promote international cooperation for peace and sta-

\textsuperscript{315} Id. at 163, 167, 168–69. The strategic trust utilized under the Pacific Islands Mandate differed from a typical trust territory, in that the Security Council performed all U.N. functions under a strategic trust. Id. at 163. This resulted in America’s ability to establish naval and military bases, which effectively created a strategic area, rather than a trust State. Id.

\textsuperscript{316} See id. at 162.

\textsuperscript{317} 3 Marjorie M. Whiteman, Dep’t of State, Digest of International Law 348–49 (1964) (quoting a radio address made by President Truman to the United States regarding the Berlin Conference) (internal quotations omitted).

\textsuperscript{318} See Korman, supra note 12, at 199.

\textsuperscript{319} See id.


\textsuperscript{321} See id.

\textsuperscript{322} See, e.g., Charles H. Fairbanks, Jr., Gorbachev’s Global Doughnut: The Empire with a Hole in the Middle, in Contemporary Issues in Soviet Foreign Policy: From Brezhnev to Gorbachev 600–03 (Frederic J. Fleron, Jr. et al., cds., 1991).
bility.\textsuperscript{323} The U.N. Charter has at its foundation reforms developed in response to the experiences and effects of World War I and World War II.\textsuperscript{324} There is a specific focus on peaceful resolution of international disputes and the role of self-determination in acquisitions.\textsuperscript{325} As noted in Article 1(2) of the U.N. Charter, a crucial goal of the U.N. is to join States together in “respect for the principle of equal rights and self-determination of peoples.”\textsuperscript{326}

The U.N. attempted to restrict States’ abilities to conquer foreign nations in Article 2(4) of the U.N. Charter.\textsuperscript{327} Article 2(4) states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”\textsuperscript{328} This construction is clearly similar to that of Article 10 of the League of Nations Charter.\textsuperscript{329} As was the case with Article 10, Article 2(4) of the U.N. Charter has been the subject of much study and interpretation.\textsuperscript{330} Most read the resolution as a ban on the use of force against any other party subject to two exceptions.\textsuperscript{331} First, there is no justification to use force unless it is part of a U.N.-
authorized collective action to maintain or restore international peace.\textsuperscript{332} Second, self-defense against armed attacks is permissible until the U.N. can intervene to preserve or restore peace and security among the disputants.\textsuperscript{333}

With regard to acquisition by force, many authorities argue that the U.N. Charter admits no circumstances under which it is ever possible to legitimate the acquisition of territory by threat or actual imposition of force.\textsuperscript{334} Hence, when a State acquires territory as a result of self-defense, there may be a temporary occupation, but there can be no legal transfer of title.\textsuperscript{335} There are several rationales for this blanket prohibition. For example, there are practical restrictions on any realistic ability to expand acquisitional rights.\textsuperscript{336} Further, a principle of proportionality suggests that any use of force in self-defense must constitute a clear necessity vis-à-vis the degree of the threat faced by the defending State.\textsuperscript{337} One form of evidence of necessity is the immediacy of the retaliation.\textsuperscript{338} Beyond necessity and immediacy, retaliation must also be proportional to the seriousness of the threat.\textsuperscript{339} Another rationale for the strict limitations on acquisition by conquest is the right of self-determination.

3. Self-Determination and the Expansion of European Hegemony

The concept of self-determination is probably the most well-established feature of the modern philosophy of national rights.\textsuperscript{340} Reaching back as far as the North American colonies’ struggle for independence within the British realm, and extending to peoples outside the boundaries of Western civilization, this concept has become an internationally recognized rule.\textsuperscript{341} Its broad acceptance is further evidence of the obsolescence of the doctrine of conquest in the present

\begin{itemize}
\item \textsuperscript{332} U.N. Charter arts. 39, 42.
\item \textsuperscript{333} \textit{Id.} art. 51.
\item \textsuperscript{334} See \textit{Korman, supra} note 12, at 200.
\item \textsuperscript{335} See \textit{id.} at 210.
\item \textsuperscript{336} See \textit{id.} at 206–08.
\item \textsuperscript{337} \textit{Malančzuk, supra} note 24, at 314, 317.
\item \textsuperscript{338} \textit{Id.} at 316–17.
\item \textsuperscript{339} \textit{Restatement (Third) of Foreign Relations Law of the United States \$905} (1987) (“[A] state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered.”); see \textit{Malančzuk, supra} note 24, at 316–17.
\item \textsuperscript{340} See \textit{Malančzuk, supra} note 24, at 326–27.
\item \textsuperscript{341} \textit{Id.}
day.\textsuperscript{342} Under this theory, acquisition by force can no longer divest a territory’s people of their rights because those rights are conferred inalienably on the original, rightful inhabitants.\textsuperscript{343} As States began to recognize this right, opportunities for acquisition by force began to diminish substantially.\textsuperscript{344} In 1970, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Declaration on Principles of International Law) determined the following rule:

The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

\ldots

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.\textsuperscript{345}

In addition to suggesting that any threat or actual imposition of force voids acquisition of territory, the declaration clearly mandates that individuals should have rights of self-determination.\textsuperscript{346}

III. SOME JURISPRUDENTIAL AND PRAGMATIC CONSIDERATIONS TODAY

Viewed two-dimensionally, the Earth possesses a vast but finite surface area.\textsuperscript{347} States controlling the surface area also control the subter-

\begin{footnotesize}
\begin{enumerate}
\item See Korman, supra note 12, at 228.
\item See id. at 227.
\item See id.
\item See Malanczuk, supra note 24, at 327.
\item See The World Factbook, Cent. Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (follow hyperlink to expand “Geography: WORLD”) (last visited Jan. 10, 2012) (stating that the total surface area of Earth is 510.072 million sq. km.; land comprises 148.94 million sq. km. (29.1\% of the surface area), while water encompasses 361.132 million sq. km. (70.9\% of the surface area)); see also Nina Caspersen & Gareth Stansfield, Introduction, in UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM 1–8 (Nina Caspersen & Gareth Stansfield eds., 2011) (describing the division of the Earth’s surface into entities that control delineated territory).
\end{enumerate}
\end{footnotesize}
ranean soil, and adjacent waters and airspace. The Earth is the foundation for international society, which itself is “subject to the ebb and flow of political life,” where new States supplant the old. When nation-states claim sovereignty over land previously held by predecessor states, the international community must decide when and if to accept the new claim. The decision to accept the new claim is an act of recognition, a “formal acknowledgement by one state that another state exists as a separate and independent government.” Note, however, that acceptance of a State’s existence does not presuppose official recognition of the State’s government via diplomatic relations.

A. State vs. Political Recognition

Throughout human history, nations have resorted to war to settle international disputes, and the relatively new collection of international organizations founded with the objective of achieving peace are simply incapable of thwarting this inherent human tendency. Despite the best efforts of these well-intentioned groups, nations will continue to attempt to extend their territories and promulgate their beliefs through conquest. Existing and new nation-states acquire territory. The predecessor State may choose to accept the acquisition of territory, or it may appeal to the international community for redress against the acquiring State.

Governments must distinguish between state and political recognition. A lack of diplomatic relations does not mean that States do not recognize each other as independent States. States need not accord formal recognition to any other State, but will treat others as inde-

348 Restatement (Second) of Foreign Relations Law of the United States § 11 (1965) (“The territory of a state consists of (a) its land area; (b) its internal waters and their beds; (c) its territorial sea and the bed of the territorial sea; and (d) the subsoil under, and . . . the air space above, (a), (b), and (c).”).
349 See Shaw, supra note 15 at 444.
350 See id.
352 See Shaw, supra note 15, at 444–45.
353 See Jennings, supra note 82, at 50–61.
354 Cf. 1 Oppenheim’s International Law, supra note 70, § 55(3) (listing twentieth-century examples of the seizure of occupation of foreign territory by a state).
355 See, e.g., Shaw, supra note 15, at 492–509 (discussing the methods by which States—both existing and new—acquire territory).
356 See Jennings, supra note 82, at 79–80.
358 See id. at 446–47.
pendent State entities that meet with certain requirements.\textsuperscript{359} Upon the occurrence of a transitional event, existing States determine whether to recognize the change, and if so, decide on “the kind of legal entity” the new State assumes.\textsuperscript{360} States render such decisions based on policy and other political considerations.\textsuperscript{361} Recognition therefore occurs after the event that purportedly establishes the new nation-state.\textsuperscript{362}

Recognition is a crucial factor for prescription.\textsuperscript{363} As noted previously, recognition requires that other States recognize a State’s right to territory in order to effectuate prescription.\textsuperscript{364} In the modern context, States have sought to justify recognition in cases wherein they had illegally conquered territory but held it indefinitely.\textsuperscript{365} Although much of the international community now rejects the legacy doctrines of justification for territorial acquisition, it is necessary to address the fact that States will continue to acquire territory even if what they seize lacks internationally-recognized title.\textsuperscript{366} If acquisition through force persists despite international condemnation, recognition and prescription are the two best means of response.\textsuperscript{367} Eventually, the international community needs to know who has title to the territory; after all, title must belong to someone.\textsuperscript{368} Permitting the vanquished party to hold de jure title could pose significant problems.\textsuperscript{369} Recognition, which implies prescription, is the better doctrine through which to accomplish a transfer of title.\textsuperscript{370} Scholars have called recognition “the primary way in

\textsuperscript{359} See id.
\textsuperscript{360} See id. at 444–54 (examining historical examples of state recognition).
\textsuperscript{361} See id. at 445. For example, the United States refused to recognize the People’s Republic of China and North Korea based primarily on political judgment. Id. at 445. Although both foreign governments “exercised effective control over their respective territories,” the United States wanted to preclude the legal effects resulting from recognition. Id. “Recognition is [thus] a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation.” Id.
\textsuperscript{362} See id.
\textsuperscript{363} See id. at 148.
\textsuperscript{364} See Shaw, supra note 15, at 504–05.
\textsuperscript{365} See id. at 500.
\textsuperscript{366} See id.
\textsuperscript{367} Cf. Malanczuk, supra note 24, at 150–51, 154–56 (noting that States may acknowledge the expansion of another state’s territory through prescription and recognition).
\textsuperscript{368} See id. at 74–75.
\textsuperscript{369} See id. at 153.
\textsuperscript{370} Cf. Shaw, supra note 15, at 444–45, 490 (stating that “the essence of territorial sovereignty is contained in the notion of title,” and discussing recognition as a means of defining territorial sovereignty among the international community).
which the international community has sought to reconcile illegality or doubt with political reality and the need for certainty.”

Recognition is achievable by the official acknowledgment by a number of States that the party in possession should indeed have title to the land. Several prerequisites are necessary to validate recognition. First, the recognition must consist of an express statement. Second, the conquest must benefit from de jure recognition, rather than simply de facto recognition. Third, the new State must be recognized by third-party States. Additionally, the third-party States that recognize title must generally have some legal claim to the territory, unless “a considerable number of other States have likewise recognized title.”

Although the concept of recognition in international affairs is useful for the determination of title, in practice the opposite concept—non-recognition—is a more frequent remedy when territory is acquired by force. Express non-recognition by an exiled government, a third-party State, or the U.N. acts to bar prescription. Affected parties have used this doctrine frequently in response to the use of force to seize territory. The Stimson Doctrine employed the principle of non-recognition with respect to Japan. Specifically, U.S. Secretary of State Henry Stimson announced that the United States would refrain from granting official approval of Japan’s aggression against China in establishing a surrogate State in Manchuria. The Stimson Doctrine broke sharply from the traditional view that, regardless of the legality of the war, an action of conquest and annexation vests title to the territory in

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372 See 1 Oppenheim’s International Law, supra note 70, § 39.
373 See id. § 45.
374 See Malanczuk, supra note 24, at 155.
375 Id. A de jure recognition occurs when a State formally fulfills the requirements of statehood. Shearer, supra note 3, at 130. De facto recognition accords statehood because the facts of the situation justify it. Id. However, international law considers the territorial title defective under this circumstance: “[I]f the recognizing state says that it recognizes the conquest only de facto, it is saying in effect that it regards the conqueror’s title as defective, and such a statement obviously cannot give the conqueror good title to the territory.” Malanczuk, supra note 24, at 155.
376 Malanczuk, supra note 24, at 155.
377 Jennings, supra note 82, at 44.
378 See id. at 67–68.
379 See id. at 44.
380 See id.
381 See, e.g., Korman, supra note 12, at 239.
382 See Malanczuk, supra note 24, at 152.
the victor.\textsuperscript{383} Shortly after the United States enunciated the Stimson Doctrine, the League of Nations passed a resolution concurring with the notion that stating that States should refrain from recognizing "any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations."\textsuperscript{384} This directed States to assume an obligation to refuse recognition of any territorial change undertaken by way of the threat or use of force.\textsuperscript{385}

Similarly, the Declaration on Principles of International Law states that, "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal."\textsuperscript{386} In \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)}, the ICJ validated as a governing principle each State’s duty to refrain from granting official sanction to an action when the U.N. Security Council has determined the action to be illegal.\textsuperscript{387} The international community, however, has often applied the standard inconsistently.\textsuperscript{388} For example, in 1961, India invaded the Portuguese colony of Goa,\textsuperscript{389} claiming that Portugal had contravened its obligations under the Declaration on the Granting of Independence to Colonial Countries and Peoples, and, therefore, that Portugal’s possession was illegal.\textsuperscript{390} Portugal countered that India violated Article 2(4) of the U.N. Charter when it forcibly acquired the territory.\textsuperscript{391} When the case came before the U.N. Security Council, the Council refused to condemn the act for political reasons.\textsuperscript{392} Though it was feasible to grant the people of Goa the right to form their own government,\textsuperscript{393} and despite manifest violations of international law by India, the Council permitted annexation under the "colonial enclave" exception, rather than extending to Goa an official right of self-determination.\textsuperscript{394} This exception applies to annexations wherein the

\textsuperscript{383} See, e.g., Korman, \textit{supra} note 12, at 239.
\textsuperscript{384} League of Nations Official Journal, Records of the Special Session of the Assembly, Special Supplement No. 101, 87 (1932); Malanczuk, \textit{supra} note 24, at 152.
\textsuperscript{385} Malanczuk, \textit{supra} note 24, at 152.
\textsuperscript{386} G.A. Res. 2625 (XXV), \textit{supra} note 345, at 123.
\textsuperscript{388} See Korman, \textit{supra} note 12, at 269–70.
\textsuperscript{389} Id. at 267.
\textsuperscript{391} See Korman, \textit{supra} note 12, at 267, 270.
\textsuperscript{392} See id. 269–70.
\textsuperscript{393} See id. 272–74.
\textsuperscript{394} See id.
acquired territory shares ethnic and geographic links with the conquering State.\textsuperscript{395}

In the early twentieth century, the United States accepted and helped apply Declarative Theory principles toward recognition of new States in the Americas and the Caribbean.\textsuperscript{396} The 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention) established the process, still in use today, for nation-state recognition under international law.\textsuperscript{397} Under the Montevideo Convention, “[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.”\textsuperscript{398} Further, the Montevideo Convention delineates between a State’s political stature and recognition by other States.\textsuperscript{399} “The political existence of the state is independent of recognition by the other states.”\textsuperscript{400} Although the Montevideo Convention dealt exclusively with States in the Americas and the Caribbean, over time its treaty has transformed into a restatement of international law.\textsuperscript{401} For example, the Montevideo Convention’s definition of a State survived into the late twentieth century.\textsuperscript{402} In 1991, the European Union applied this definition as a basis for recognizing Croatia, Macedonia, and Slovenia as independent States.\textsuperscript{403} Switzerland applies the Montevideo Convention’s definition to recognize States, but distinguishes state recognition from political recognition.\textsuperscript{404} India treats recognition “as a matter of course or routine” once “condi-

\textsuperscript{395} G.A. Res. 1514 (XV), supra note 390. National unity and territorial integrity of a country are crucial concerns for the U.N., thus, any attempt made to disrupt this is incompatible with the purposes and principles of the U.N. Charter. See U.N. Charter art. 2, para. 4.


\textsuperscript{397} See id.

\textsuperscript{398} Id.

\textsuperscript{399} Id. art. 3.

\textsuperscript{400} Id.


\textsuperscript{402} Id.


\textsuperscript{404} See The Recognition of States and Governments, Switz. Fed. Dep’t Foreign Aff., http://www.eda.admin.ch/eda/en/home/topics/intla/cintla/recco.html (last modified Dec. 10, 2009) (“[T]here is no obligation under international law to recognize other states... Where the recognition of governments is concerned, the central element is the exercise of sovereign power over the state... Switzerland is in favour of the widest-possible recognition of states, but it is extremely reticent about recognizing governments.”).
tions of statehood have been fulfilled.” Despite the potential benefits of non-recognition, it remains inefficient in protecting territorial boundaries. Unless the international community is willing to exert enough force on aggressor nations, States will continue to conquer neighboring nations in the face of international condemnation.

A prime example of the inefficiency of non-recognition is Israel’s conquests in Palestine. In 1967, Israel captured territory that was part of the original Mandate for Palestine. In 1980, Israel passed an act to legalize its annexation of East Jerusalem. The U.N. Security Council was quick to condemn the act. Although most States view the war as valid self-defense, none have recognized Israel’s right to title in East Jerusalem. Despite such international condemnation and use of non-recognition, Israel continues to hold possession of the territory.

There have been more recent examples of the successful use of non-recognition—namely, the first Gulf War. In that instance, the international community came together in condemnation of Iraq and provided assistance to Kuwait in order to expel the aggressing force, to restore possession to Kuwait, and to maintain the territorial rights of Iraq.

B. The Doctrine of Uti Possidetis

Under the doctrine of uti possidetis, colonial boundaries remain after a colony achieves independence. This doctrine is a reasonable solution in the limited context of colonies that become independent States. The principal goal of uti possidetis is to find political solutions to territorial disputes and avoid conflict. One of the earliest applications of the doctrine occurred during the independence of the States

406 See Korman, supra note 12, at 248.
407 See, e.g., id. at 252.
408 Id. at 254.
410 See Korman, supra note 12, at 255–56.
411 See id. at 254.
412 See id. at 215–16.
413 See generally Duncan, supra note 95 (taking account of the doctrine’s role in the United States by looking deeply into territorial acquisitions and the utilization of uti possidetis since the time of the establishment of European hegemony in America).
414 See id. at 543. While utilizing uti possidetis is somewhat easy and simplistic in its concept, there are practical concerns that demand a dialectic. See id. Issues such as cultural and economic gaps and geographical problems may create a necessity to redraw the boundary lines, rather than leave them to the simplicity of uti possidetis. Id.
415 See Brownlie, supra note 72, at 129–30.
of Central and South America.\footnote{416 See id.} By permitting the new States to adopt the boundary lines of the former colonies from which they emerged, the application of the doctrine prevented border disputes among the new States and forestalled further European intervention.\footnote{417 See Korman, supra note 12, at 235.}

States throughout the world have justified territorial acquisition by way of \textit{uti possidetis}, including the States that emerged from Yugoslavia in the latter decades of the twentieth century.\footnote{418 Brownlie, supra note 72, at 130.} Although the application of the concept is optional in resolving territorial disputes, it can reduce conflict in many instances and, therefore, has been a popular tool for the demarcation of the boundaries of newly-independent States.\footnote{419 See id.} Following World War II, the Western-Orthodox alliance assumed the power of disposition over the defeated regimes.\footnote{420 See id.} They assumed this power to be valid, in fact, regardless of whether the defeated State consented.\footnote{421 See id.} An example of such a disposition was the Sykes-Picot Agreement of 1916, a secret agreement made between France and Great Britain regarding the demarcation of territories in the Middle East.\footnote{422 See id.} Russia made the secret pact public, but the League of Nations effectively mandated the agreement and imposed it upon the affected nations of the Middle East.\footnote{423 See id. at 135–37, 158.} Much of the territory eventually fell under the Mandates system, and the Iran-Syria border is a remnant of such decisions.\footnote{424 See Brownlie, supra note 72, at 129.}

The common result of the application of \textit{uti possidetis} under the Mandates and Trustee Systems was the creation of States based upon geographic, rather than cultural, boundaries.\footnote{425 See id. at 163.} These unnatural divisions have invited regional infighting in many regions of the world, particularly in Africa.\footnote{426 See id. at 164.} The creation of the U.N. prompted the decolonization of many regions.\footnote{427 See id.} Many of the colonies under the Mandates and Trustee systems obtained rights of self-determination.\footnote{428 See id.} Despite the granting of such rights, many States are still an uneasy amalgam of
ethnic, religious, or cultural groups. The following section addresses these problems and explores how increased utilization of self-determination rights could assist in reducing ethnically based violence, as affected the Kurds in Iraq, Serbs and Bosnians in Yugoslavia, and other peoples in an array of States. The following section also speculates as to the effects of a broad recognition of numerous States in observance of rights of self-determination, should such an eventuality come to pass.

C. Practical Limitations on Annexation Under Claims of Self-Defense

The primary practical restriction on acquisition under the doctrine of conquest under the U.N. Charter is the absence of an established adjudicative body with power to hear and resolve disputes involving conquered territory. If the U.N. allowed such acquisitions and annexations, an international body would have to take responsibility for determining whether the taking was just, and if so, how to conclude the matter. To this author, such a body would necessarily have to be acceptable to all the parties involved. Currently, the U.N. simply provides a framework for the resolution of such conflicts; however, it lacks the power to abrogate and alter territorial boundaries.

Another practical restriction is that under the U.N. Charter, it is impossible to acquire territory through measures of self-defense. A defending State has no justification for taking any of the territory of the aggressor after it successfully repels an attack. Were it possible for one State to acquire land from an aggressor State, it could discourage States from invading other nations. If the international community allowed such takings after a war, however, it would make “questions of title depend upon the determination of such controversial issues as the identification of the aggressor and the limits and meaning of self-defense.”

Finally, the Vienna Convention voids any treaty into which a State enters under the threat of force. That is, quid pro quo annexation,
in which “quid” is the victor’s agreement to sign a treaty to cease hostilities, constitutes duress and is consequently invalid because territorial annexation between two parties at war lacks innate recognition by the international community.\textsuperscript{439} Thus, any annexation resulting from self-defense would almost certainly be formalized in an agreement to end the war, and would therefore be void under the Vienna Convention.\textsuperscript{440}

D. Self-Determination Under Modern International Law

The principle of self-determination\textsuperscript{441} allows a people to determine without coercion its preferred form of government.\textsuperscript{442} The concept has evolved through a number of stages and is still the subject of much contention.\textsuperscript{443} The principle of self-determination was a key factor in the foundation of the United States.\textsuperscript{444} President Thomas Jefferson wrote in the Declaration of Independence that “Governments are instituted among Men, deriving their just powers from the consent of the governed.”\textsuperscript{445} Although not the first group to use the term “self-determination,” the Bolshevik revolutionaries who founded the Soviet Union were the first to encompass within the term a view of national equality wherein States have sovereign equality and the validity of a claim for self-determination depends upon the oppression of the claimant group.\textsuperscript{446} For Western European advocates of “self-determination” as a term encompassing government by popular consent, a transfer of territory between States is valid only with the consent of the people.\textsuperscript{447} Although President Wilson’s lofty views on self-determination, which were specifically aimed at peoples outside the boundaries of Western civilization, lacked international recognition immediately after World War I, the international community has since begun recognizing more human rights—certainly including, but likewise moving beyond, the right of self-determination itself.\textsuperscript{448}

\textsuperscript{439} See id. arts. 51–53.
\textsuperscript{440} See id. arts. 51–52.
\textsuperscript{442} See Malanczuk, supra note 24, at 326.
\textsuperscript{443} See id. at 327.
\textsuperscript{444} See id. at 327.
\textsuperscript{445} See Gruda, supra note 441, at 370.
\textsuperscript{446} The Declaration of Independence para. 1 (U.S. 1776).
\textsuperscript{448} Id. at 160–61.
Following World War II, the right of self-determination continued to evolve, starting with the U.N.’s Trustee System, modeled after the League of Nations’ Mandates System, which placed certain territorial regions under a Trust.\(^{449}\) The ICJ granted the Moroccan Sahara a right of self-determination in Western Sahara.\(^{450}\) Under the U.N.’s system, there were three possible methods for former colonial peoples to determine their form of government: (1) integration of the colony into an existing State, (2) creation of a sovereign, independent State, or (3) any other condition or status that grows out of an uncoerced decision by the people.\(^{451}\)

Initially, international law limited the principle of self-determination to newly decolonized States.\(^{452}\) Those States under the Mandates or Trust Systems clearly had a right to self-determination in determining their new governments.\(^{453}\) It is unclear, however, whether non-colonial States have the same rights to self-determination.\(^{454}\) What is also unclear is whether a colonial State may rely on the right to self-determination anew after its initial reliance, as might occur if a different indigenous group asserted independence from the post-colonial government.\(^{455}\) Although the re-utilization of self-determination in forming governments could become problematic, peoples within established States are increasingly beginning to demand rights of self-determination.\(^{456}\)

A major concern regarding the principle of self-determination as it applies to non-colonial States is that it may conflict directly with certain agreements among States regarding territorial integrity.\(^{457}\) It is often the case that the principle of self-determination is manifest within the same document that requires respect for territorial integrity.\(^{458}\) Several U.N. resolutions recognize a right of self-determination to certain peoples.\(^{459}\) Despite the apparent contradictions in U.N. documents, the U.N.’s actions over the past few years seem to indicate an expansion of self-

\(^{449}\) Malanczuk, supra note 24, at 335.

\(^{450}\) Western Sahara, Advisory Opinion, 175 I.C.J. 12, ¶¶ 62, 70 (Oct. 16).

\(^{451}\) G.A. Res. 1514 (XV), supra note 390.

\(^{452}\) See Shaw, supra note 15, at 251–53.

\(^{453}\) See Malanczuk, supra note 24, at 327–28.

\(^{454}\) See id. at 329–33.

\(^{455}\) Id. at 335.

\(^{456}\) Mayall, supra note 429, at 274–76. Providing each “people” the right to establish their own State, or even choose their own form of government could cause major concerns in the international community. Id. at 276. According to Professor James Mayall, there may be as many as “8000 identifiably separate cultures.” Id.

\(^{457}\) See Malanczuk, supra note 24, at 332.

\(^{458}\) See id.

determination to peoples that inhabit lands beyond both the States and colonies of Western civilization, or even those that have exercised their right of self-determination independent of international influence.\textsuperscript{460}

This expansion is apparent in the U.N. Declaration on the Rights of Indigenous Peoples.\textsuperscript{461} This document specifically expresses a right of self-determination to indigenous societies.\textsuperscript{462} Although the U.N. lacks the ability to convey title, mainly due to its lack of status as a territorial sovereign, and only possesses the power of recommendation, it has been common for an international agency to dispose of Mandate and Trustee territory through the collective action of States.\textsuperscript{463} According to Ian Brownlie, the right to terminate mandates may actually fall within the U.N.’s powers.\textsuperscript{464} The ICJ has also spoken out on applying the principle of self-determination to non-colonial territories.\textsuperscript{465} In a 1949 advisory opinion, the court stated that “‘[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.’”\textsuperscript{466} According to Brownlie, this confers upon the U.N. some implied right of territorial disposition under the Declaration on the Granting of Independence to Colonial Countries and Peoples.\textsuperscript{467}

E. Self-Determination and the Second Gulf War

The most recent war in Iraq provides fairly clear evidence of why attempting to create rights of self-determination is a difficult proposition in reality. Although the original rationales given to justify the invasion of Iraq included the goal of giving the Iraqi people rights of self-determination, the United States also invaded for the purpose of establishing a friendly democratic government that would reject terror-
The goal of establishing democracy bears a close relationship to that of supporting self-determination; it is often assumed that a free people will select a democratic form of government, perhaps because it is counterintuitive that a newly-freed people would reject freedom by popular vote. Thus, in a very real sense, the invasion of Iraq sought to permit self-determination.

There are, however, many concerns attendant to “delivering” self-determination. There are practical concerns regarding the cost of this enterprise, both from the perspective of the invading power, which must bear the cost of invasion, and from that of the invaded country, that is forced to suffer the inevitable collateral damage of even the most advanced, targeted campaign. There are also theoretical concerns, including whether any State has a unilateral right to invade another for the purpose of establishing the conditions for self-determination. In the case of Iraq, another rationale for the invasion was based on American claims of self-defense; the United States purportedly feared that al Qaeda might find safe haven with the Iraqi regime of President Saddam Hussein and pose an intensified threat. The basis for this perception was the Iraqi leadership’s refusal to cooperate with U.N. weapons inspectors in their attempt to verify the status of Iraq’s arsenal of chemical weapons that had previously been used both against the Kurds in northern Iraq and against the Iranians in the Iran-Iraq war. The Iraqi regime’s flouting of the U.N.’s legitimate function seemed to offer clear evidence to national intelligence agencies around the world

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471 See, e.g., Malanczuk, supra note 24, at 329.
that Iraq possessed a dangerous stockpile of chemical weapons—and, hence, posed a danger to the United States.476

Thus, the U.S. invasion had as part of its justification the fear that Iraq might ally with al Qaeda.477 According to U.S. officials, the activities of al Qaeda leaders in Baghdad reinforced the inference that Iraq posed an imminent threat.478 This purported to reinforce a justification for invasion as necessary for self-defense under U.N. norms.479 The problem with this argument was that, beyond the claims of Western powers, there was at best ambiguous evidence of an Iraqi alliance with al Qaeda.480 Moreover, even if Iraq did provide support to al Qaeda, neither the U.N. Charter nor norms of international law recognize resource cooperation in and of itself as constituting an actual military alliance.481 For this reason, the United States first sought authority from the U.N. Security Council, based on the Iraqi regime’s obstruction of the U.N.’s attempt to inspect its weapons facilities pursuant to the international agreements made after the first Gulf War.482 The Security Council’s majority approbation suffered defeat after a veto threat, which left the United States to decide whether to undertake unilateral action.483

Having lost the opportunity to obtain formal international legitimation, the United States next turned to bilateral diplomacy to secure international support outside the Security Council.484 In the author’s view, this partially legitimated the invasion, by virtue of the participa-

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477 See Posteraro, supra note 475, at 165.
tion of a plurality of States; the effect was to relegate dissenting States to unilateral objections, as they likewise lacked the power to secure official U.N. condemnation, even in the form of a symbolic gesture in the U.N. General Assembly. The result was active international support for the U.S. invasion, which removed from the United States the burden of showing an absolute justification based on a theory of self-defense. Specifically, the aggregation of international support justified the action under several theories, including that of the defense of the international community, and, more importantly, the fact that specific peoples within Iraq had long been deprived of their right of self-determination. This argument was particularly compelling in light of the Iraqi regime’s ruthless suppression of both the Kurdish people in the north and the Marsh Arabs in the south.

Thus, the U.S. invasion of Iraq found support in the international community based simultaneously on the justifications of quelling crossnation violence and supporting the rights of suppressed peoples to self-determination. The justification of establishing a right of self-determination for a people would have been insufficient. Likewise, it would have been difficult to justify invasion based solely on the immensity of the threat of a resource alliance between Iraq and al Qaeda. The confluence of these two justifications, however, bolstered by Iraq’s prior use of chemical weapons and evidence from national intelligence agencies regarding Iraq’s pursuit of nuclear weapon technology, combined to enable the international community to support the U.S. invasion. Now the question is how specifically to establish meaningful rights of self-determination.

The challenge in Iraq is similar to that in Nigeria of former years, wherein the boundaries of the former colony enclosed three inde-
pendently identifiable peoples within a single State. When the British undertook to meet this particular challenge, they made the choice to maintain the colonial boundaries, rather than to create a dangerous precedent of redrawing settled boundaries for the sake of individual people’s independence. The Organization of African Unity (today’s African Union) likewise faithfully observed the principle of respecting prior colonial boundaries in settling all disputes among post-colonial African States. Similarly, in Iraq, it was particularly difficulty to define the “Iraqi” people. Specifically, there were the ethnic divisions between Kurds, an Indo-European people related to the Iranians, and Arabs, the dominant ethnicity, and religious divisions between Sunni and Shi’a Muslims. Some measure of violence had characterized the prior interactions among these three groups (Sunni Kurds, Sunni Arabs, and Shi’a Arabs), but it was unclear how much of that was actually a product of the defunct regime’s policies of violent oppression, without which perhaps there may not have been any significant conflict among these groups.

Throughout the occupation of Iraq, Western opinion-makers frequently insisted that peoples of disparate identities in the Islamic civilization were perpetually prone to violence against one another. That this proposition conflicted with reality appeared not to dissuade many from applying this stereotype to Iraq. There was, to be sure, a legitimate question of whether after the overthrow of Saddam Hussein the


See id.


former British Mandate of Iraq still possessed sufficient cultural coherence exist within pre-invasion borders. The only viable solution in Iraq, however, given international precedent on the matter of dealing with former colonies, was to keep the nation-state intact and allow the Iraqis themselves to work out their own harmony.\textsuperscript{502}

The tensions surrounding self-determination and its applicability to any given State are ongoing and challenging. One major challenge is that of simply developing a good definition of a people.\textsuperscript{503} A “people,” may be defined by a number of factors, including religion, ethnicity, culture, geography, and civilization of origin.\textsuperscript{504} And according to James Mayall, there may be as many as “8000 identifiably separate cultures.”\textsuperscript{505} But it would be ludicrous to argue that boundaries should be drawn so as to isolate distinctly similar groups of people. The potentially huge number of States that would result is less concerning than the dangerous precedent of associating national boundaries with the territorial reaches of nominally distinct peoples. Such a position would incentivize surreptitious occupation and result in innumerable conflicts that the international community—now fragmented into an exponentially larger number of States—would be incapable of moderating. An example of an error of judicial judgment that indeed moved in this direction is Western Sahara, which incentivized foreign occupation for the sole purpose of securing international legitimacy for a new State based on an observation that it appeared to contain its own people.\textsuperscript{506} In fact, the Moroccan Sahara constituted such a sparsely populated region, more than any other proposed State except Greenland, that populating it with a foreign people was a comparatively easy proposition.\textsuperscript{507} Consequently, any precedent of permitting the definition of national boundaries to follow the territory claimed by a nominally distinct people is dangerous.\textsuperscript{508}

With regard to modern doctrines for justifying the acquisition of territory, self-determination raises additional problems. For the principle

\textsuperscript{502} See Cohen, supra note 487, at 335.
\textsuperscript{503} Gruda, supra note 441, at 366–68.
\textsuperscript{504} Id.
\textsuperscript{505} Id.
\textsuperscript{506} See Western Sahara, 1975 I.C.J. ¶¶ 81, 151, 162.
of self-determination to work, the people must be able to effectuate an actual transfer of title to the new sovereign. It is insufficient for a people simply to declare that, via self-determination, they now have title to the territory. There must be some formal method of transitioning sovereigns if self-determination is to be viable. The only effective doctrine for obtaining possession and transferring title appears to be cession. The doctrine of occupation is problematic because the land would be unlikely to be considered terra nullius; the doctrine of conquest is no longer acceptable to the international community which obviates this doctrine as a justification; and, the doctrine of prescription would require the acquiescence of the exiting sovereign, which is unlikely to occur in most cases. Thus, only the doctrine of cession remains.

F. Negotiation and Arbitration of Territorial Disputes

As traditional modes of acquisition become obsolete or scorned by the international community, and as their modern replacements seem to offer more problems than they solve, many States turn to negotiations or arbitrations to resolve disputes. One forum for these methods of dispute resolution, the PCIJ, was founded by the League of Nations under Article 14 of the Charter. The ICJ constitutes the successor to the PCIJ under the U.N. When establishing which party has title to the territory, the ICJ usually bases its decisions on treaties, the doctrine of uti possidetis, and effective control. The ICJ focuses primarily on legal documents when rendering decisions.
In a dispute between Botswana and Namibia, the ICJ looked to the Anglo-German Treaty of 1 July 1890 to determine the legal status of, and boundary around, Kasikili/Sedudu Island.\(^{521}\) The treaty had established spheres of influence between England and Germany.\(^{522}\) Despite various sources of evidence of Namibian prescriptive title, including maps and other written evidence, the ICJ held that, by the terms of the Anglo-German Treaty, the island belonged to Botswana.\(^{523}\) Similarly, in Land and Maritime Boundary Between Cameroon and Nigeria, the ICJ rejected Nigeria’s claim for consolidation of title and stated that effective control was insufficient to override conventional title.\(^{524}\) The ICJ ruled that the principle of *uti possidetis* determined title under the Anglo-German Agreement of 11 March 1913.\(^{525}\)

In some cases, however, title cannot be determined from binding agreements.\(^{526}\) In these situations, the court will look to whether a party has exercised effective control.\(^{527}\) In Sovereignty over Pulau Ligitan and Pulau Sipadan, the ICJ examined a number of documents but was unable to find any that established title.\(^{528}\) The court next looked to effective possession evidence and found that the island territories belonged to Malaysia based on current national legislation, pronouncements within administrative law, and quasi-judicial opinions.\(^{529}\) Although such evidence was relatively scarce, it covered a significant period of time and displayed a pattern manifesting Malaysia’s persistent intention to exercise political functions on the islands.\(^{530}\) In reaching its determination, the ICJ noted that it will only weigh evidence of effective possession when it is otherwise infeasible to establish clear title.\(^{531}\)

Surveying the types of evidence used most frequently, one scholar determined that parties in international arbitrations over territory

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\(^{523}\) Kasikili/Sedudu Island, 1999 I.C.J. ¶¶ 82, 90, 94, 104.

\(^{524}\) Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, 1998 I.C.J. 275, ¶ 106 (June 11).

\(^{525}\) Id. ¶ 52, 60.


\(^{527}\) See, e.g., id. ¶ 92, 124.

\(^{528}\) See id. ¶ 143.

\(^{529}\) See id. ¶ 134–49.

\(^{530}\) See id. ¶ 148; Lesaffer, *supra* note 94, at 55.

\(^{531}\) Lesaffer, *supra* note 94, at 54.
brought a variety of reinforcing arguments. Litigants frequently put forth arguments based on geography, economy, culture, heritage, elitism, and ideology as evidence for their respective claims. Such evidence, however, was rarely persuasive if raised in lieu of treaties or other “hard” documents. The reason is that most of the disputes feature an array of conflicting arguments by both sides, but these arguments often rest on sparse evidence. Therefore, looking to treaties, agreements, and other “hard” evidence more readily enables the court to achieve sufficient clarity and certainty to support a confident ruling.

**Conclusion and the Future**

Modes of acquisition have taken many forms since the dawn of civilizations, from rudimentary systems in which the most powerful actor might take what it could, to a modern, individual rights-based approach based on the collective experiences of Western civilization during the era of hegemonic expansion. Throughout the twentieth century, there were persistent attempts to eradicate the traditional doctrine of conquest and establish a system of peaceful transfer that recognizes the rights of people in addition to those of the State. The most prominent feature of this evolution was the establishment of international organizations to advocate peace and to protect the human rights of individuals. Unfortunately, these institutions, and the modern modes of peaceful acquisition they advocate, have proven inadequate. Even the strongest forms of condemnation from the international community have been unable to prevent the use of condemned practices to claim territory.

Part of the reason the modern modes of acquisition have failed to take control is perhaps their logical flaws. The concept of self-determination—namely, that every people should enjoy the right to consent to the form of government that will rule them—is limited in the extent to which it can be applied to every society on every continent. However, the practical limits to this principle, such as the prospect of 8000 separate States in the world, are obvious. Beyond this, the burden of determining what exactly constitutes a “people” for purposes of establishing a country under the doctrine of self-determination would clog and

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532 See Sumner, supra note 519, at 1784–92.
533 See id.
534 See id. at 1806–07.
535 See id. at 1783–92 (describing potential disputes when litigating based on geographical, economic, cultural, elitist, and ideological justifications).
536 Cf. id. at 1809 (arguing that the ICJ’s preference for treaty law might be an attempt to restore predictability and stability in international territorial disputes).
cripple the international legal system. Moreover, the precedent of granting independent States to often ill-defined independent peoples would undermine the integrity of national boundaries; it would not relax any tensions that might currently exist between groups. By now, it should go without saying providing a people a right of self-determination is not as simple as signing a declaration and then standing back to watch the birth of a new State.

The recent conflict in Iraq provides clear evidence that vindicating the right of self-determination takes huge amounts of time, treasure, and blood. The current Iraqi government may finally be the product of its people, but the role of the United States and its allies has been essential to its stability, and will be for the foreseeable future. In other scenarios, it is possible that similar efforts might fall short of the ideal outcome that appears to be the Iraqi experience of the twenty-first century. There remains no definition of what a “people” means in Iraq, but that question has waned in importance as Iraq’s multiple peoples appear to have settled into some semblance of harmonious coexistence. While the nation still suffers from conflicts among cultures and religions, these conflicts are now less violent than they were in the immediate aftermath of the U.S. invasion.

More generally, recent experience has provoked questions of whether it is just to go to war in order to effectuate self-determination. Under what conditions is it valid for foreign powers to invade, regardless of the virtuous ends that they espouse to justify their campaign? In the case of the Iraqi invasion, for example, the U.N. officially declined to back it, so the international community acted outside of that structure to pursue what it collectively felt to be a worthwhile goal. This was an unprecedented act in the history of international relations, and it is unclear where that response may lead in the future of the U.N. or even the definition of the international community itself.

Perhaps the best way to confront the concerns that attend the acquisition of territory today is to utilize all available modes of acquisition in moderation. Rather than attempt to rely on the principle of self-determination as a spearhead for the reduction of conflict, the international community must develop a system for ascertaining the best mode of acquisition for each case. Moreover, in order to effectuate such a system, the international community, whether via the U.N. or some other body—including the unsettling possibility of further ad hoc, bilaterally-arranged international coalitions similar to that which supported the Iraq invasion—must be so organized as to wield collective authority in State relations. Since World War II, the modern system of imposing sanctions and issuing strongly worded resolutions has been widely used to
punish aggression. But that combination of remedies often seems more like a pro forma exercise in diplomacy than an effective means of effect needed change. Although such a system has worked in some situations, the international community is frequently helpless to stop aggression and acquisitions that result from centuries of cultural incompatibility.

Future domains of territorial acquisitions include space and the ocean floor. The 1960’s race to the Moon served as the catalyst for the development of an international framework to determine nation-states’ rights in space. In 1967, the U.N. reached a resolution in the matter by passing the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. Although its primary purpose concerned the banning of nuclear and other weapons of mass destruction, the resolution provided a foundation to preserve space exploration for the good of all mankind, not for the advantage of individual nation-states.

Principles of territorial acquisition may be necessary to resolve near-space disputes as well. International telecommunication networks rely on geosynchronous orbiting satellites. The International Telecommunications Union, through INTELSAT, developed a system to allocate geosynchronous space and maintain satellite resources. Nevertheless, non-member States predictably dispute the characterization of geosynchronous allocations as outer-space. For example, in 1976, the Bogota Declaration announced that “segments of the synchronous geostationary orbit are an integral part of the territory over which the equatorial States exercise their national sovereignty.”

To prevent rogue States from using force and relying on the doctrine of conquest to take territory, the international community must prepare to utilize sufficient force to subdue such uprisings. Beyond stopping aggression, however, the international community must also have some method for creating a system that will permit or induce rival cultures to live harmoniously. What is most interesting about the mode

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538 See Shaw, supra note 15, at 545.
539 See id. at 549–52. Geosynchronous orbits occur approximately 22,300 miles above the equatorial line and allow satellites to remain fixed in relation to the Earth’s surface. See id. at 552.
540 See id. at 549. Shaw notes that the communists established a comparable system called INTER-SPUTNIK. Id.
541 Bogota Declaration (Dec. 7, 1976), in 6 J. Space L. 193, 193 (1978), Signatories to the Bogota Declaration include Brazil, Columbia, the Congo, Ecuador, Indonesia, Kenya, Uganda, and Zaire. Id. at 196.
of reaction to the second Gulf War is the prospect that multiple modes of international cooperation, characterized by a combination of fixed associations of nations and ad hoc coalitions, may become this century’s norm. Despite the uneasiness that this prospect will evoke in many quarters, it is possible that a competing system of cooperation, exemplified by the dissensus between the U.N. Security Council and the free coalition of States that backed the Iraq invasion, is superior to a fixed system that is the sole authority for international relations.

Although almost everyone can agree that wars and rogue States are undesirable, if the age-old status quo must suffer destruction, the international community must put into place an effective, realistic plan to end the justification for acquisition by way of the doctrine of conquest to dissuade rogue coalitions of States that might use conquest as a justification for territorial expansion. Meanwhile, it should review its current organizational premises, as the dissensus between the U.N. Security Council and the ad hoc coalition in the Iraq case indicates that the current structure impedes true international consensus about how to handle the modern international emergencies. Calls to vest more power in the U.N. suffer from the misguided assumption that the optimal way to police the world is by delegating more national sovereignty to a collectivity. In fact, the international scale of conflict is analogous to the national scale of a major economy. Centralized control works in a corporation, but a country, let alone an international union, requires a wiser, more refined balancing of competing interests. Equilibrium can only result from multiple States pursuing self-interested ends in cooperation with all other States. In the end, the system must be arranged so that it would be against the interests of every State to flout international consensus. Insofar as all States come to depend on all others to meet their needs, and no State remains that relies on the vicissitudes of a sole human decision-maker on the matter of international relations, flexibility will breed peace.
LOVE IT OR HATE IT, BUT FOR THE RIGHT REASONS: PRAGMATISM AND THE NEW HAVEN SCHOOL’S INTERNATIONAL LAW OF HUMAN DIGNITY

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Abstract: This Article presents a novel understanding of pragmatism in the New Haven School of international law. The New Haven Jurisprudence is wrapped in layers of mystification and the scant accounts of its pragmatism in the literature are either entirely mistaken or only partially helpful, betray a vernacular or truncated understanding of pragmatism, and fail to engage with the internal, epistemic structure of the policy-oriented jurisprudence. In response, this Article uncovers a contradictory form of foundationalist pragmatism in the Yale Jurisprudence in a peculiar relationship between its contextualist and problem-solving promises and its unreflective normative commitments to a set of postulated values of human dignity. In doing so, it foregrounds a “foundationalist antifoundationalism” and its crippling impact on the pragmatist promises of policy-oriented jurisprudence. Against the worn-out accusations of the New Haven Jurisprudence of U.S. imperialism or disguised affinity with natural law, understanding its foundationalist pragmatism offers a new appreciation of both the genius of Yale’s policy-oriented approach and the promises of pragmatism for policy thinking in international law.

INTRODUCTION

In 1971, Richard Falk—himself an astute student of the New Haven School of international law (NHS)—predicted that if by 2010 the world would have overcome "the fundamental challenges of war, pov-
property, pollution, and oppression," an historian seeking to “recreate the intellectual roots of such a positive outcome” could not hope to do better than to explicate the “clarity of vision, seriousness of commitment, and extent of impact . . .” of the life and work of Professor Myres McDougal. With 2011 already behind us, the historian is hardly so lucky as to be asked for an account of the intellectual roots of a world without war, poverty, pollution, and oppression. Despite this, Professor Myres McDougal’s place in the history of American international law, as Falk aptly put it, “tower[s] so far above his contemporaries as to be virtually invisible.”

Like most things in the altitudes of invisibility, however, the policy-oriented approach to international law that was born and flourished in New Haven remains, seven decades later, persistently enveloped in layers of mystification. In its own time, it lived a life of celebrity scholarship—attracting some and repelling many others—in which fiery rebuttals trumped meaningful engagements with critics. In its afterlife, it earned little more than either overwhelmingly negative or positive accounts of what it was not, or underwhelming appraisal and appreciation of what it was. Reactions to the NHS’s policy approach run the gamut from critiques that target its theoretical inadequacies or follies and the threat posed to the rule of law if policy and law were to be so closely integrated, to laudatory commendations of the NHS’s own assertive stance as a comprehensive jurisprudence for a new world public order of human dignity, to enchantment with the NHS’s methodo-

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2 Id. at 16.
3 See generally Myres S. McDougal & Harold D. Lasswell, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203 (1943) [hereinafter McDougal & Lasswell, Legal Education and Public Policy]. Legal Education and Public Policy is the first collaborative work of Lasswell and McDougal, which in effect set the groundwork for a new policy-oriented jurisprudence.
4 See discussion infra Part I.
5 For examples of such accounts that address the NHS’s general jurisprudence, without discussing specific doctrinal debates, see, for example, John Morton Moore, Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell, 54 Va. L. Rev. 662, 688 (1968), who suggests that the jurisprudential canvas into the Lasswell-McDougal project is among the most rewarding endeavors in legal thought, and Eisuke Suzuki, The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence, 1 Yale Stud. World Pub. Ord. 1, 46 (1974), who argues that the NHS “has aided contemporary scholars and decisionmakers alike to construct adequate tools for the study of the interrelations of law and the world social process.”
logical heresy of weaving policy into the fabric of law without actually adopting that methodology in any identifiable form or substance.\(^6\)

This Article aims to break through the by-now solidified walls of misperception around Yale’s policy-oriented jurisprudence, dispel some of the accepted wisdom about its foundations and nature, and present a more nuanced, dispassionate, and plausible understanding of its epistemological commitments and methodological claims. For all their differences, critics and admirers of the New Haven Jurisprudence agree about at least one fundamental assumption: that New Haven’s policy-oriented approach and its avowed antifoundationalism are consistent with the teachings of American pragmatism. This Article challenges the accepted wisdom about pragmatism in the NHS and offers a more accurate reading of its antifoundationalism. It does so because the peculiar relationship between pragmatism and human dignity in the NHS not only defined the fate of its career during and after the Cold War, but continues to bear crucial implications for the life of international law in the United States. A fresh and accurate understanding of the pragmatist and policy-oriented jurisprudence of the international law of human dignity, therefore, through its historical significance, opens up new avenues for a realistic assessment of international law’s vocation, limits, and potential in the twenty-first century.

As any cursory review of American legal thought confirms, Professor McDougal and Harold Lasswell’s collaborative project transcends international law into the wider space of jurisprudence, introducing a configurative and sophisticated theoretical framework to advance human dignity in a free society.\(^7\) History, however, evidently had a different course plotted for the success and reception of Yale’s policy science jurisprudence. The Lasswell-McDougal project is known as “the first American attempt to conceive of . . . lawyering—legal teaching, research, practice and decision-making—as an overtly political endeavor.”\(^8\) Pedagogical reconstruction was, therefore, the first platform on which the NHS hoped to construct an image of the politically conscious lawyer

\(^6\) This view is best reflected in the general, but unenunciated, understanding of the NHS as an all-encompassing, oceanic movement that has altered the discipline such that it is simply no longer possible to think of international law in pre-McDougalian terms.

\(^7\) See generally MYRES S. MCDouGAL & HAROLD D. LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992) [hereinafter MCDouGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY].

\(^8\) NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 164 (1995).
as a lawyer of human dignity. The American system of legal education, however, was not persuaded to train lawyers as policy scientists in order to advance the normative goals of human dignity or universal democracy. Nor was international law—the discipline the Lasswell-McDougal collaboration in effect spent its entire career to reform—enticed by the configurative methodology of policy science. In fact, as will be outlined in Part I below, contemporaneous reactions to the NHS’s interdisciplinary project ranged from agnosticism to outright rejection, rendering the NHS the most visible, but ultimately the least influential, mid-twentieth century project of disciplinary renewal.

Later interdisciplinary proposals for an international law geared toward post-Cold War challenges and opportunities were also not aligned with Yale’s policy-oriented methodology. One would have expected the post-Cold War reemergence of enthusiasm about the potential of political science to enrich international law to exhibit, beyond reverence for empirical research, a more meaningful methodological affinity with or understanding of the elaborate application of policy science in the New Haven Jurisprudence. Aside from an implicit regard for the pioneering work of McDougal, however, the international relations rescue mission lacked the sophistication of Yale’s configurative and multidisciplinary approach, remaining content to set up international law with quantitative ambitions. This was, after all, “a new generation of interdisciplinary scholarship.”

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9 Hence, the first Lasswell-McDougal work was devoted to a comprehensive plan for legal education. See McDougal & Lasswell, Legal Education and Public Policy, supra note 3, at 206.

10 For the best account of the failure of the NHS’s educational program, see Laura Kalman, Legal Realism at Yale, 1927–1960, at 184–85 (2001), which details the opposition to the Lasswell-McDougal proposal in the general perception of policy science as being too costly and academic, and just elitist. Interestingly, McDougal himself blamed the failure of educational institutions to adopt the policy-oriented approach on timing, rather than institutional constraints:

We got much more attention than we wanted before we wanted it . . . . We thought we’d have several years to formulate the stuff and write it up before we got too much attention, but we got too much success too quickly to serve intellectual purposes, and then we got the reaction.

Id. at 185 (quoting an interview with McDougal).


12 See generally Anne-Marie Slaughter et al., International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, 92 Am. J. Int’l L. 367 (1998) (exploring the intersection of international law and international relations and specifically the use of international relations theory to solve various international legal problems).

13 Id. at 393.
carry the NHS’s torch would have been Critical Legal Studies (CLS) or its offspring, which share to an equal degree McDougal’s skepticism about the law’s autonomy. But this shared epistemological view about the law and its indeterminacy provides a very thin genealogical relation between CLS and the NHS, considering that CLS would cringe both at New Haven’s commitment to a scientific approach to decision-making and at the significant, overdetermining role of its normative fidelity to human dignity for legal outcomes.

Even through its brightest chance for resurrection or comprehension in the twenty-first century as “a ‘new’ New Haven School,” the NHS has been taken merely to inspire a pluralistic platform against the reductionism of rational choice theory, to delineate the complexity of diverse world public orders in a new age, or to question, in a way that does little to enhance our understanding of the NHS, the Lasswell-

14 See, e.g., Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 201–02 (1993) (suggesting that the seeds of CLS could be found in Lasswell and McDougal’s first collaborative work).
15 See, e.g., James Boyle, *Ideals and Things: Legal Scholarship and the Prison-House of Language*, 26 Harv. Int’l L.J. 327, 343 (1985) (“To claim that one can inject a universal value (‘human dignity’) into an avowedly means-end technique is a contradiction in terms. For this to become one of the dominant approaches to international law is a travesty.”).
16 McDougal himself also spoke of the differences between the NHS and CLS:

We seek more emphasis upon deliberate creation and appreciation of policy than most prior framers of jurisprudence and we recognize the need for a comprehensive, integrated set of values to achieve this emphasis. It is here that we differ from the Critical Legal Studies people . . . [W]e try to be constructive as well as destructive.

McDougal's quest for scientific precision in legal decision-making as the specific product of its time and space. An amalgam of heterogeneous projects, the “new” New Haven School reaches out to different parts of the proverbial elephant in the dark, to pay respect to a shared geographical locale, rather than to find inspiration in the epistemological, methodological, or normative insights of the Lasswell-McDougal project.

If international law as a whole in the United States was not enlightened by the New Haven Jurisprudence, why, then, does McDougal’s policy-oriented approach warrant a new reading? Two reasons connected to the internal structure of policy-oriented jurisprudence not only justify, but demand, a new assessment of this mid-twentieth century genius of U.S. international legal thinking. First, the NHS’s policy approach to international law is symbolic of how Americans predominantly engage with (or disengage from) international law with a more flexible, policy-conscious, contextualist, and problem-solving attitude. In general, the association of American theories of international law with the Yale approach often has overestimating undertones that are both negative and positive. On the negative side, Yale—and thus McDougal’s policy-oriented approach—is blamed for reflecting an ill disposition for easily breaking the law in the name of balancing conflicting policies. On the positive side, even its detractors, who deny it the exalted status of “jurisprudence,” acknowledge that “[o]ne can hardly participate in modern international law scholarship without a background in ‘policy science.’”

A more profound understanding of the internal structure, epistemological claims and function, and methodological and normative commitments of the NHS is required to reject the simplistic association of this policy-oriented approach with U.S. foreign policy interests to bring about the demise of international law. Likewise, given that even the “new” New

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20 See, e.g., Brad Roth, Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold War Era, in United States Hegemony and the Foundations of International Law 232, 249–50 (Michael Byers & Georg Nolte eds., 2003) (“At its worst, the policy-oriented approach equates law with justice as interpreted by the strong.”). Recognizing the policy-oriented approach as neither uniquely American nor merely a divisive apology to justify U.S. foreign policy interests, Roth still believes that it “remains a controversial mode of legal analysis, especially among those who seek to maintain a critical perspective on U.S. actions.” Id. at 250.
Haven School barely resembles McDougal’s policy science except in geographic name, against the fantastic and overblown description of the NHS as a gateway to “modern international law scholarship,” a more realistic account of McDougal’s legacy for international law is long overdue.

Understanding that legacy is beyond the ambit of this Article. But to understand that invisible yet extraordinary and long-enduring impact, as opposed to the banal visibility often afforded the NHS, it is first crucial to cast the principal epistemic claims of the NHS—those suggesting the influence of pragmatism—in a new light. These two constitutive pragmatist claims are contextualism and problem-solving orientation. To grasp their origin, function, and implications for Yale’s international law of human dignity, one must properly locate McDougal’s intellectual pedigree.

Widely held and deeply ingrained in international lawyers’ consciousness, but never methodically delineated, is a belief that the NHS has deep roots in American Legal Realism. Upon further examination, however, “McDougal’s realist sentiments” irretrievably give way to the force of Lasswell’s policy science. Acknowledging the exceedingly strong and determinative influence of Lasswellian policy science on the New Haven Jurisprudence, compared to currently unexplored traces of Legal Realism, is the long neglected key that will open new avenues for a better understanding of the real place and disciplinary legacy of the NHS in international law.

How so? As I will argue, there is a peculiar interaction between the scientific and normative commitments in the New Haven Jurisprudence, in which the strenuous standards of empirical analysis it prescribes (or any other form of inquiry for that matter) do not apply to

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23 For a notable exception, see generally William Morison, Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay, in Toward World Order and Human Dignity 3 (W. Michael Reisman & Burns H. Weston eds., 1976). As the only extensive comparative jurisprudential study of the NHS, Morison’s essay reads McDougal against a number of twentieth-century schools of thought and not merely Legal Realism. As such, his analysis of the NHS’s realist roots is theme selective and, inevitably, limited in scope.

24 Cf. Duxbury, supra note 8, at 170 (stating that Lasswell and McDougal found legal realism to be inadequate and thus attempted to move American jurisprudence away from the traditional methods of legal realism).

25 Id. at 167–68.
the normative values of human dignity. Human dignity, therefore, takes
the form of an overarching and determinative element in legal deci-

sion-making, while its substance consists of a set of homegrown value
postulates that reflect the parochial normative worldview of the New
Haven masters. The form and substance of human dignity, defined as
such, bear significant consequences for the fundamental epistemic
claims of the policy-oriented approach—the claims that putatively make
the NHS a genus of pragmatism. What remains of the pragmatist prom-
ises of contextualism and problem-solving orientation, in the face of
what ultimately is a foundational faith in the essence and determining
role of human dignity, is no more than a semblance of pragmatism, if
one recognizes antifoundationalism as the cardinal epistemic build-

ing block of pragmatism. New Haven’s antifoundationalism, in the final
analysis, is not without foundations of its own. This foundationalist anti-
foundationalism becomes not only the hallmark of policy-oriented ju-
risprudence, aligning it with the foreign policy interests of the leader of
the free world, but also the explanatory force behind international
law’s reaction to the role of policy versus law for many years to come.

To make sense of New Haven’s foundationalist pragmatism—a
contradiction by nature with grand consequences—one should flex the
commonly held assumption about the force of realist jurisprudence on
Yale’s collaborative renewal project in international law. The Lasswell-
McDougal project sought a new and receptive disciplinary home in in-
ternational law for Lasswell’s policy science and a counterpart for the
policy scientist of democracy in the international lawyer of human dig-
nity. Reading the foundationalist antifoundationalism of Yale under the
shade of Lasswell’s pedigree affords a breeze of sympathy toward
McDougal’s vision for a policy-oriented international law, vindicating it
from the unsophisticated accusations of legitimization and hasty cri-
tiques that have failed to follow or engage with the internal logic of the
New Haven Jurisprudence.

To offer a new understanding of New Haven’s pragmatism for an
international law of human dignity, this Article proceeds as follows. In
Part I, I map the discipline’s reactions to the Lasswell-McDougal project
to illustrate that, regardless of the nature of objections, the literature has
unanimously entertained an external critique of the Yale approach
without a trace of attention to its epistemic claims and a critical assess-
ment of their function and success in delivering what they promise. Part
II reviews the sketchy accounts of New Haven’s pragmatism in the litera-
ture and suggests that they lack a philosophical understanding of prag-
matism, and thus adopt, at best a truncated, and at worst a vernacular,
usage of the term. The centerpiece of the argument advanced here,
Parts III and IV, instead take contextualism and problem-solving orientation as the two core claims of the New Haven Jurisprudence that bear significant epistemological implications for policy-oriented approach and re-assess their success in light of the normative commitments of the New Haven masters. By dissecting the function of New Haven’s contextualism and problem-solving orientation and their interaction with the central role of human dignity in legal decision-making, I aim to foreground and make sense of the NHS’s foundationalist antifoundationalism or pragmatism. Part V concludes the argument.

Rather than intend to discover the “real” New Haven Jurisprudence, or propose an affirmative account of what a plausibly pragmatist international law of human dignity (or any other normative agenda) ought to look like,26 this Article takes apart some of the fundamental, but misguided and misleading, understandings of Yale’s policy approach, of pragmatism, and ultimately of policy thinking in international law. As the existing literature bears evidence, no account of the career of the Lasswell-McDougal project and its legacy for international law would take off successfully amid the fog that still surrounds the epistemic and methodological tenets of policy science. This is neither about saving Yale’s policy-oriented approach nor about venerating the tradition of pragmatism, but rather a first attempt at taking stock of what really went on in the Lasswell-McDougal heresy in order to establish solid ground for a more accurate understanding of how this mid-twentieth century revolutionary project of disciplinary renewal speaks to us today.

I. NEW HAVEN’S POLICY-ORIENTED INTERNATIONAL LAW AND THE PANORAMA OF AGNOSTICISM

In its own time, the policy-oriented approach of the NHS faced general resistance. This resistance at first appears to derive from a commonly shared source of disciplinary anxiety among international lawyers of the time about the methodological novelty so passionately advocated by Lasswell and McDougal. Under the New Haven account, international law faced a choice between, on the one hand, a multi-disciplinary project of renewal with a sophisticated scientific apparatus and clear normative commitments, and on the other hand, stagnation and a naïve hope in the autonomy of the rule of law.27

26 The latter project would be a worthwhile endeavor and certainly deserves its own space. That will not, however, be here.
27 See, e.g., McDougal & Lasswell, Legal Education and Public Policy, supra note 3, at 237.
This picture, however, is too general and too vague to reflect the complete story of the discipline’s reception of a policy-oriented international law of human dignity. The ill fate of the democratic science of international law envisioned by the NHS may be attributed, in varying degrees, to a wide variety of factors, such as: institutional constraints, unfavorable timing, McDougal’s complex language and style, international lawyers’ impatience with New Haven’s scientific accuracy and technical vocabulary, agnosticism about the practical value of employing scientific language, resistance against a disciplinary renewal generally perceived as either unnecessary or incomprehensible, anxiety about the certainty of the law and the professional image of the lawyer giving in to the professional identity of the policy scientist of democracy, and a mutual sense of alienation between the old and the new.

An historiographical attempt to understand the career of the NHS must weigh all these explanations and possibly discover more. But the map of contemporaneous reactions to McDougal’s policy-oriented heresy here has a different purpose. It presents a synopsis of what was in debate in order to illustrate what was not. Agnostic reactions to McDougal’s proposal, in all their variations, focused on an external critique to target its ideological implications, its view of law and power, and its complex style and language.28 As manifested by this map, none took any interest in the internal, epistemic structure of the New Haven Jurisprudence.

The map below sketching popular skepticism against the NHS is admittedly simplified to some degree. Any effort to thread various interpretations of the methodological renewal of the NHS inevitably disregards some nuances in the interest of making sense of a common disciplinary spirit. In fact, the prevalent strands of skepticism about the New Haven Jurisprudence never quite converged on what they found most problematic with the policy-oriented approach; nor did the New Haven masters take the various objections they faced seriously enough to engage in a dynamic and linear series of debates and methodically classify the arguments of their skeptics. This lack of genuine communication may explain why all the negative reactions to the policy-oriented approach remained external to the NHS’s epistemic structure.

28 See discussion infra Parts I.A.–C.
A. Policy-Orientation and Legitimization

The first set of critiques of the methodological renewal and normative commitment of the NHS derives from blanket skepticism about the political orientation and intellectual independence of the New Haven masters. By focusing on the American character of their policy approach to legal decision-making, these readings of Lasswell and McDougal begin with an assumption about New Haven’s partiality for U.S. dominance during the Cold War. These assumptions are specifically illustrated in different aspects of the configurative jurisprudence in which policy considerations must determine legal outcomes. Though not always to an equal degree, the skepticism appears to be cast over the mere plausibility of the scientific claims and the possibility of consensus over the specific normative commitments of the New Haven Jurisprudence on the one hand, and the particular application of those scientific methods and the interpretation of the accompanying normative commitments on the other.

Some simply remain unconvinced by the Yale School’s claims to scientific objectivity. It is difficult, however, to determine whether the plausibility of scientific objectivity or the failure of McDougal and his associates to apply those standards to actual legal problems is truly in question when, for instance, Leo Gross speaks of “the policy-science approach to international law which disguises policy in a pseudoscientific apparatus of procedures for determining what the law is.” At the center of the scientific teachings of policy sciences to promote objectivity lie the “maintenance of clarity in observational standpoint,” “[t]he delimitation of an appropriate focus of inquiry,” and the “performance of intellectual tasks.” These three principles aim to define precisely the relationship of the scholar to the legal problem at hand—the question of who is analyzing what and how. The identification of the scholar or policy scientist with a particular class, culture, and nation-state significantly impacts the way she formulates the question and seeks the answers. Even more important is the professional role the international

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law scholar adopts, either consciously or unconsciously. McDougal, Lasswell, and Reisman contrast the “scholarly observer” with the “active decision-maker,” a distinction that, despite being oversimplified, is nevertheless a testament to the importance of defining a precise observational standpoint in order to maintain objectivity.

The oversimplification of a divide between scholarly pondering and decision-making is even more evident when one considers that, within each category, the questions of contentment with status quo or a desire for change—and, for scholars, the task of accommodating an intellectual, social, and political orientation through a congenial jurisprudential approach—complicate the clarification of the observational standpoint far more than the policy sciences appear to recognize. To be sure, McDougal clearly recognizes that his own specific vocational, stylistic, community, national and international affiliations shape and constrain his vision, and that distinguishing between individual inclinations and common interests of mankind is a matter of exercise and persistence. Such a clarification demands careful psychological self-analysis. Identifying the footprints of culture, class, and personality in Lasswell’s schema, and defining a particular professional role with respect to the analysis of the problem under investigation, requires a stronger faith in psychology than lawyers generally find persuasive.

Even if, in principle, psychology and observation of the self were granted the scrutinizing power that Lasswell recommends to the policy scientist and that McDougal borrows for the international lawyer, Lasswell and McDougal’s application of the test of rationality to their own work and their resistance to the impacts of class, personality and culture were less than successful. In fact, some sympathetic readers find that the alleged objectivity in observational standpoint falls short not in the usefulness of the concept itself, but in the New Haven masters’ overestimation of their own rationality in adhering to that first element of objectivity. McDougal’s reliance on “reasonableness,” the “wider shaping and sharing” of values, and “minimum world public order” as working criteria to deduce specific desired results from general principles such as “community policy” and “human dignity” poses a difficult

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32 McDougal et al., Theories About International Law, supra note 30, at 199.
35 See, e.g., Tipson, supra note 31, at 235–37.
challenge to his claim of rationality and his extensive survey of trends and conditioning factors in different contexts.\textsuperscript{36}

Take, for instance, McDougal’s justification of American hydrogen bomb tests based on “established community expectations.”\textsuperscript{37} The community expectations favoring the unrestricted right of the United States to conduct a series of hydrogen bomb tests derive from three factors: the absence of an absolute resolution between \textit{mare liberum} and \textit{mare clausum} claims; the universal right of defense against external security threats, which extends to nuclear testing in preparation for self-defense; and the vote of the Trusteeship Council of the 1947 Trusteeship Agreement governing the American control of the Marshall Islands, which recognized the right to nuclear testing as an extension of the Trustee’s authority.\textsuperscript{38} The quick path of reasoning from “community expectations” to the specific, undisputed right of the United States to nuclear testing runs afoot of contextual-orientation methodology with respect to the absence of empirical evidence regarding general community expectations and the opinions of world elites.\textsuperscript{39} Considering that McDougal and his associates start from an anarchical assumption about international relations to make a case for the seriousness of security threats, an appeal to “community expectations” —including the opinion of those with no interest in the “wider shaping and sharing” of values and those who stand in opposition to the “minimum world public order”— would be meaningless.\textsuperscript{40} One also must wonder about McDougal’s reliance on the vote of the Trusteeship Council; elsewhere he is clear that “the presumed congruence of formal and actual authority of intergovernmental organizations may or may not be sustained by the concurrence of expectations necessary to justify a claim of actual constitutive authority.”\textsuperscript{41} Here, an “effective decision” overrides an “authoritative decision.”\textsuperscript{42} With that said, given the subjec-

\textsuperscript{36} See id. at 235–36.
\textsuperscript{38} Wood, supra note 37, at 437–38; see McDougal & Schlei, \textit{The Hydrogen Bomb Tests}, supra note 37, at 650, 678.
\textsuperscript{39} Wood, supra note 37, at 437–38.
\textsuperscript{40} See McDougal & Schlei, \textit{The Hydrogen Bomb Tests}, supra note 37, at 650.
\textsuperscript{41} Myres S. McDougal et al., \textit{The World Constitutive Process of Authoritative Decision}, in \textit{1 The Future of the International Legal Order} 73, 80 (Cyril E. Black & Richard A. Falk eds., 1969).
\textsuperscript{42} Wood, supra note 37, at 438. Similar challenges have been posed to other works of McDougal and his associates that apply general principles of “reasonableness,” “commu-
tivity of independent states’ determination of perceived threats, it is curious that McDougal expects such determinations to pass the test of “reasonableness” so smoothly.

It is, then, the speedy descent from the high ground of general principles to the valley of “self-evident” results that betrays sheer disregard for detailed contextual analysis and, understandably if not justifiably, gives rise to suspicion of McDougal’s uncritical acceptance of the views of the policy elite. To one commentator, “the impact of these implicit normative premises [of human dignity] on McDougal’s thinking about substantive issues, despite his self-conscious concern with values in the formulation of his conceptual framework, constitutes a striking confirmation of the subtle impact of underlying values in all intellectual endeavor.” A more scathing review goes so far as to reduce the entire scientific and normative enterprise of the policy sciences to no more than the crude material interest of the United States: “Law is policy. Policy is human dignity. Human dignity is fostered in the long run by the success of American foreign policy. Therefore, law is the handmaiden of the national interest of the United States.”

Stanley Hoffmann considers the problem to result from McDougal’s definition of the values of human dignity in a manner overlapping with the American national interest in the face of Communism. This critique is neither against the proposed (pseudo)scientific recommendations of policy sciences, nor against its normative commitment to human dignity per se, but rather against the precise way in which these

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43 See Oran Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 Am. J. Int’l L. 60, 74–75 (1972) (“McDougal has leaned towards a somewhat uncritical acceptance of the views of the American ‘establishment’ on a number of specific issues in the field of international relations.”).

44 Id. at 75.


goals are defined and applied to any number of particular cases to determine outcomes.47

In what is perhaps sacrilegious treatment of policy sciences’ democratic commitments, some consider the Yale School’s application of contextual-orientation methodology and the Soviet doctrine of co-existence to be essentially two sides of the same coin.48 Equally repugnant to the praxis-attentiveness of policy science is the haziness in McDougal’s distinction between the professional roles of scholar and policy-maker, and a call for intellectual or theoretical purity. In Hoffmann’s words:

[The scholar’s] primary duty, in our discipline as in all others, is to seek knowledge and understanding for their own sake. This implies that the main purpose of research should not be “policy scientism.” The fighting of crusades, the desire to advise policy-makers, or the scholar’s dedication to national or international causes can and perhaps even should be the occasion, but they should not be the purpose, of theoretical research.49

In essence, Hoffmann applauds the definition of observational standpoint in the interest of knowledge for the sake of knowledge.50 Hankering after pure knowledge, however, only turns upside down the contribution of generations of American social thinkers—from pragmatists to the progressives of the early and mid-twentieth century, including policy scientists. McDougal’s clarification of observational standpoint does not detach theory from praxis or knowledge from action. Rather, as unrealistic a demand as it is, it is meant to make the

47 Id.
49 Stanley Hoffmann, *Contemporary Theory in International Relations* 10 (1960). Hoffmann continues: “[T]he distinction between ‘what is worth knowing intellectually and what is useful for practice,’ between understanding and doctoring, remains essential, both for practical and for ethical reasons.” Id. Richard Falk, in the interest of developing a theory of international law, also suggests that the jurisdiction of the theorist and the adversary be separated:

[R]ecognizing the difficulty of making engineering applications of high-order legal abstractions, . . . the theorist [ought to] refrain from participation in adversary arenas (and, ideally, . . . an adversary [should] refrain from entering scholarly arenas), or at least that the nature of participation in legal debate [should] be clearly labeled.


50 See Hoffman, supra note 49, at 10.
scholar aware, vis-à-vis her inquiry, of her integrated identity and identification assumptions, and the particular professional position she takes. In fact, McDougal’s clarification is intended to help achieve the ever-desired objectivity and scientific knowledge at the service of practical problems. It is one thing to point to the illusory nature of such a level of objectivity, but an entirely different thing to blame McDougal’s partiality to U.S. national interests on this straddling of the scholarly and decision-making positions.51

The divergent characters and intellectual orientation of Lasswell and McDougal provide another basis for criticism of a credible standpoint in their collaboration.52 Behind the New Haven Jurisprudence, stands Lasswell—a scientific-minded, “insatiable” pioneer in “total comprehension” of social affairs, who is called “the ideal of the omniscient scientist”—and McDougal—“the ideal of the irrebuttable advocate, the tireless persuader or persistent proselyte,” who never misses an opportunity to channel solutions for any problems to the cause of human dignity as he defines it.53 The dual nature of policy sciences reflect the differences of two minds or two temperaments, that of a scientist and that of an advocate.54 Under this reading, the advocacy side of Yale’s configurative jurisprudence blunts its scientific edge because it either provides direction or manipulates results to fit the NHS’s desired outcomes.55 Thus, in plain disregard of the postulated normative values advocated by policy sciences, objectivity claims lose credibility in light of the policy-oriented approach’s overestimation of its own objectivity.

In sum, whether it is the adulterated scientific objectivity of policy sciences, its masters’ conflated observational standpoints (despite their

51 Richard Falk, in fact, finds McDougal’s insistence on policy explication to have a necessarily radicalizing impact, which disqualifies international lawyers as mere professional technicians, particularly at the service of governments and corporations. See Richard Falk, The Place of Policy in International Law, 2 Ga. J. Int’l & Comp. L. 29, 32 (1972).
52 See Tipson, supra note 31, at 236.
53 See id. at 236–37. Lasswell himself refers to this difference:

Lucily our preferred frames of thought, though complementary, are not the same. McDougal loves verbal combat, especially in the frame of a prescriptive system and an appellate court. So far as I am concerned, most combat is boring and time-wasting. My preference is inquiry into factual causes and consequences. We are aware of these differences and deliberately exploit the intellectual tensions that result.

54 See Tipson, supra note 31, at 237.
55 But see Anderson, supra note 45, at 382–83 (arguing that “Professor McDougal’s approach is coherent, and is not simply the intrusion of advocacy into scholarship,” but nevertheless going on to reject it as an extra-juristic system).
recommendations for defining a credible standpoint), the centrality of human dignity in determining legal outcomes, the definition of human dignity in a way to converge with American foreign policy interests, or a disharmonious collaboration of two opposing personalities, the first group of critiques follows a straightforward explanation and views the policy-oriented international law as a project devised to maintain and legitimize the U.S. national interest.

B. Policy-Orientation and the Reduction of Law to Power

The second series of critiques concerns the project’s broad definition of the social processes that define law. These objections run the gamut from direct opposition to debasing law with politics, to a significantly more sophisticated and widespread challenge to the actual application of the configurative methods of a policy-oriented international law. The blanket rejection of the intrusion of politics and policy into law came either from international lawyers avowedly associated with positivism or from commentators within the neighboring discipline of international relations who placed too much hope in a romanticized conception of law as taming the political realities of interstate relations.

To those associated with a positivist foundation of law, the NHS inherited “all the faults of American ‘legal realism.’”\(^{56}\) In McDougal’s refutation of legal normativity, law, as they saw it, was no more than a “euphemism.”\(^{57}\) International law, in comparison to other fields of law, is more susceptible to politicization and yields more easily to arbitrary interpretations. Legal realism’s strike, therefore, as reflected in the policy-oriented approach, was an existential threat that sacrificed law for propaganda: “Other more hardy areas of the law may have been able to withstand the idolaclastic onslaughts of legal realism. If international law is moribund, it would be better to bury it forthrightly than to have it cannibalized by the realistic school for digestion into propaganda.”\(^{58}\) Wolfgang Friedmann, however, questioned whether McDougal, by defining a set of policy goals and values that shaped the direction of international law, adopted a “value philosophy” that alienated a great majority of legal realists.\(^{59}\) These goals and values of “an ‘inclusive’ order of human dignity” have the flaws of “natural law ideology” and “can, at

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57 See Anderson, supra note 45, at 382.
58 Id. at 383.
best, outline the conditions of an international law of cooperation, not those of the international law of coexistence.” The manner in which McDougal fuses law and policy, Friedmann argues, runs the risk of rendering international law merely a convenient instrument of national policy. Followed to its logical conclusion, McDougal’s doctrine, in which the standpoint of the policy-maker vis-à-vis human dignity determines legal outcomes, “is ultimately destructive of any ‘minimum world order.’” Although this might be affirmation of Dean Acheson’s remarks on the irrelevance of international law to national survival, its gravity and risks to a minimum world order as the precondition to developing goals of human dignity should not be lost on McDougal, who genuinely believed in the relevance of international law to ensure the survival of mankind and to promote human dignity.

Taking the criticism to its limits, Anthony D’Amato challenges New Haven’s policy-oriented international law on two counts. The first and most fundamental problem lies in McDougal’s equation of reasonableness with legality. The broad test of reasonableness applied by McDougal, along with the breadth of contextual factors recommended for consideration and the significance of strict adherence to the specificities of context replaces the predictability of law with “psychological debility of ex post facto rationalization.” If McDougal’s approach is to be accepted, there is a danger of changing legal thinking “from the propounding of broad beneficial conventions and improvement of existing rules to the detailed rationalizing of the factors of specific cases.” The erosion of rigid rules would in turn lead to a clash of international claims that “otherwise would never arise.”

On a practical level, decision-makers would

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60 Id. at 613.
61 Id. at 608.
62 Id.
64 See Friedmann, supra note 59, at 608.
66 Id. at 460.
67 Id.
68 Id.
69 Id.
70 Id. at 460–61.
always face a choice between equally reasonable claims.\textsuperscript{71} Absent at least a few rigid rules, power would inevitably write the rules of the game.\textsuperscript{72} To assume that the remedy is in reciprocity, as McDougal does, merely speaks of hankering after an image of utopia.\textsuperscript{73}

Starting from a practical orientation and moving within a different line of argument from the positivist concern with delimiting law, Richard Posner took issue with McDougal’s reliance on customary international law in outer space.\textsuperscript{74} In Posner’s view, McDougal’s elaboration on both the implications of uniform rules of access and competence in space and the significance of the Soviet Union’s past practice was irrelevant and confused.\textsuperscript{75} That McDougal put the onus on the Soviet Union to prove the lawfulness of its potential exercise of exclusive competence over the spacecraft of other states in light of its history of acquiescence to the freedom of space so far as peaceful vehicles were concerned betrayed a confusion between law, power politics, and mankind’s ideals of a rational world order.\textsuperscript{76} To speak of custom in the area of outer space—the vital national interest of the two superpowers “in the academic and even casuistic fashion” of McDougal and his associates—was to lose sight of the difference between law, power, and universal aspirations toward peace and justice.\textsuperscript{77} “These areas may overlap and interpenetrate, but they are not the same.”\textsuperscript{78} McDougal’s use of custom in a field as exotic as outer space operates in a fantasy world wherein law and power are one and the same.\textsuperscript{79}

Longing for legal distinctiveness in terms no more compromising than the positivists, Stanley Hoffman pronounced that the NHS did its

\textsuperscript{71} See D’Amato, supra note 65, at 460.
\textsuperscript{72} See id. at 461.
\textsuperscript{73} See id.
\textsuperscript{75} Id. at 1372.
\textsuperscript{76} Id. at 1372–73. Posner asks:

Is not all of this [talk of custom and burden of proof] rather beside the point? To whom would the Soviet Union have to prove the “lawfulness” of its conduct—of what practical significance would its “onus” be? Can the Soviet Union, in the space arena, be dismissed as “only one of many interested states”? Is it enough that the Soviet Union might be restrained by fear of retaliation by the United States—are we speaking of law or the balance of power?

\textsuperscript{77} Id. at 1372–73.
\textsuperscript{78} Id. at 1373.
\textsuperscript{79} See id. at 1373–74.
best to undermine all the constituents of law’s distinctiveness. To Hoffman:

Law is distinguished from other political instruments by certain formal features: there is a certain solemnity to its establishment; it has to be elaborated in a certain way. More significantly, the legal order, even in international affairs, has a life and logic of its own: there are courts and legal experts who apply standards of interpretation that are often divorced from underlying political and social factors.

Oran Young was similarly concerned about law losing its discriminatory power in the hands of those who advocated for policy-oriented jurisprudence. The dispute was not over the existence of a “world constitutive process of authoritative decision,” but rather how to designate this process “not simply in the interest of preserving certain verbal formulae but of maintaining sufficient distinctions between social categories.” In Young’s view, the utility of maintaining what McDougal derisively and hyperbolically called an “Austinian” conception of law was to allow for “explor[ing] the connections between the law of a social system on the one hand and the changing distribution of power or the evolution of authority relations in the system on the other.” McDougal rejected any such division as obscurantism, mainly because he defined the political process in such a narrow way that in order to accommodate the fluidity of authoritative process, he had to expand the scope of legal process. In McDougal’s view, Young’s demand for a distinction between the law of a social process and the dynamic distribution of power and evolution of authority is an example of “much too common a practice among social scientists, as well as among some unenlightened lawyers, to accept a limited, conventional, and parochial conception of law… and to conclude, hence, that naked power reigns supreme in ‘international relations’ or ‘the international system.’” In fact, as Robert Wood demonstrates, Young, “like most political scien-

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80 Hoffmann et al., supra note 46, at 118–20.
82 Young, supra note 43, at 64.
83 Wood, supra note 37, at 429–30.
84 Young, supra note 43, at 64.
85 Wood, supra note 37, at 430.
tists, distinguishes in the first instance between ‘naked power’ and ‘political power,’ particularly in reference to a ‘political community.’”

Like Lasswell and McDougal, integrationists consider “[i]nterdependence and consciousness of interdependence” to constitute the essence of a political system or a social community and, thus, identify a political community with the conscious pursuit of social transactions on the basis of “the authoritative distribution of values.” To them, legal systems, which embody a set of rules and principles, “are both aspects and outcomes of this authoritative process,” and though they can be evaluated in light of the fluid process of the authoritative distribution of values, they cannot be mistaken for the whole process. Thus, while many of the social scientists and lawyers who call on McDougal and Lasswell to distinguish between different social categories agree about the breadth of authoritative processes of decision-making, they distinguish between naked power, political power, and legal principles, rules, and standards. What is disputed, then, is in effect the scope of the authoritative decision-making processes. Lasswell and Mc Dougal assimilate politics in its entirety into the legal processes of authoritative decision-making, while political scientists, in a disciplinary rivalry, maintain the political nature of authoritative decision-making processes and limit jurisdiction to where legal principles, rules, and standards are at work in a specialized institutional setting. Expanding the scope of the legal process of authoritative decision-making in the New Haven Jurisprudence meant eclipsing politics for the political scientist, just as it portended the demise of law for the mainstream international law discipline. Introduced to the configurative jurisprudence of New Haven, both sets of professionals were distraught that they no longer recognized their uniquely held disciplinary identities in a system that cor-

87 Wood, supra note 37, at 430. Wood draws on this distinction in the works of David Easton, who, in Wood’s words, defines politics “in terms of the authoritative allocation of values in society,” in The Political System: An Inquiry into the State of Political Science 129–34 (1960); Karl Deutsch who, in Wood’s words, believes that a political community is “a community of social transaction supplemented by both enforcement and compliance,” in Political Community at the International Level: Problems of Measurement and Definition 40 (1954); and Leon Lindberg, who, according to Wood, “defines the essence of a political community as being the existence of a legitimate system for the resolution of conflict, for the making of authoritative decisions for the group as a whole,” in The Political Dynamics of European Economic Integration 7 (1963).

88 Wood, supra note 37, at 431.

89 Id.

90 See id.

91 See id.

92 See id.
roded each and every conceivable distinction between various social categories.

The international law discipline’s skepticism about the absence of an adequate distinction between different categories of authoritative processes of decision-making in the New Haven Jurisprudence mirrors its frustration with McDougal’s exaggerated and one-sided portrayal of his opponents’ defense of potential flexibility in the application of rules, principles, and standards.\(^\text{93}\) In the interest of replacing law with power, as the argument goes, McDougal castigates the “rule-oriented” approach as an illusory hope in “rules hav[ing] a meaning or ‘normative character’ largely independent of the purposes of the people who make use of them; and [in] these rules admit[ting], apparently without aid of criteria of interpretation, of practically automatic application in particular instances.”\(^\text{94}\) By attributing to his opponents a “model of automation in decision”\(^\text{95}\) and utter disregard for the complementary nature of both rules and policies, and, further, by challenging their unawareness of what he calls the general normative ambiguity of rules, McDougal is understood to practically end any substantial dialogue about the actual interaction of rules and policies and irreversibly declare the rule-oriented approach futile.\(^\text{96}\) His impatience with any consideration by his opponents of the flexibility of principles and standards, if not the openness of precise rules per se, along with his unwavering faith in the liberating force of policy applied in a manner consistent with the order of the masters of power, leads to suspicions that law in the hands of McDougal is “merely an increment to power.”\(^\text{97}\)


\(^{95}\) Myres S. McDougal & William T. Burke, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 48 n.124 (1962) [hereinafter McDougal & Burke, The Public Order of the Oceans] (“One can only wonder where Prof. Fisher is able to observe in flesh his model of automation in decision, and by what criteria he recommends that particular choices be made between inevitably complementary policies of the international law of the sea.”).

\(^{96}\) See Daniel, supra note 93, at 167.

\(^{97}\) Anderson, supra note 45, at 382. Anderson finds ample evidence for his argument in some of McDougal’s writings on power:

Among the instruments of power, when power is comprehensively conceived, there might be recognized, finally, not merely diplomacy, propaganda, armaments, and goods, but an international law which is an expression, not of an arbitrary political fiat, but of the fundamental policies of peoples and in
Distinguishing between policy-oriented jurisprudence and its application by McDougal and his associates to questions of world public order, one scholar locates the problem not in the comprehensive authoritative process of decision-making itself, but in the notion that McDougal conflates the descriptive with the prescriptive.\footnote{Tipson, supra note 31, at 241.} Using the NHS’s own terminology, when “theory about law” is used as “theory of law, or at least of law-making,” cynicism about rules is expected.\footnote{Id. at 241–42.} This is reminiscent of legal realism’s relationship to rules, precedent, and \textit{stare decisis}.\footnote{See, e.g., \textit{How to Do Things with Rules: A Primer of Interpretation} 48–72 (1976) (providing a foundation for rules in general); Grant Gilmore, \textit{Legal Realism: Its Cause and Cure}, 70 \textit{Yale L.J.} 1037, 1038–40 (1961).} While it is true that the mere development of a theory that minimizes or questions the utility of rules does not change existing expectations about the role of rules, it is also true that propagating contextualism or empirical methods does not necessarily synchronize the standard, societal understanding of legal reasoning or diminish the generally expected central role of law in most legal contexts.\footnote{See id. at 242–43.} In this reading, conflating theories about law and theories of law is not essential to the contextualist theory of Laswell and McDougal, but rather it is incidental to the way they have implemented their policy-oriented jurisprudence in addressing practical questions of international law.\footnote{Tom J. Farer, \textit{International Law and Political Behavior: Toward a Conceptual Liaison}, 25 \textit{World Pol.} 430, 440–41 (1973), quoted in Tipson, supra note 31, at 242–43; see Ian Brown-}

Other scholars consider rules, merely for practical reasons, to have a relatively significant role.\footnote{See id. at 242–43.} Rules are “rational and indispensable” in many decision-making contexts simply because of “the possibility and desirability of promoting greater uniformity and hence predictability of decision by limiting the variety of contextual factors that a decision-maker . . . should be encouraged to take into account.”\footnote{Tipson, supra note 31, at 241.} Rules, like

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theories, are therefore essential to reduce the “overwhelming bulk” of social phenomena to a volume that is manageable in practical decision-making. This is salient especially when interpreting international legal agreements because the text itself provides a strong basis for identifying and considering all relevant contextual factors.

C. Policy-Orientation as Conceptual Grandiloquence

The third series of critiques targets the style of presentation in the New Haven Jurisprudence. Complex style and perplexing terminology are trademarks of Lasswell’s work that find their way into the New Haven Jurisprudence. During his tenure with the Wartime Communications Research Project, the main task of which was to apply content analysis to American fascist propaganda, Lasswell was presented with an opportunity to fulfill his dream of psychiatrist-as-king and activist. Lasswell’s high hopes for a positive role for social scientists, however, went awry in large part due to his abstruse expression. The govern-

lie, The Public Order of the Oceans, 12 Int’l & Comp. L.Q. 1053, 1056 (1963) (book review). Brownlie seems to be concerned about the value and practical usage of The Public Order of the Oceans, compared to “a text, a set of clear prescriptions,” for decision-makers “who have to live by the law and custom of the sea.” Id.

106 Farer, supra note 105, at 441–42.

107 See Gerald Fitzmaurice, Vac Victis or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It?, 65 Am. J. Int’l L. 358, 369 (1971) (reviewing Myres S. McDougal et al., The Interpretation of Agreements and World Public Order (1967)); Gidon Gottlieb, The Conceptual World of the Yale School of International Law, 21 World Pol. 108, 110 (1968) (reviewing Myres S. McDougal et al., The Interpretation of Agreements and World Public Order (1967)).

108 The word is borrowed from Erwin Griswold who, recognizing the importance of Lasswell and McDougal’s approach to legal education, nevertheless found it to be “impaired by a certain tendency towards grandiloquence.” Erwin Griswold, Intellect and Spirit, 81 Harv. L. Rev. 292, 297 (1968).

109 See Fitzmaurice, supra note 107, at 360–61; Fred Rodell, Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy Science—Or How Not to Teach Law, 1 Vand. L. Rev. 5, 6–7 (1947) (suggesting that McDougal’s style is plagued with verbosity and outlandishness). Fitzmaurice offers a spirited critique of McDougal and his co-authors’ style in The Interpretation of Agreements and World Public Order, noting,

[T]his book . . . is written in a highly esoteric private language[—]we do not say jargon, but a kind of juridical code which renders large tracts of it virtually incomprehensible to the uninitiated (or at least to the unpracticed and unversed), short of a word by word “construe,” such as we did in school with our Latin unseens.

Fitzmaurice, supra note 107, 360.


111 See id. at 247–48.
ment, being wary of the dangers of emphasizing ideology, wished to keep the project entirely limited to research on facts and figures.\textsuperscript{112} Lasswell tried to convince his superiors of the importance of a positive movement against fascism, proclaiming, “if democracy is to endure, democracy must make propaganda in favor of itself and against propaganda hostile to itself.”\textsuperscript{113} His inability to make a convincing point about this normative view of propaganda and the positive role of social scientists was partly due to the general discomfort of his superiors with propaganda, and mostly due to his usage of technical vocabulary and putatively scientific methods that were incomprehensible to anyone outside his research group.\textsuperscript{114}

This story resonates with many international lawyers who encounter Lasswell and McDougal’s work. Lasswell alone is said to “move heaven and earth to find the picayune meaningful,” if only for the fact that “he operates best with high abstractions and adores the game of multivariable ping-pong.”\textsuperscript{115} When Erwin Griswold noted a tendency toward “grandiloquence” in the New Haven proposal, he specifically had the first Lasswell-McDougal collaboration on legal education in mind.\textsuperscript{116} Despite the intended limited application of the term, many in the field found the term grandiloquence to be applicable to the complex language and sophisticated conceptual framework used throughout New Haven’s jurisprudence.\textsuperscript{117}

In terms of accessibility and comprehensibility, the pedagogical program of policy science at Yale did not fare any better than its volumi-
It faced agnosticism similar to the popular mid-twentieth century concerns about the return of natural law. Jerome Frank warned his classes about a new brand of natural law in policy sciences "far vaguer than many of the older brands." Reportedly, many students "call[ed] one of the Lasswell-McDougal courses 'drifting and dreaming.'" Likewise, the Yale Law faculty found Lasswell to be "a queer guy," and found his "jargon irritating." They couldn't understand him," and "[n]obody on the faculty had much use for [him], but he was McDougal’s protégé."

Reacting to the application of policy sciences to coercion, Friedmann unwittingly paid tribute to McDougal by comparing his style to that of Hegel, only to charge both at once with the legitimization of hegemony. "Just as hundreds of pages of rigorous conceptual dialectics in Hegel's *Philosophy of Law and State* . . . disguise that Hegel really wanted to show that the reactionary Prussian monarchy under which he held his chair at the University of Berlin was the ultimate embodiment of the world spirit," McDougal’s use of conceptual and indirect language was an attempt to embroider a simple and plain allowance for the use of nuclear armaments or preemptive self-defense against a Commu-
nist state. This complexity merely exacerbates the ambiguity and uncertainty in McDougal’s approach toward the significant and determinative role of policy considerations in international law. Thus, beyond a matter of random stylistic taste or preference, simplicity and clarity of prose were demanded of McDougal in order to deflect suspicions of a disguised, spurious agenda.

The critique of abstruseness comes not merely from skeptics, but also from those generally sympathetic to the complexity and conceptualism of the New Haven Jurisprudence. “One can admire the intellectual resources brought to McDougal’s scholarly conceptualism of law as an instrument of social and humanitarian will, without approving unqualifiedly the abstruse formulation of principles [therein] enunciated.” Note that the point of contention here is not McDougal’s methodological conceptualism and its implications, but rather his conceptual framework, so far as it “cloaks the substance” of the ideas, and his “structural idiom” that detracts from the intelligibility of the conceptual formulation of law.

Yet others remained skeptical about the practical impact of the New Haven writings on world public order and questioned if the principal audience of these writings could in any way benefit from the complex style and thought process of the New Haven teachings in actual decision-making. Because McDougal’s recommendations are recognized as theoretical and in part visionary, their comprehension is restricted to the initiated and the “scholar who needs to know the thought behind thought,” and thus remain out of reach for those who look for guidance with no interest in digesting “a world maze.” This is due in part to the fact that the recommendations of McDougal and his associates, particularly in areas less subjected to existing regulations,
are prone to theoretical verbosity only loosely in touch with reality.\textsuperscript{133} Even when the reader’s mind finds new horizons in McDougal’s work, it is doubtful that there is an acceptable balance between the intellectual reward and perseverance required to follow the work’s masterly blend of astronomy, sociology, anthropology, and political science.\textsuperscript{134}

Another more sophisticated strand of critique of the cumbersome apparatus of policy-oriented jurisprudence shifts the attention away from mere comprehensibility to the substantive content of the scientific claims of policy sciences.\textsuperscript{135} Under this reading, the problem with McDougal’s cumbersome language is its machinations to shield the pseudo-scientific nature of the jargon used in order to give an illusion of mastery of scientific language.\textsuperscript{136} McDougal and his associates offer postulates in the format of a conceptual formula using the language of symbols without creating equations or any other mathematical medium to make sense of those symbols.\textsuperscript{137} Reducing propositions to symbols without mathematical models, however, is little more than a mockery of scientific work—it is in effect only creating symbols for the sake of symbols.\textsuperscript{138} The “turgid style” of the New Haven School writings is a lamentable heritage of social scientists, which paradoxically, “while attempting to create order,” in fact “create[s] a form of chaos.”\textsuperscript{139}

\textsuperscript{133} The reviewer refers to McDougal and his coauthors’ elaboration on “inclusive enjoyment versus exclusive appropriation,” using the example of the Antarctica Treaty, and questions the authors’ claim that it was in fact enlightenment that resolved difficulties in the Antarctica. “In Antarctica, if enlightenment means self-interest, it can be power based. The Antarctica Treaty did not resolve difficulties, but . . . it ‘froze’ the status of conflicting claims.” Id.

\textsuperscript{134} See D.H.N. Johnson, Book Review, 13 INT’L & COMP. L.Q. 1121, 1122 (1964) (reviewing Myres S. McDougal et al., Law and Public Order in Space (1963)). But see James Milton Brown, Law and Public Order in Space, 36 MISS. L.J. 116, 119 (1964) (book review) (“It is disappointing to find legally-trained critics, whose functional lives evolve around a special vocabulary, complain . . . over the need to devote a little effort to acquire the precision tools of the Public Order vocabulary.”); and Edward Hambro, Law and Minimum World Public Order by Myres S. McDougal & Florentino P. Feliciano, 50 CAL. L. REV. 745, 748 (1962) (book review) (“The reading of the book needs a certain amount of hard work, but once the reader masters the terminology of the book, he is richly rewarded. He will not always find the solution to all the problems, but he will find a penetrating analysis, a fresh approach, and original thought.”).

\textsuperscript{135} See Allison Scafuri, Book Review, 18 VAND. L. REV. 863, 864–66 (1965) (reviewing Myres S. McDougal et al., Law and Public Order in Space (1963)).

\textsuperscript{136} See id. at 863.

\textsuperscript{137} Id.

\textsuperscript{138} See id. at 863, 865.

\textsuperscript{139} Id. at 863 (finding analogy in H.L. Menken’s review of Thorstein Veblen, The Theory of the Leisure Class (1918)).
Despite the stylistic criticism, however, some scholars recognized the intellectual capital needed to engage with McDougal’s language and found it to be rewarding through the heightened awareness it raised about the world legal order.\textsuperscript{140} “A reader should be prepared . . . for an austere pilgrimage, unalleviated by witty asides or enhancing quotations.”\textsuperscript{141} Falk attributes the general criticism of McDougal’s obscure jargon and murky sentences to many who privately concede that they in fact have lacked the time or patience to navigate through the policy-oriented jurisprudence.\textsuperscript{142} In Falk’s view, McDougal’s style corresponds to his intellectual ambitions.\textsuperscript{143} McDougal, borrowing from Lasswell, aims to present a comprehensive and systemic account of social realities that impact the process and structure of policy choices in legal decision-making.\textsuperscript{144} Such a lofty endeavor needs a precise, though perhaps unconventional, linguistic device. The complexity of McDougal’s writings “stems from an insistence upon nuance and accuracy, not from an infatuation with German metaphysics, or some inborn quality of verbal ineptitude.”\textsuperscript{145} “His sentences are almost always impossible to improve upon.”\textsuperscript{146} Stylistic criticisms of McDougal stem from an anti-intellectualism that expects accessible language in legal writings for the benefit of the uninitiated.\textsuperscript{147} But McDougal’s framework of analysis, which reflects a complicated image of social reality, is comparable to Einsteinian physics in its usage of a complex language to open a new path of inquiry into realities that habitually remain masked from lawyers’ views.\textsuperscript{148}

To take stock, the three categories of critiques of policy-oriented jurisprudence—policy as legitimization, policy as invasion of power into law, and policy framework as conceptual grandiloquence—comprise the body of the critical reactions provoked by the methodological renewal of the New Haven Jurisprudence.\textsuperscript{149} As is evident, McDougal’s interlocutors, when they were able to see beyond problems with the accessibility of New Haven’s approach, focused on either ideological

\textsuperscript{140} E.g., Falk, supra note 49, at 643.
\textsuperscript{141} Id.
\textsuperscript{142} See id. at 658.
\textsuperscript{143} See id.
\textsuperscript{144} See id. at 644, 658.
\textsuperscript{145} Id. at 658.
\textsuperscript{146} Falk, supra note 49, at 658.
\textsuperscript{147} See id.
\textsuperscript{148} See id.
\textsuperscript{149} See Anderson, supra note 45, at 382; Fitzmaurice, supra note 107, at 360–61; Friedmann, supra note 59, at 608; Rodell, supra note 109, at 6–7.
analyses or the ill consequences of New Haven’s conception of power for the rule of law.150

To be sure, there were sharper critical voices who found fault with McDougal’s faith in an absolute concept of human dignity and its determining role for legal outcomes.151 Some took issue with the lack of adequate empirical inquiry in the New Haven Jurisprudence, despite “ambiguous hints to the contrary,” to validate the postulated values of human dignity, which remain “rather ab extra scientiam (though perhaps ab intra McDougal).”152 Others challenged McDougal’s confidence in a consensus about values and his Suarezian vision of “world community” with homogeneous values.153 Still others highlighted the threat that McDougal’s thought posed to the rule of law by prescribing human dignity as the favored value of the interpreter in the interpretation of rules or international agreements.154 Further, some accused McDougal of Hegelian idealism because he considered conflicting interests to be capable of resolving themselves to the satisfaction of the parties involved and that of the “policy of the world community” through a priori values.155 And still others believed that McDougal’s invocation of postulated values of human dignity as the foundational criteria of legality masked the oppressive role of social structures, and thereby forestalled a more concrete criticism that would place in the foreground factors of class, gender, and race.156

Like other external critiques, however, these more insightful reactions failed to engage with New Haven’s internal, epistemic structure. Finding fault with the nature and place of the values representing human dignity in the NHS and identifying that as another form of foundationalism is one thing,157 but delineating how exactly this founda-

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150 See Anderson, supra note 45, at 382; Friedmann, supra note 59, at 608.
151 See, e.g., B.S. Chimni, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 100 (1993); Julius Stone, Problems Confronting Sociological Enquiries Concerning International Law, 89 Recueil des Cours 61, 73 n.1 (1956).
152 Stone, supra note 151, at 73 n.1.
153 See id. at 113 n.1.
154 See Chimni, supra note 151, at 100.
157 These values, which are in fact categories of desired events or preferences, are: power (participation in making important decisions—those involving severe deprivations); respect (access to other values on the basis of merit without discrimination on grounds irrelevant to capacity); enlightenment (access to knowledge, which is the basis of rational choice); wealth (control over economic goods and services); well-being (enjoyment of
tionalism affected New Haven’s problem-oriented policy approach, and what this meant for decision-making in international law, is quite another. Interestingly, such an engagement—one that takes the claims, premises, and promises of McDougal’s thought seriously enough to evaluate its function on its own terms—is absent from the scant accounts that find the policy-oriented and problem-solving characters of the New Haven Jurisprudence consistent with the insights of pragmatism. The result is that human dignity and pragmatism, the two identifying faces of the Lasswell-McDougal project, which correlate with its normative and scientific commitments, remain epistemologically disconnected. Even after taking into account all the strands of criticism, it remains unclear why the pragmatist promises of contextualism and problem-solving methodology were unfulfilled. Nor do we learn whether or how the relationship between human dignity and pragmatism in the New Haven Jurisprudence may be related to, or explain, the logical correspondence between the policy-oriented approach and American foreign policy dictates.

II. Pragmatism and International Law in the New Haven Jurisprudence

Counting generously, there are only a handful of reflections on pragmatism and international legal theory. When considering a pragmatist representative in international law, however, these sparse accounts all turn their gaze toward the NHS’s policy-oriented approach. One would expect to easily trace the intellectual footprint of pragmatism in Lasswell’s work through his years in Chicago, where Dewey’s thought traveled into various social scientific disciplines. But Lasswell himself, the mind behind policy science, did not acknowledge an explicit intellectual debt to philosophical pragmatism, founded by Charles Sanders Peirce, William James, and John Dewey, except for a few cursory observations in his later writings. The Lasswell-McDougal

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159 In 1971, Lasswell wrote: “The policy sciences are a contemporary adaptation of the general approach to public policy that was recommended by John Dewey and his colleagues in the development of American pragmatism.” Id. at xiv. Earlier on in his first exposition on policy sciences, Lasswell had a less direct reference to his affinity for pragma-
policy-oriented international law does not include any direct or indirect mention of pragmatism either. This is quite consistent with the history of pragmatism itself, which went out of philosophical fashion right around the birth of the NHS and reappeared as neopragmatism well after the maturity of McDougal’s jurisprudence.\footnote{For a fine history of philosophy of pragmatism, see Pragmatism: From Progressivism to Postmodernism (Robert Hollinger & David Depew eds., 1995). But see Robert Talisse, Pragmatism and the Cold War, in The Oxford Handbook of American Philosophy 254 (Cheryl Misak ed., 2008) (arguing against the eclipse of pragmatism through the Cold War).}

In fact, in McDougal’s time, Philip Allott appears to have been the only commentator who directly took note of pragmatism, though only in the context of denying McDougal a place either in the American pragmatist tradition or in realism.\footnote{Id.} There was, Allott said, “too much of a priori in McDougal . . . a certain Hegelian element . . . in the basic concept of McDougal’s method, that of states with competing interests which must be resolved into something which satisfies both sides and also satisfies the policy of the world community (world-spirit).”\footnote{Id.} Allott’s brief but keen observation gets to the heart of the problem of a priori concepts, such as human dignity and its correlatives such as community policy, inherent in the NHS.\footnote{See id.} It does not, however, go far enough to explain what a pragmatist commitment to the normative values of human dignity would look like or to articulate the consequences of McDougal’s accommodation of a priori values for his problem-solving and contextualist ambitions. Allott seems to be after the philosophical roots of McDougal’s normative commitments\footnote{Allott believes that no tradition of political and moral philosophy is relevant except for utilitarianism: There is abundant evidence . . . that McDougal accepts the possibility of a “calculus of values”, in the style of Bentham; . . . It seems clear that he feels able to weigh one interest against another, one value against another, one value-statement against another. The words “weigh” and “outweigh” are used on more than one occasion in such a context. It is highly speculative to suggest what the equivalents of “pleasure” and “pain” would be in McDougal’s system; possibly “humanity” and “inhumanity”.} and his

\[\textit{tism. See The Policy Sciences: Recent Developments in Scope and Method 12 (Daniel Lerner & Harold D. Lasswell eds., 1951) [hereinafter The Policy Sciences]. On another occasion, Lasswell makes a curious comparison between pragmatism and mysticism: “Pragmatists assert that the quest for truth is a ’logic of inquiry.’ It is, therefore, an experience in self-discipline in the course of which the knowledge and perhaps the order of preference of the inquirer is open to change.” Harold D. Lasswell, The Future of Political Science 155 (1963).}\]
mention of pragmatism is as cursory as a simple rejection of its connection with the NHS.\textsuperscript{165}

Only after its renascence and reemergence on the legal theory scene\textsuperscript{166} did pragmatism receive some attention—though scant—in international law.\textsuperscript{167} In \textit{Patterns of American Jurisprudence}, Neil Duxbury intriguingly suggests that the NHS, in spite of all that Lasswell and McDougal might have intended to the contrary, “represents a suppression rather than a continuation of the realist faith in pragmatism.”\textsuperscript{168} Duxbury admits that this claim is “strange” because the purpose of policy-oriented jurisprudence seems to be the strengthening of the problem-solving and policy-making skills of the would-be-lawyer.\textsuperscript{169} The path of the policy-oriented approach is linked to the history of Dewey’s thought after World War II.\textsuperscript{170} Lasswell and McDougal adopted Dewey’s conception of democracy as a set of basic human ideals, the optimum realization of which calls for proper institutions throughout society.\textsuperscript{171} Furthermore, policy science, similar to Dewey’s attempt to reconstruct philosophy,\textsuperscript{172} expounded a set of intellectual tasks to reconstruct legal education and the legal profession.\textsuperscript{173}

An emphasis on democracy and the cultivation of a set of intellectual skills however, Duxbury writes, does not make policy science a pragmatic theory.\textsuperscript{174} “For policy science is too preoccupied with the development of a methodology and too little concerned with the matter of how that methodology may prove in some way to be useful.”\textsuperscript{175}
science jurisprudence, thus, is “[a]t best groundwork; interpreted less charitably, it is the use of theory to encourage procrastination over matters practical.” 176

Duxbury’s reading seems to promise the right destination. Nevertheless, it neither takes the right direction, nor goes far enough on the road to that destination. His concern, in the last analysis, is similar to the earlier complaints regarding McDougal’s conceptual grandiloquence: 177 “The idea that [lawyers] might achieve as much by becoming versed in the language and methods of policy science demanded too great a leap of faith. It demanded also, certainly of academic lawyers, too radical a reorientation of perspective.” 178 This recognition certainly carries a great deal of explanatory power and historical significance for understanding the career of the New Haven Jurisprudence and its reception by the international legal discipline. 179 The overemphasis on the role of experts—policy scientists of democracy and international lawyers of human dignity—corresponds to the fate of pragmatism in the United States after Dewey and throughout most of the Cold War. As far as the contribution of philosophical pragmatism is concerned, however, Duxbury’s account reduces it to mere practicability. Equating pragmatism with practicability is little more than a vernacular reading of pragmatism and sets a very low threshold for the understanding of both pragmatism and New Haven’s policy-oriented international law.

In a constructivist proposal, Harry Gould and Nicholas Onuf suggest that pragmatism can provide constructivism with everything it needs epistemically to present an alternative view of rules as social constructs against ontological realism. 180 This pragmatist approach to the conditions of rule, however, is found neither in the early pragmatism of Peirce, James, and Dewey, nor in Legal Realism. 181 Dewey delved into political theory but did not consider the conditions of rule in any of his writings. Likewise, Legal Realists paid great attention to methods of adjudication and the study of law, but were uninterested in broader politi-

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176 Id. at 202.
177 See supra text accompanying note 108.
178 DUXBURY, supra note 8, at 202.
180 Harry Gould & Nicholas Onuf, Pragmatism, Legal Realism and Constructivism, in Pragmatism in International Relations 26, 31–32 (Harry Bauer & Elisabetta Brighi eds., 2009).
181 See id. at 38.
cal theory. To find a pragmatist view of the conditions of rule, Gould and Onuf suggest that one should turn to the New Haven Jurisprudence, which they introduce as pragmatism’s representative in international law.

Starting with Legal Realism’s position about “the instrumentality of the law and its reconceptualization as a locus of judgment,” Lasswell and McDougal proceeded a step further, delineating the process of “authoritative decision” and its relation to “effective control,” and asking oft-neglected questions such as: how to identify rules; who may prescribe rules (for whom and by what procedures); who may invoke rules; and how to apply and appraise the effectiveness of rules. These are not merely questions about rules but also about rule—that is, rule as process. That said, New Haven’s pragmatist view of rule as process poses a conceptually binary opposition between two different world public orders—minimum and optimum—which may not be entirely consistent with pragmatism’s rejection of absolute and binary distinctions. Recognizing the NHS’s pragmatist potentials, Gould and Onuf still believe that its “daunting conceptual vocabulary and latent rule-skepticism” obscure conditions of rule. In their view, the NHS’s emphasis on “the degree of centralization, or . . . respect for human dignity” in differentiating between minimum and optimum world public orders neglects more delicate and important differences in forms of rule.

Gould and Onuf’s reference to the centrality of human dignity captures a significant issue at the heart of the NHS which has negative bearings for its claim to pragmatism. Their concern is to identify variations in rule depending on context and social process in which rules and rule perform different functions. Their quibble is with the liberal assumption about order as spontaneous, natural, and benign (or not always benign but nevertheless easily manageable and subject to quick adjust-

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182 Id.
183 See id.
185 Id. at 209–12.
189 Id.
190 Id.
191 See id. at 41–43.
They also take issue with the NHS’s discount of rule and rules in a world of minimum public order where human dignity is not sufficiently respected, but, as they suggest, where some “functionally limited hierarchical arrangements” do exist. Gould and Onuf do not, however, address the internal structure of policy-oriented jurisprudence and the consequences of the centrality of human dignity for its pragmatist and problem-solving promises. Further, beyond quick references to pragmatism’s incompatibility with binary distinctions, they say little about the precise implementation of the NHS’s pragmatist promises of contextualism in relation to the central role of human dignity.

The last and most recent account of international law and pragmatism belongs to an enthusiast for the potential of philosophical pragmatism to bring practice and action back to the center of international legal argument. Siegfried Schieder, who in an earlier work presented a discursive reading of pragmatism in line with neopragmatism, posits two reasons for the lack of attention in literature to the influence of pragmatism on the international legal system. The first reason is that “perceptive boundaries between pragmatism and international law may generally impede philosophy from engaging with a practical science.” Alternatively, the second reason posits that since pragmatism is understood to relate to the entirety of legal decisions, and since there is limited adjudication in international relations, there has not been adequate interest in pragmatism’s contribution to international law. Why Schieder considers international law to be merely a “practical science” is quite curious. Pragmatism’s connection to legal theory through the medium of adjudication and the low priority of adjudication in international politics, however, is not too farfetched as a possible reason for the dearth of attention to pragmatism in international law.

In Schieder’s view, the policy-oriented approach of the NHS is closely related to “the specific American products of instrumentalism

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192 See id. at 43.
193 Id.
194 Siegfried Schieder, Pragmatism and International Law, in PRAGMATISM AND INTERNATIONAL RELATIONS, supra note 180, at 127–28 [hereinafter Schieder, Pragmatism and International Law].
195 See Siegfried Schieder, Pragmatism as a Path Towards a Discursive and Open Theory of International Law, 11 EUR. J. INT’L L. 663, 689 (2000) (taking a neopragmatist turn to present pragmatism merely as a theory of discourse for which justification of norms does not have much worth beyond the discourse itself).
196 Schieder, Pragmatism and International Law, supra note 194, at 127.
197 Id.
198 Id. at 128.
and philosophical pragmatism.” Adopting a secondary literature description, he lists five features of legal pragmatism—antifoundationalism, contextualism, instrumentalism, consequentialism, and perspectivism—in order to argue, in a schematic fashion, that the New Haven Jurisprudence does in fact live up to these pragmatist demands.

Antifoundationalism in international law, under this account, amounts to a rejection of positivism and natural law, both of which have traditionally supported deduction of legal decisions from a basic norm or a system of norms. Against the traditional view of sources of international law, pragmatism stresses a relational and discursive path by virtue of which norms and legal cases come under the law of contingency and historicity. This view, Schieder says, is reflected in none other than McDougal himself, who questions a metaphysical view of rules as autonomous absolutes living in a vacuum.

Schieder’s understanding of (anti)foundationalism is too thin to take him beyond a superficial portrayal of McDougal’s view of legal normativity. Consider foundationalism in epistemology to refer to (1) a set of theories of epistemic justification that rely on a distinction between basic and inferred beliefs, (2) an a priori conception of epistemology on which all claims to knowledge depend, or alternatively (3) the idea that our standards of weaker or stronger evidence, and of more or less justified beliefs, must be grounded in some relation to justification and truth. Today, foundationalism (as well as its genetically related terms of transcendentalism, essentialism, metaphysical, etc.) is no stranger in post-realist American jurisprudence. When there is a lucid account of the relationship between epistemic foundationalism and legal theory, however, only foundationalism understood in the third aforementioned category is accounted for with an analogue in

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199 Id. at 127. Schieder mistakenly notes that Lasswell and McDougal studied in Chicago in the 1920s under John Dewey and George H. Mead, and claims that was the channel through which pragmatist thinking entered into McDougal’s approach to international law. It was in fact Lasswell alone who studied in Chicago, and whether he studied under Dewey directly would need historical proof—one that Schieder fails to provide. Id. at 140 n.3.

200 See id. at 128 (citing Thomas F. Cotter, Legal Pragmatism and the Law and Economics Movement, 84 Geo. L.J. 2071 (1996)).

201 Id.

202 See id. at 127–28.

203 See id. at 128–29.

204 Id. at 129.


206 Id.
legal theory: “[T]he idea that legal rules, to be (in a non-epistemic sense) justified, must be grounded in some relation to (presumably, moral) values.”

Understood as Schieder intends, McDougal’s antifoundationalism stands beyond any doubt and a reference to it is almost redundant. This happy ending, however, ignores more than half of the story of normativity in policy-oriented jurisprudence. Schieder repeats, almost verbatim, McDougal’s claim to empirical verification of values of human dignity in the NHS as well as his dismissal of philosophical justification. He does not pause to find evidence for the NHS’s claim to empiricism or to ask whether the lack of justification for the normative commitments of human dignity may bear any consequences for New Haven’s contextualism and problem-solving promises.

 Likewise, so far as contextualism is concerned, Schieder’s account is content with a worn-out juxtaposition between the American and European traditions of international law, in which the former is mindful of social and political circumstances and the latter is convinced of the objectivity and political neutrality of the rule of law. Schieder’s snapshot of New Haven’s pragmatism, however, does not address what context means in a policy-oriented approach, nor does it address how McDougal and his associates employ contextual variables in practice to answer legal questions.

The remaining three pragmatist features he attributed to the NHS are treated with no more diligence in Schieder’s hands. An appropriate response to Schieder’s list and his reading of New Haven’s pragmatism is a topic for another occasion. Here it is sufficient to state that instrumentalism and consequentialism—both philosophical concepts—are, in Schieder’s view, reduced to McDougal’s successful recon-

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207 See id. This is only partly true, according to Geoffrey Samuel, whose work on legal epistemology takes knowledge of “facts,” rather than legal rules, as its central concern. See Geoffrey Samuel, Epistemology and Method in Law 173–80 (2003). Justification and the status of beliefs (definition 1 above) play a role when lawyers construct and reconstruct facts in legal cases. See id. at 173. Moreover, the epistemic (non-inferential) status of both facts and concepts at the heart of some putatively naturalist approaches to jurisprudence is the litmus test of the veracity of their claim to scientific naturalism. The point here simply is that the epistemic distinction between basic and inferred beliefs bears important implications for legal theory. See id.


209 See id.

210 See id.

211 See id. at 130–31.

212 See id. at 131–34.
ciliation of law and power;\textsuperscript{213} perspectivism, as against positivism, is reduced to the legal system’s openness to newly emerging norms.\textsuperscript{214}

III. Contextualism Contextualized: A Re-Assessment of Contextual-Oriention of Policy Science Against Pragmatic Contextualism

As much as contextualism resonates with pragmatism in general, it is in fact more distinctively particular to neo-pragmatism’s idea of thinking as situated and context-bound.\textsuperscript{215} This is the belief that all thought is rooted in habits and patterns that human beings develop either individually or, more importantly, as a collective. The development of such patterns and habits is aided by the capacity for language and their transmission by culture, the two factors capitalized by the renaissance pragmatism of the post-linguistic turn.\textsuperscript{216}

Surely it was pragmatism’s understanding of knowing as situated in conventions, habits, and practice, as opposed to possessing an a priori status, that earned it a badge of victory over foundationalism. Not only did pragmatism’s founding fathers debunk the assumption of a beginning point-zero for human knowledge,\textsuperscript{217} but they also made clear that all our inquiries begin with and build upon opinions and beliefs that “we” have in stock.\textsuperscript{218} Given the emphasis on the collective notion of

\textsuperscript{213} See id. at 131–32.
\textsuperscript{214} See Schieder, Pragmatism and International Law, supra note 194, at 132–34.
\textsuperscript{215} See id. at 131.
\textsuperscript{216} For an interesting attempt to project “contextualism” onto classical pragmatism and provide an account of Holmes as the embodiment of the jurisprudential tenets of American pragmatism, see generally Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989).
\textsuperscript{217} These grounds are rational indubitable intuitions for the rationalist, and uninterpreted, real data accessible to the mind by senses for the empiricist.
\textsuperscript{218} Peirce emphasized the impossibility of universal doubt in the following way:

\[\text{[T]}\text{here is but one state of mind from which you can “set out,” namely, the very state of mind in which you actually find yourself at the time you do “set out”—a state in which you are laden with [an] immense mass of cognition already formed, of which you cannot divest yourself if you would; and who knows whether, if you could, you would not have made all knowledge impossible to yourself?}\]

Charles Sanders Peirce, What Pragmatism Is, in 5 Collected Papers of Charles Sanders Peirce 272, 278 (C. Hartshorne & P. Weiss eds., 1934). James was equally clear as to the importance of opinions each individual has in stock when set out on the path of inquiry, and his resistance to give up on old beliefs when faced with the “inward trouble” of making any modifications to those opinions. William James, Pragmatism: A New Name for Some Old Ways of Thinking 59–60 (1907). Through this struggle, eventually, the individual “saves as much of it as he can, for in this matter of belief we are all extreme conserva-
inquiry and the social origins of beliefs and habits from which it proceeds, pragmatism’s break from foundationalism parts ways with the methodological individualism of empiricism as well. Still, contextualism is more often associated with neo-pragmatism because with the neo-Wittgensteinian centrality of language in all “truth” making endeavors already standing firm on the philosophical scene, contextualism needed only to take the ball and run with it to push contingency and historical irony all the way down. Nevertheless, unless it is clear what we mean by contextualism, a proprietary quibble over the roots of contextualism in classical pragmatism or in its postmodern reincarnation is futile.

The historical and practice-bound character of human thought and life, if that is meant by contextualism, is not unique to pragmatism, old or new. Philosophers as widely apart as Otto Neurath, Martin Heidegger, and Ludwig Wittgenstein, in his later work, have all

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219 See Dewey, supra note 218, at 208–11; see also Peirce, supra note 218, at 281.
220 Rorty’s account of our present situation is illustrative of this point:

Truth cannot be out there—cannot exist independently of the human mind—because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own—unaided by the describing activities of human beings—cannot.

Richard Rorty, Contingency, Irony, and Solidarity 5 (1989). From the centrality of language in providing the sole medium to describe the world, and the contingency of all languages, he then moves to conclude that our “intellectual and moral progress [is] a history of increasingly useful metaphors rather than of increasing understanding of how things really are.” Id. at 9.

222 Referring to Neurath’s famous metaphoric boat on whose strongest planks inquirers have to hold a stable foot to continue the path of inquiry and reconstruct and change as they sail. See Otto Neurath, Protocol Sentences, in Logical Positivism 199, 201 (A.J. Ayer ed., 1959).
223 Heidegger was under no illusion that beliefs are free from presupposed prejudices that are mostly collective, historical, often unquestioned, and pre-reflective. See Martin Heidegger, Being and Time 190–203 (J. Macquarrie & E. Robinson trans., 1962).
accounted for the constituting role of praxis in human thought. Hegel, Marx, the historical school of jurisprudence, and Burkan version of conservative socio-political theory had already sung their “songs of experience” and each pondered on the practice-bound character of human inquiry before the emergence of pragmatism qua a distinctive philosophical tradition. It is true that, contrary to the conservative, Burkan treatment of history, pragmatism teaches to begin with old beliefs and builds upon them only so long as such beliefs and habits do not hinder the best usage of the tools of creative intelligence. But any philosophy that has broken away from foundationalism agrees on the situated state of knowing. What, then, pairs the “contextual” with “pragmatic” so ubiquitously? Beyond the vernacular, which tends to automatically equate one with the other, it is perhaps the fact that pragmatism ranks atop other antifoundational traditions in teasing out how exactly context-dependence of human inquiry epistemically defeats foundationalism. It does so by providing a context-dependent ground for our investigative affairs which, taken seriously, is liberated from both the illusion of foundational certainty and the chaos of radical indeterminacy. Regardless of whether pragmatism and epistemic contextualism as two existential paradigms of knowledge are merely isomorphic, their similar approaches to the role of practice and context standing against both foundationalism and skepticism validate their epistemological union. What remains is to explore the function of

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224 Ludwig Wittgenstein often emphasized the habitual and social basis of all reasoning in his later work. See, e.g., Ludwig Wittgenstein, On Certainty \¶¶ 166, 189, 204 (G.E.M. Anscombe & D. Paul trans., 1969).


226 See id. at 211–15.

227 See id. at 177–83.

228 See id. at 302–04, 306–07.

229 In contrast to a general tendency to regard pragmatism and contextualism as one and the same, some have argued for a clear distinction between epistemic contextualism and epistemic pragmatism. See, e.g., Joseph W. Long, Who Is a Pragmatist: Distinguishing Epistemic Pragmatism and Contextualism, 16 J. Speculative Phil. 39 (2003). Long applies a three-fold litmus test to differentiate pragmatism from epistemic contextualism, only the first of which is notable here. According to the first criterion, the difference between pragmatism and contextualism lies in responding to the regress problem of justification. The problem is as follows: every belief \( C \) must be inferentially justified by a belief \( E \), which in turn needs to be justified by another belief \( F \), which needs to be justified by yet another belief \( G \), ad infinitum. Contrary to foundationalism, which would have the regress end with some empirically basic or non-inferentially justified beliefs in no need of further justification, the pragmatist holds that our beliefs are immediately justified or unjustified based on the practical difference their veracity would make. Id. at 41. Contextualists, on the other
context in the New Haven Jurisprudence with respect to its pragmatic war against foundationalism.

If jurisprudential approaches of the past failed the test of temporal relevance because of their scant regard for context and a false claim to context-transcendence through legal semantics, the configurative jurisprudence of Yale is wary of a direct relationship between its relevance and context sensitivity. The scholar of policy-orientation leaves the high field of semantics for a more cumbersome and rewarding labor of self-observation through proper techniques and elements that are sufficiently sensitive to the conditionality of time and space. She has the modesty of determining her own standpoint in search of objectivity, the vigilance of protecting her profession’s collective identity against the distortive influence of power, and the diligence of returning to the field of semantics only once she is armed with a fair understanding of pragmatics.

While this summary is a fair description of what amounts to contextual-orientation in policy science, further elaboration is in order. The first part of the argument below details the various functions of context in the Lasswell-McDougal oeuvre. As will be shown, context-sensitivity, in the final analysis, is to serve two purposes: a procedure to ensure rationality and a conceptual tool against foundationalism. With this demonstrated, I will reexamine the real function of the conceptual tool of context in policy science against the backdrop of epistemic contextualism.

A. Context, Rationality, Reflexivity, and Pragmatics

Although contextualism is central to the policy-oriented approach, it is difficult to find an articulate account of how precisely context safeguards inquiry from leaning on any variation of foundationalism. On its face, the demand of such an account may seem superfluous because

hand, such as Wittgenstein in his later years, think that it is absurd to ask for any justification of our basic beliefs, because—similar to the rules of a game—such basic beliefs are beyond justification. Id. at 43. So while the pragmatic theory of knowledge argues that our basic beliefs are justified, contextualism holds that they are not. Id. at 45. In other words, contextualism is skeptical in an epistemic sense, but anti-skeptical in a pragmatic sense; whereas pragmatism is epistemically anti-skeptical. This distinction, though intriguing, is overshadowed by the simultaneously constraining and liberating role of context shared by epistemic pragmatism and contextualism. Contextualism, whether of epistemic or pragmatic genuses, liberates justification from foundationalism and at the same time constrains radical indeterminacy. That is a sufficient ground for the argument developed here to disregard this distinction.

230 See 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 17.
the contribution of particularities of context in transcending the limitations of semantic foundationalism is self-evident. The NHS finds semantic foundationalism to be the foremost reason for the failed idealism of both its contemporaneous and past approaches to international law and boasts context-sensitivity as the remedy for that failure for any jurisprudence that hopes to be relevant. Yet the obvious importance of considering the socio-political, historical, or economic particularities of each case in legal decision-making does not per se address how precisely such particularities respond to the insufficiency of the semantic. In a self-professedly value-oriented jurisprudence such as New Haven’s, normative values also make up part of the body of the context and so add yet another layer to the question around the role of context in overcoming gaps, conflicts, and ambiguities in semantics.

Three understandings of contextual-orientation in policy science can be gleaned from the works of Lasswell and McDougal. The first two are specific to Lasswell’s policy sciences, and the third one is contextualism as applied to the jurisprudence of international law.

1. Contextual-Orientation and Rational Observation

According to Lasswell, the path of inquiry for the policy analyst is not a journey with a specific end in view, but rather a means to enhance the potential for enlightened action. Rational inquiry leading to enlightenment reads the meaning of details as part of a whole, the conception of which is in turn constructed, revised, and disciplined through concrete evidence in a dynamic manner. The whole in each situation under investigation is made up of the socio-historical context of that situation in addition to value judgments specific to the particular analyst. To ensure rationality, the complex web of social interactions based on shared meanings and values “recognized and sustained in the continuing interplay among participants in the social process” must be considered both as an objective universe to face and as a context to penetrate by the analyst. The analyst undertakes a psychoanalytical examination of herself and the unfamiliar territory of the social process and considers the wider context than that which is apparent. Yet the familiar is under constant reexamination as well: “The whole aim of the

231 Id. at xxii.
233 See id. at 218.
scientific student of society is to make the obvious inescapable” as “[t]he world about us is much richer in meanings than we consciously see.”

Thus, for Lasswell, the conception of the “self-in-context” necessarily links the analyst’s “insight” into one’s self with her knowledge of other people and a wider social context, as it is through an understanding of individual characteristics that are “ordinarily excluded from the focus of full waking attention by smooth working mechanisms of ‘resistance’ and ‘repression’” that the inhibiting shadow of anxieties is dispelled and the light of rationality appears. As much as psychoanalytic observation of the self and “insight” into individual characteristics is important to remove blinders and render an understanding of social context possible in order to make the individual aware of her total institutional context and provide for contextual “insight” into social reality at different levels, traditional psychoanalytic technique must be adapted to “reality critique.” Rational observation is thus ensured by the analyst’s deep “insight” into the particular context of individual specificities which provide the lens through which the institutional context is examined.

Rational inquiry is also contextual in the sense that it is necessarily directional, that is, of a temporal, developmental dimension. Contextual-orientation is to discern a totality which is not fixed in time, but involves both a stable configuration in a particular moment and a process of changing patterns in the form of historical development. The “principle of temporality” requires that the policy analyst, as an actor within a changing context, adopt a “developmental construct” and draw an image of anticipated future developments based on past trends. Such a “developmental construct” is not bound to any laws of historical development, contrary to Marx to whom Lasswell acknowledges a debt for this concept, but rather it is tentative and subject to

\[\text{Id. at 250.}\]
\[\text{Id. at 36.}\]
\[\text{Lasswell, A Pre-View of Policy Sciences, supra note 158, at 155–57.}\]
\[\text{See Lasswell, Clarifying Value Judgment, supra note 234, at 96–97.}\]
\[\text{Lasswell, A Pre-View of Policy Sciences, supra note 158, at 158.}\]
\[\text{See id.}\]
\[\text{Harold D. Lasswell, World Politics and Personal Insecurity 4–5 (1965) [hereinafter Lasswell, World Politics and Personal Insecurity].}\]
\[\text{Harold D. Lasswell & Abraham Kaplan, Power and Society: A Framework for Political Inquiry, at xiv (1950) [hereinafter Lasswell & Kaplan, Power and Society].}\]
\[\text{Lasswell, A Pre-View of Policy Sciences, supra note 158, at 67–68.}\]
revision. Future events are “partly probable and partly chance” and no amount of knowledge of past trends and present evidence can totally eliminate uncertainty.\footnote{Id. at 11.}

Context-sensitivity not only enables the individual observer to see through her own individual characteristics and background that have had a pivotal formative influence on her observation, but also empowers the analyst’s professional identity to stand free from the internal peculiarities of the observer or the external pressure of power. It thereby becomes emancipatory by embedding itself in a professional outlook conscious of its limits and capabilities.

\section*{2. Context-Sensitivity and Professional Reflexivity}

The enlightened observer is inescapably, but only implicitly, conscious of her past, present, and future assumptions and the influence of her natural and cultural environment. To uplift that consciousness to the level of “undogmatic access to inclusive versions of reality,” there ought to be professional “policy training operations” that employ appropriate procedures to make a full image of the total context available to the analyst.\footnote{Id. at 155–56.} One example of such a procedure, according to Lasswell, is to hold continuing seminars composed of highly committed members who willingly engage in a collective psychoanalytic technique of free association in which “uttering of uncensored suggestions” is encouraged.\footnote{Id. at 150.} He suggests the appointment of a “devil’s advocate” in an adversarial model of seminars to challenge dominant predispositions and help unmask unrecognized demands, expectations, and identifications.\footnote{Id. at 152–53.} Pursued seriously, a global network of such seminars to this end could be established.\footnote{See id. at 154.}

The reflexive labor of the analyst toward reducing constraints upon freedom and rationality of inquiry thus moves beyond “insight” into oneself, simultaneously demanding and reinforcing an institutional identity. The identity of rational policy science as such is defined by the analyst whose “insight” allows her to observe changes of social regularities alongside the changes of “current meaning,” which in turn lead to a transformation in the practical “context” of action.\footnote{Harold D. Lasswell, \textit{The World Revolution of Our Time: A Framework for Basic Policy Research}, in \textit{World Revolutionary Elites: Studies in Coercive Ideological Movements}} For rational
policy science to be effective, the analyst must possess a creative orientation that allows her to at once detach from, and immerse into, the total context of social process with the mental flexibility to comprehend the process as one that both influences and is influenced by the actors.\footnote{See Lasswell, A Pre-View of Policy Sciences, supra note 158, at 155–56; Lasswell, World Politics and Personal Insecurity, supra note 242, at 4–6.} The principal goal of the enlightened policy analyst in understanding the social process is “truth”; a goal that cannot be simply presumed but must be adopted as a demanding commitment.\footnote{Harold D. Lasswell, Some Perplexities of Policy Theory, 14 Soc. Res. 176, 181 (1974).} This commitment is under constant threat by the distortive pressure of power and can be sustained only through individual efforts of the analyst as well as a cultivated professional identity for rational policy science that supports a network of rational inquirers.\footnote{Id. at 177.}

It is in the face of such circumstantial pressures and internal blind spots of personal and professional identity that Lasswell devises clear procedures to maintain contextual-orientation as a distinctive character of rational policy inquiry.\footnote{See Lasswell, A Pre-View of Policy Sciences, supra note 158, at 63–64.} Contextual-orientation is thus both an individual and a collective undertaking to enhance the rationality of policy analysis.

3. Inadequacy of Semantics and Pragmatics of Context

A comprehensive orientation in policy science toward context arms the analyst—whose principal goal of seeking truth sets her apart from the typical policy actor—with the intellectual means for undogmatic, rational policy analysis, free from the peculiarities of the personal identity and from the symbols or myths attached to professional identity. Translated to legal labor, the enlightening role of context is perhaps even more crucial, as the legal agent may act not just as the scholar to recommend sound decisions, but also as the actor entrusted with actual decision-making power. Contextual-orientation here ensures the rationality of such decisions in the sense of a closer approximation of community-approved value goals.

Legal semantics, devoid of determinate meaning, riddled with complementarity of propositions and conducive to normative-ambiguous prescriptions, falls short of the demands of a jurisprudence that is
to remain relevant at any time.\textsuperscript{255} A policy-oriented jurisprudence of international law "\[a\]bjur[es] the metaphysical derivations and justifications" of normative prescriptions so characteristic of jurisprudential work and instead relies on an empirical study of the comprehensive context of the social process within which the prescription is to be made.\textsuperscript{256} Any syntactical derivation from past decisions and semantics of rules must be weighed against alternative derivations in terms of their practical consequences for the value goals most extensively shared by decision-makers and their constituencies.\textsuperscript{257} Exclusive focus on legal semologies or content (including semantics and syntactics) without a conscious appreciation of total context of their cause and effects (pragmatics) bears the blame for much of the normative ambiguity and irrelevance of international law jurisprudence.\textsuperscript{258}

Cognizant of the comprehensive web of essential variables affecting decisions (causes) and rational appraisal of the aggregate value consequences of competing alternatives (effects), a policy-oriented international law locates authoritative decisions within the social process of the interaction of a larger global community and smaller communities. Because of interdependency or "interdetermination and interdependence\textsuperscript{259}" of peoples across state lines" as they seek to maximize values by utilizing institutions and affect resources, says McDougal, one can well speak (as he does interchangeably) of "world community process" or "world social process."\textsuperscript{260} The world social process is defined by the pro-


\textsuperscript{256} See id. at 186.

\textsuperscript{257} See id. at 146.

\textsuperscript{258} Lasswell and McDougal, following the “behavioristic” analysis of semiotician Charles W. Morris in his discussion \textit{Foundations of the Theory of Signs}, in \textit{1 International Encyclopedia of Unified Science} 77 (Otto Neurath et al. eds., 1938), present a distinction between different statements of law. In brief, the entire science of statement analysis (semiotics) is made up of statements about content (semologics) and statements about cause and effects (pragmatics). Semologics in turn consists of syntactics, which is the internal relationship of a body of (legal) propositions with one another (in terms of consistency, economy, and degree of generality), and semantics, which is the external reference of a proposition. See McDougal & Lasswell, \textit{Legal Education and Public Policy}, supra note 3, at 267–69.

\textsuperscript{259} McDougal seems never to have defined the word "interdetermination" but used it interchangeably with "interdependence," as in the following sentence: "[The world community process] exhibits the same kinds of interdeterminations, the same kinds of interdependences, as our national processes." Myres S. McDougal, \textit{International Law and the Law of the Sea}, in \textit{The Law of the Sea} 3, 5 (Lewis M. Alexander ed., 1967).

cess of sharing and shaping eight basic values (power, enlightenment, respect, wealth, well-being, skill, affection, and rectitude), the resolution of dispute over which may be accomplished within the world power process, that is, authoritative decisions with international effects that are enforced through severe deprivation or extreme indulgence. The world power process is shaped by, and in turn shapes, the interactions of the world community with its encompassed sub-communities. As such, to be entirely contextual, it is essential to adopt proper procedures that identify the source of decisions within this reciprocal interaction and their effects on the distribution of community values.

Lasswell and McDougal introduce a quite sophisticated conceptual apparatus to structure inquiry into context. First, to avoid normative-ambiguity, policy-oriented jurisprudence recommends a clear distinction between what calls for an authoritative decision, that is, specific events or value changes in social process precipitating conflicting claims, and the decision itself. These decisions have both short-term and long-term consequences for values. When some participants in the world social process are threatened or deprived of certain values resulting from the actions of others which they call illegal, they call upon the authoritative community decision-makers to apply certain prescriptions of international law to restore any lost values. By weighing the claims and counterclaims of the deprived and the depriver and interpreting the prescriptions the parties have invoked to foster their claims, they “invariably seek to make reasoned decisions by reference to common policy and shared interests.”

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261 See 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 188–90.
263 The world power process, McDougal writes, may . . . be insightfully viewed as a complex hierarchy of power processes of varying degrees of comprehension (global, hemispheric, regional, national, local), with the more comprehensive affecting “inward” or “downward” the less comprehensive, and the latter in turn affecting “outward” or “upward” the former. The metaphor of “nesting” tables or cups might be apt if such tables and cups could be conceived as being in process of constant interaction and change.
264 See 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 21–38.
265 See id. at 30–31.
266 See McDougal, The Impact of International Law upon National Law, supra note 260, at 167–68.
267 Id. at 168.
Second, the legal scholar or decision-maker engages in a three-tier analysis of “values,” “phase,” and “conditions.” These categories provide a reasonably full access to the values contested, knowledge about participants with a claim over values, and the past, present, and future of value distribution in the world power process. Under the value category, McDougal holds that the observer or decision-maker ought to consider the events leading to claims, the actual claims made over values, and all decision alternatives in terms of their policy implications or value consequences. For instance, to distinguish between permissible and impermissible coercion, a context-sensitive approach should ask to what extent coercion was necessary to change the distribution of values and how comprehensive the parties’ objectives were (consequentiality), whether the coercion was to defend the established distribution of values or to change the existing setting (conservation or extension), and to what degree the contested values were inclusive or exclusive.

In the phase analysis, inquiry is made into “features,” “elements,” or “aspects” of the process of any interaction through which men shape and share values. In addition to community or social processes as a whole, the value process, the process of legal or authoritative decisions, the analysis of events, and the claim and decision processes, there are seven categories that help dissect the specific features of each context. These are: participants (who acted in varying roles that culminated in a particular outcome?), perspectives (what were the expectations and value demands of participants and who did they identify with?), situations (where and under what conditions were the participants interacting?), base value (what effective means were at the disposal of participants to achieve their objectives?), strategies (in what manner were this means manipulated?), outcome (what was the immediate result of this interaction for value allocation?), and finally, effect (what are the effects of different duration of the outcome of the interaction?).

In the “conditions” or “conditions of context” analysis, McDougal often refers to a number of additional factors relating to the location of a particular context within the larger context of world power proc-

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268 See McDougal et al., *Theories About International Law*, supra note 30, at 198.
269 See id.
270 See id.
272 See McDougal et al., *Theories About International Law*, supra note 30, at 198.
273 See id.
For example, some factors affecting the authoritative process of interpretation and application of international agreements include: changes in the relative strength of contending visions of world public order which commend persuasion or coercion as instruments of social change, changes in the composition of territorial communities affecting the modalities of communication and common perception of meaning, changes in the technology of communication, and changes in strategies of cooperation in shaping and sharing values that may affect expectations about future modalities of such cooperation.

This sketch of the role of context in a configurative jurisprudence hardly does justice to the impressive precision with which a contextual-oriented inquiry is de-limited by Lasswell and McDougal. So much has already been said that it is unrealistic to expect a successful application of such a complicated conceptual framework in practice. Even with a masterfully crafted design of details of the indices affecting context, the limitations of investigative resources hamper any attempts to account for all variables that cause decisions and consider their respective consequences. A parsimonious selection of variables to account for, though perhaps far from the ideal image of a scholar, is more reasonable for the practitioner of international law. McDougal’s proposal in

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274 See Myres S. McDougal, Harold D. Lasswell, & James C. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure 34 (1967) [hereinafter McDougal et al., The Interpretation of Agreements and World Public Order].

275 See id.

276 This criticism comes from writers of the “incrementalist” school, most prominently Charles Lindblom. He rejects the recommendation to examine all the variables that give rise to specific decisions, or consider alternatives by way of investigation into their consequences for aggregate values, as utterly unrealistic. He instead recommends that the goals in each decision-making process be limited to a few specific ones, and that a limited number of alternatives, which differ from one another only incrementally, be considered for the advancement of those goals. See, e.g., Charles Lindblom & David Braybrooke, A Strategy of Decision: Policy Evaluation as a Social Process (1963); Charles Lindblom, The Science of “Muddling Through,” 19 Pub. Admin. Rev. 79 (1959); see also Nicholas Greenwood Onuf, Do Books of Reading Contribute to Scholarship?, 23 Int’l Org. 98 (1969).

277 Oscar Schachter writes about this from his own standpoint as a practitioner:

This brings me to still another prejudice of the international official—one which he probably shares with others in practical affairs—that is, a bias in favor of deciding questions with reasonable dispatch and facility. This, we realize, is far from the ideal conception of a scholar. We have been told, for example, that one must consider all the conditioning factors that affect decisions in the field of international law. . . . We have also been told that we must take into account future developments and the impact of various alternatives on the whole range of basic values. But surely if we attempted to follow this counsel, even in small part, no decisions would ever be made on the
fact reaches the outer limits of empirical possibility by requiring investigators to deal with eight value categories and seven phase categories with attendant sub-categories, an open-ended list of conditions of context, and five dispositional factors specifically related to scientific thinking (culture, class, interest, personality, and crisis).

Valid as this critique may be, the impossibly demanding nature of the empirical task is not the focus of this Article. The more interesting point is to illustrate how the empirical potential of the conceptual apparatus of contextualism is indeed crippled under the shadow of a “postulated” value system of human dignity. McDougal’s recommended investigation into the pragmatics of cause and effect boils down to a determination by a decision-maker of the balance of value systems and an appraisal of alternatives to those decisions. The role of law in the world power process is to ensure the conservation and expansion of the preferred value system of human dignity, and the recommended phase analysis with all its scrupulously defined subcategories must be utilized to that end. No doubt legal semantics is unable to live up to this task. But nothing in that suggests that the meaning of rules, as McDougal is convinced, is radically indeterminate. Contextualism can afford to offer an epistemic view within which meaning is determinable, if not invariably determinate. Pragmatics of context, therefore, is epistemically illu-

complex issues of contemporary international life. From the point of view of a participant—if not of a scholar—we must have a reasonably manageable frame of reference; we must take account of the limits on our ability to obtain and organize information and to look into the future; we must, in consequence, restrict our focus to relatively few variables and pay attention to perhaps only one or two major values in any specific situation. In short, it is not wisdom (as Santayana observed) to be only wise, and it may not be rational to introduce all the questions that should rationally be considered. For most of them may be unanswerable.

Oscar Schachter, *The International Official in a Divided World*, 53 Am. Soc’y Int’l L. Proc. 344, 348 (1959). McDougal seems to be aware of some of these problems, but never to have offered any practical suggestion as how to face them. See, e.g., McDougal et al., *Theories About International Law*, supra note 30, at 286 (admitting to the difficulty of accounting for all goal values and preferences, but also taking issue with the “incrementalist” thesis, which in its strict form is unable to estimate “what is worth knowing” and appraise “the net benefits of alternative benefits”); Myres S. McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *The Ethic of Power: The Interplay of Religion, Philosophy, and Politics* 221, 238 (Harold Lasswell & Harlan Cleveland eds., 1962) [hereinafter McDougal, *The Ethics of Applying Systems of Authority*] (conceding the fact that she who applies principles of content and procedure is ultimately responsible for using her creative discretion to choose which values to consider, and that such principles will aid in the process of selection).

278 See *McDougal et al., The Interpretation of Agreements and World Public Order*, supra note 274, at 34.
minervative of semantics. This is contrary to the policy-oriented approach of Lasswell and McDougal, under which legal semantics is irremediably indeterminate and indeterminable, and so disregarded and replaced with pragmatics.\textsuperscript{279} Ironically, the consequences of McDougal’s recommended pragmatic context analysis in its most precise form are not contingent on context, but instead guided by a set of non-reflective values or “preferred events” which themselves are not context-dependent.\textsuperscript{280} They are thus no less unwarranted or rigid than what McDougal avoids in the foundationalism of semantics.

B. A Re-Assessment of the Role of Context in Policy-Oriented Jurisprudence

As noted earlier, Lasswell and McDougal’s masterly detailed articulation of a conceptual framework for context-analysis triggered a good deal of skepticism, much of which related to the demanding empirical task involved.\textsuperscript{281} A more interesting critique of Lasswell’s original design of a framework for contextual-orientation, however, asks some difficult questions about the rationale behind devising the categories and sub-categories as introduced by policy science.\textsuperscript{282} This is particularly crucial with regard to the value category and its eight subsumptive sets of values which I will take up in the next part. Here, I intend to illustrate how, in the New Haven Jurisprudence, pragmatics neither complements semantics nor in fact addresses occurring cases of semantic indeterminacy to provide interpretive remedy, but instead is substituted for semantics. Because, as will be shown, the value category in the last analysis outruns other categories in the McDougalian contextual apparatus to find answers to legal cases, contextual-orientation is in effect tantamount to the preservation of values of human dignity. This, however, is nothing more than a trite observation regarding policy-oriented international law, known to any dilettante with the most cursory ac-

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\textsuperscript{279} See McDougal & Lasswell, Legal Education and Public Policy, supra note 3, at 268.
\textsuperscript{280} See 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 335–36.
\textsuperscript{281} See Tipson supra, note 31, at 537.
\textsuperscript{282} A critic takes Lasswell’s failure to give any explanation as to how he arrived at these categories, which he introduces as the conceptual tools for context analysis, to be “mere ’intellectuality’ in science,” arbitrary, and “the result of intellect ’culling’ ideas from all other minds engaged in solving problems of substance without Professor Lasswell having the benefit of experiencing that process.” Arthur J. Brodbeck, Scientific Heroism from a Standpoint Within Social Psychology, in Politics, Personality, and Social Science in the Twentieth Century, supra note 115, at 245. The result is a set of concepts received with no more than “cold empathy,” leaving the reader desiring to know about Lasswell’s own creativity in selecting some concepts rather than others. Id.
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quaintance with its value-oriented configurative jurisprudence. Furthermore, the primacy of values of human dignity over all other contextual factors does not in and of itself negate the context-sensitivity of McDougal’s approach, though it certainly affects its efficacy. The problem appears only when such justifying values remain unjustified in a context-transcendent manner, betraying epistemic irresponsibility on the part of advocates of values of human dignity. The upshot is not only universalizing the particular, but more importantly, presenting answers to cases, hard or not, that are as predictable as any diehard literal reading of semantics may produce. The examples below will demonstrate this point.

In a comprehensive series of four volumes on world public order, McDougal and his collaborators set a prime example of the level of sophistication involved in any contextual analysis.283 Applied to the general jurisprudence of a particular doctrinal field, the grand task is no impediment to a “systematic”284 effort to capture various constituents of

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283 See McDougal & Burke, The Public Order of the Oceans, supra note 95; McDougal & Feliciano, The International Law of War, supra note 271, at 71; Myres S. McDougal, Harold D. Lasswell & Ivan A. Vlasic, Law and Public Order in Space (1963); McDougal et al., The Interpretation of Agreements and World Public Order, supra note 274. In order to recommend the method by which decision-makers should determine basic community values, and alternatives thereof to address each respective problem area, these volumes place values in their most comprehensive context as follows: They first offer a phase and value analysis to establish (1) the process by which the values of space and oceans are shaped and shared, coercion inflicted, or agreement reached; (2) the process of claims and counterclaims regarding each particular area and the problems faced by decision-makers having to choose between the conflicting claims; and (3) the process of decision, related to the area in question, by which contraposed claims are resolved. This is followed by an examination of the larger context of conditions in which each process occurs. McDougal and his associates then go on to recommend basic community policy or policies to guide decision-makers in balancing existing claims in the relevant area. The subsequent chapters take this analysis to a more specific level regarding particular problems in the area under examination, finally recommending the intellectual tasks designed to help the scholar scientifically understand the history of the problematique (trend) and alternative possibilities, given the already-clarified goals of the scholar and the desired direction of the future. Trend analysis itself requires a contextual analysis of the past, similar to what the decision-maker is advised to do for present decisions. This should attest to the level of sophistication in McDougal’s recommended contextual analysis. For works by colleagues or followers of the NHS who have adopted this mode of inquiry, see, for example, Douglas M. Johnston, The International Law of Fisheries: A Framework for Policy-Oriented Inquiries (1968); B.S. Murty, Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion (1968); William T. Burke, The Legal Regulation of Minor International Coercion: A Framework of Inquiry, in Essays on Intervention 37 (Roland Stanger ed., 1964).

284 However apt a description “systematic” is, it still must be qualified. Sometimes the subject matter does not lend itself to the application of conceptual categories, such as in McDougal & Burke, The Public Order of the Oceans, supra note 95, at 453–62, where
context by McDougal and his associates through the designated proper categories.\textsuperscript{285} This degree of comprehensive coverage of contextual categories, however, barely sustains when McDougal addresses specific cases in order to assess their legal status in practice.\textsuperscript{286} For instance, consider McDougal’s recommended contextual analysis of the lawfulness of coercion, in which the decision-maker ought to consider the events, claims, and decision alternatives to assess the short-term, middle-range, and long-term proposed or actual consequences for community values.\textsuperscript{287} Together with this is a consideration of the particular event leading to the claim under investigation so far as the phase category and conditions of context are concerned.\textsuperscript{288} More concretely, when considering participants in an incident of coercion, their “fighting capabilities, composition of internal elites, concentration of power in internal structures of authority, [and] ideological affiliation” are at stake.\textsuperscript{289} The decision-maker must take into account the participants’ objectives, the importance of the goals pursued (whether they bear major or minor changes to the existing order), the expansion or conservation of values, and the sharability of values.\textsuperscript{290} The conditions of context include some “more important factors of fairly obvious significance [for] . . . appraising lawfulness [of coercion] . . . expectations about the nature of the available technology of violence, and about the relative probabilities of effective community intervention, and the kind of public order demanded by the respective participants.”\textsuperscript{291} McDougal directs the decision-maker to inquire (1) not only into which participant fired the first shot, but also into whether such an act was justified under the circumstances; (2) into which participant accepted community intervention more readily; and (3) into the “degree of conformity” that

\textsuperscript{285} See, e.g., McDougal et al., \textit{The Interpretation of Agreements and World Public Order}, supra note 274, at 14–21 (dividing the context of international agreements into the following categories: participants, objectives, situations, base values, strategies, outcomes, effects, and conditions).

\textsuperscript{286} See, e.g., McDougal, \textit{The Soviet-Cuban Quarantine}, supra note 42, at 598–600 (discussing Article 51 in terms of customary rights instead of contextual analysis).


\textsuperscript{288} See id. at 779–91.

\textsuperscript{289} See McDougal, \textit{The Ethics of Applying Systems of Authority}, supra note 277, at 235 (emphasis added).

\textsuperscript{290} Id. at 235–36.

\textsuperscript{291} McDougal & Feliciano, \textit{The International Law of War}, supra note 271, at 183.
the decision-maker expects to secure if “a characterization of impermissibility” is to be made.\textsuperscript{292}

In response to Quincy Wright and other critics of the U.S. quarantine of Cuba,\textsuperscript{293} McDougal argued for the legality of the quarantine based on a new interpretation of Article 51 of the United Nations Charter (Charter).\textsuperscript{294} While Wright argued that the United States was not responding to an “armed attack” and thus was not entitled to a defensive use of armed force,\textsuperscript{295} McDougal scoffed at the strict interpretation of Article 51 by virtue of which the customary right of self-defense is limited to the actual cases of an armed attack.\textsuperscript{296} Invoking the “plain and natural” language of Article 51 quite curiously, McDougal accuses the proponents of a strict reading of Article 51 of “word-juggling” and “substitut[ing] for the words ‘if an armed attack occurs’ the very different words ‘if, and only if, an armed attack occurs’.”\textsuperscript{297} McDougal repeated his earlier arguments for the right to anticipatory self-defense in Law and Minimum World Public Order to offer a different reading of Article 51 reflecting the customary limitations of necessity and proportionality on the right to self-defense\textsuperscript{298} and concluded:

\textsuperscript{292} See id. at 206.
\textsuperscript{293} See Quincy Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546 (1963). For more on Professor Wright's position, see also Quincy Wright, Non-Military Intervention, in The Relevance of International Law 5, 13 (Karl Deutsch & Stanley Hoffman eds., 1971).
\textsuperscript{294} McDougal, The Soviet-Cuban Quarantine, supra note 42, at 603.
\textsuperscript{295} See Wright, supra note 293, at 560–61.
\textsuperscript{296} See McDougal, The Soviet-Cuban Quarantine, supra note 42, at 599.
\textsuperscript{297} Id. at 600. Leo Gross turns this argument against McDougal, claiming that McDougal himself could also rightfully be accused of word-juggling, as his comments could be read as follows: “Nothing . . . shall impair the inherent right of . . . self-defence, if, but not only if, an armed attack occurs . . . .” Leo Gross, Problems of International Adjudication and Compliance with International Law: Some Simple Solutions, 59 Am. J. Int'l L. 48, 53 (1965).
\textsuperscript{298} See McDougal, The Soviet-Cuban Quarantine, supra note 42, at 598. As McDougal puts it:

The more important limitations imposed by the general community upon this customary right of self-defense have been . . . those of necessity and proportionality. The conditions of necessity . . . have never . . . been restricted to “actual armed attack”\textsuperscript{,} imminence of attack of such high degree as to preclude effective resort by the intended victim to nonviolent modalities of response have always been regarded as sufficient justification, and it is now generally recognized that a determination of imminence requires an appraisal of an initiating state’s coercive activities upon the target state’s expectations about the cost of preserving its territorial integrity and political independence. Even the highly restrictive language of Secretary of State Webster in the Caroline case, specifying a “necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation,” did not require “actual armed attack,” and the understanding is now widespread that a test formulated in the previous century . . . is hardly relevant to contempo-
Even this impressionistic recall of some of the more salient features of the larger context of threat and response should suffice to suggest that a third-party observer, genuinely concerned to clarify the common interests of all peoples, could reasonably conclude that the action taken by the United States was in accord with traditional general community expectations about the requirements of self-defense. The flow of pertinent comment and decision since the incident would indeed seem to confirm that this has been the overwhelming conclusion of world public opinion.299

The “impressionistic” examination of the larger context of the necessity and proportionality of the imposition of quarantine took into account the fact that the countermeasure was aimed against the U.S.S.R. and not against Cuba, and that, far from being egocentric, it was endorsed by the Organization of American States (participants).300 While the Soviet objectives were expansionist, the United States was responsible for securing the elimination of nuclear weapons from Cuba.301 The general geographic area was of strategic concern to the United States and other countries in the hemisphere (situation), as historically expressed through the Monroe Doctrine. Furthermore, expectations of a crisis in the world arena were high and the estimates for an effective response from the organized community of states were low.302 The outcome of the Soviet’s act, almost within its reach, was a new, more direct military threat to the whole of the Americas, while the quarantine was a reversible action causing no irremediable destruction.303 It is true that none of these contextual factors are considered in comparison to the counterclaims of the adversary as a genuine contextual-oriented analysis would require and that McDougal’s drawing on geographically harmonious foreign affairs interests in light of, inter alia, the Monroe Doctrine is simply ahistorical and, further, that the magnificence of the actual quarantine vis-à-vis the perceived threat is trivialized simply as “reversible.” What is more illuminating, however, is two-fold.

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299 Id. at 603.
300 See id. at 601–02.
301 See id.
302 Id.
303 Id. at 602–03.
First, McDougal’s reliance on the language of Article 51 to justify the legality of the quarantine is highly curious.  

Ironically enough, not even the U.S. government made any attempt to use Article 51 to justify the Cuban quarantine. The State Department’s then-Deputy Legal Adviser, Leonard Meeker, later summarized the Government’s position as follows:

[I]t may be noted that the United States, in adopting the defensive quarantine of Cuba, did not seek to justify it as a measure required to meet an “armed attack” within the meaning of Article 51. Nor did the United States seek to sustain its action on the grounds that Article 51 is not an all-inclusive statement of the right of self-defense and that the quarantine was a measure of self-defense open to any country to take individually for its own defense in a case other than an “armed attack.” Indeed, as shown by President Kennedy’s television address of October 22[, 1962,] and by other statements of the Government, reliance was not placed on either contention, and the United States took no position on either of these issues.


304 See D.P. O’Connell, Book Review, 4 Sydney L. Rev. 318, 318 (1964) (reviewing Myres S. McDougal & F.P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961) and Myres S. McDougal, Studies in World Public Order (1960)). Without elaborating further, O’Connell writes: “McDougal, despite all his social science language, and his dedication to relativism, is in fact excessively legalistic and of a fundamentally conservative turn of mind.” Id.

305 See McDougal, The Soviet-Cuban Quarantine, supra note 42, at 600.

306 See id. at 602–03 (applying a contextual framework to the factual scenario of the Cuban crisis).
for “redefinition” or a less restrictive view of anticipatory self-defense, and it is not clear how mysteriously such a broad view would gain widespread recognition in the short term. It is worth noting that one may object to the distinction between questions of facts and law as contradicting the basic principles of viewing law as a process of authoritative and controlling decisions—perhaps disguised positivism. Such an objection is without force, however, because it is precisely the absence of factual grounds in interpreting the law that renders McDougal’s project of contextual-orientation meaningless for legal interpretation.

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308 McDougal & Feliciano, The International Law of War, supra note 271, at 67. According to the authors:

The traditional requirements imposed upon resort to self-defense—a realistic expectation of instant, imminent military attack . . . —may . . . require some redefinition to take into account the potentialities of the newer technology of violence. From this perspective, the emphasis in the United Nations Charter upon “armed attack” as the precipitating event for the legitimate recourse to self-defense may appear most unrealistic.

Id. 309 In fact, in her review of the U.N. debates about self-defense from its founding to 1963, Rosalyn Higgins concludes that:

In virtually all those instances where a right of anticipated self-defense has been specifically in issue . . . the United Nations has preferred not to give rein to the doctrine. This does not, however, warrant the assumption that Article 51 has restricted this right as laid down in The Caroline; there has merely been a reluctance on the part of the United Nations to encourage it, for fear it may be too fraught with danger for the basic policy of peace and stability.


310 It is helpful here to compare, in some length, Richard Falk’s inquiry into the legality of the 1968 Israeli raid on the Beirut airport, during which Israeli soldiers destroyed all commercial aircraft belonging to Arab Airlines in retaliation for Arab commando actions against El Al Airline. See generally Richard Falk, The Beirut Raid and the International Law of Retaliation, 63 Am. J. Int’l L. 415 (1969). On the doctrinal level (the Charter and subsequent U.N. re-affirmations thereof), Falk asserts, “Israel is not entitled to exercise a right of [forcible] reprisal in modern international law.” Id. at 430. While the law “seems clear” on this point, he continues, “[s]uch clarity . . . serves mainly to discredit doctrinal approaches to legal analysis. International society is not sufficiently organized to eliminate forcible self-help in either its sanctioning or deterrent roles.” Id. This fact regarding the expectations of the “international society” ought to be considered when judging the legality of the Israeli actions. Falk thus draws on the precedent of February 1969, another Israeli attack against Arab commando bases in Syria:

Evidently, for instance, the attacks on the Syrian bases resulted in fairly large Arab casualties and yet failed to provoke any sense of international opposition to the Israeli action. An attack of this kind on bases seems well assimilated . . . into the structure of international expectations about tolerable levels of Arab-Israeli violence, given current levels and forms of conflict and hostility.
Second, though the value category occupies an independent framework alongside other categories in the McDougalian conceptual scheme for contextualism, it is hardly an overstatement to note that it in fact colonizes the implications of all the other categories in its normative grasp.311 The clearly articulated constituent elements of context, the identification of participants, the assessment of their objectives, perspectives, situations, base values, strategies employed, and outcome and effects, all take place on a bedrock of binary opposition between the universally sharable values of human dignity and the totalitarianizing values of human indignity. The identification of a participant with either of the two dominant visions of world public order, and the characterization of its objectives and perspectives and the effects of the claims and decisions simply leaves no room for a holistic understanding of context. No sooner is a participant identified on either side of the

Id. at 420. So given public expectations about a tolerable level of violence in the Arab-Israeli relationship, these expectations give rise to a valid second level of legal inquiry. As Falk puts it:

As a technical matter, Charter law is properly accorded priority over inconsistent rules of customary international law. . . . However, the inability of the United Nations to impose its views of legal limitation upon states leads to a kind of second-order level of legal inquiry that is guided by the more permissive attitudes toward the use of force to uphold national interests that is contained in customary international law. . . . Even second-order [level of] legal inquiry may be ill-adapted to the kind of retaliatory claim being made by Israel . . . and a third-order legal inquiry involving the specification of considerations bearing on the relative legal status of a particular retaliatory claim [may be necessary].

Id. at 430–31 n.39. On the third level of inquiry, Falk offers a set of indicators to assess the legality of Israeli claims, indicators (which are mainly specifications and adaptations of customary norms) that unlike customary norms, would "overcome[e] the dichotomy between war and peace, and would be more sensitive to the continuities of terroristic provocation and retaliatory response such as are evident in the Middle East." See id. at 435. Based on these indicators, Falk notes the Israeli Beirut raid as unreasonable and thus illegal. Id. at 439–40.

The difference between McDougal’s and Falk’s applications of “general public expectations” as a contextual factor in assessing the legal status of an incident of coercion should be obvious. While Falk’s process-oriented approach has no difficulty severing the link between public expectations and the law of the Charter to suggest different orders of inquiry, McDougal’s invocation of the text of the Charter draws on facts on the ground to determine the meaning of Article 51 but to decide the urgency of preemption and then provide a Charter-based rationalization. Absent from the former is a clear articulation of the legal basis for lower levels of inquiry, as well as any regard for contextual interpretation of the existing law. The latter, however, is in sheer disregard of contextualism at the core of a policy-oriented international law. Neither one takes the elements of context affecting the interpretation of the law of Charter seriously.

311 See McDougal, International Law, Power, and Policy, supra note 157, at 169.
value pole than the idea of holistic reasoning in context is nipped in the bud. None of this is to suggest that, in a sly rationalization of desideratum, McDougal manipulates the conceptual apparatus of context to reach his favored policy consequences. Rather, the claim is that, taken to its logical conclusion, the reign of value judgment over all other variables of context and the fixity of value demarcation in the policy-oriented approach neither can nor does leave any hope for a genuinely contextual-oriented jurisprudence.

The rigidification of context is by no means limited to the law of the use of force. While rejecting international law jurisprudence on the termination of treaties for either overemphasizing consent or unrealistically terminating agreements unilaterally, McDougal suggests an organization of “systemic inquiry into the prescription and practice by which the decision-makers of nation-states terminate . . . agreements” that “distinguishes between termination which is based on mutual consent and termination” based on the grounds of changed conditions. An inquiry that is both cognizant of the past practice of the decision-makers of nation-states and amenable to securing policy preferences should seek an “appropriate balance between the honoring of the reasonable expectations of the parties to agreements . . . and the permitting or encouraging of a continual, progressive reformulation of policies to keep them in accord with the changing perspective and conditions of the parties.” On its face, the recommended balancing work between the “reasonable expectations” of the parties and the dynamic interrelations of policy preferences could be best achieved in a comprehensive contextual framework of inquiry. But understanding that “reasonable expectations” in international agreements are limited to those that are recognized as such by the interpreters in light of their compatibility with, and potential for, the advancement of values of human dignity,

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312 This is the critique Louis Henkin makes specifically regarding McDougal’s invocation of Article 51 in the case of Cuban quarantine. See Louis Henkin, Remarks, 57 Am. Int’l L. Proc. 147, 165–69 (1963). For a similar critique, see also Dean Acheson, The Arrogance of International Lawyers, 2 Int’l L. 591, 593–99 (1968) (discussing McDougal & Reisman, Rhodesia and the United Nations, supra note 42). Chimni goes so far as to suggest that “McDougal’s jurisprudence appears to give the impression of working itself backwards from this point, putting together elements which in combination can provide some form of intellectual rationalisation and justification for every action that the United States undertakes.” Chimni, supra note 151, at 140.

313 McDougal, International Law, Power, and Policy, supra note 157, at 211–12.

314 Id. at 212 (emphasis added).

315 See id. at 211–12.

316 See McDougal et al., The Interpretation of Agreements and World Public Order, supra note 274, at 44.
the application of rebus sic stantibus cannot rest on a myriad of contextual variables independent of the determinative consequences of the value bipolarity in the New Haven Jurisprudence.

Likewise, against the confusion surrounding the admission of newly-emerged, territorially-organized political bodies to the arenas of formal authority of existing nation-states, McDougal recommends a distinction between the facts to which decision-makers respond and the ensuing consequences of their response in order to rescue “recognition” from all the “normative-ambiguity” that surrounds it.317 A comprehensive inquiry conducive to the clarification of the concept should first examine “what access official decision-makers . . . of newly emerged bodies politic have to established arenas of formal authority prior to ceremony of recognition and what new access to such arenas and other advantages they obtain after such ceremony.”318 An inquiry should also be made into “what policies in terms of legitimacy, constitutionalism, willingness to perform international obligations, and so on, the decision-makers in established nation-states have in fact sought and achieved in granting or withholding recognition in respect to newly emerged bodies politic.”319 Instead of focusing on the ceremony of recognition as the “outmoded survival of earlier power processes,” it is rational to devise new collective modes of recognition based on “criteria compatible with an international law of human dignity.”320 In the process of establishing a collective mode of recognition, so the argument goes, the history of granting or withdrawing recognition and their resulting consequences, as well as the effects resulting from each new act of recognition, must be evaluated in terms of their correspondence with the preferred values of human dignity.321

At times, it may seem that McDougal favors the process of contextual interpretation not to respond to any semantic limitations of legal rules, but to ensure that the outcome of the process of legal decision-making is taken seriously.322 What may seem to be a concern for fostering compliance, however, is no more than a reductive employment of contextual flexibilities and confinement of the great potentials of con-

317 See McDougal, International Law, Power, and Policy, supra note 157, at 197.
318 Id.
319 Id. at 198.
320 Id.
321 Id.
text to the determinative demands of value judgment. McDougal’s view on the width of the continental shelf is a fine case in point. The Convention on the Continental Shelf defined the shelf as the “seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres . . . or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.”

McDougal criticized the precise “200 metre” standard and argued for the vaguer standard of “exploitability.”

It is true that the outer limit placed upon the exploitability criterion is most imprecisely indicated by restricting application of the standard to “adjacent” submarine areas; we do not share the curious view that the additional provision of the 200-meter depth . . . remedies this imprecision . . . . The degree of vagueness in the exploitability criterion, deplored by all commentators, seems nevertheless much less likely to produce consequential tension than would a criterion which, while certain and precise, would also limit coastal authority to only part of an exploitable area.

Contrary to the objections against McDougal for favoring open-ended standards, all of which focus on the threat that a McDougalian framework would pose to the rule of law, it must be noted that the “exploitability” criterion could indeed reduce the possibility of “consequential tension” by considering the changing exploitation capabilities of states. Such a standard is characteristically future-oriented and not captured in the past. This is in line with the objectives of a policy-oriented international law that views experience of the past as a guide to wisdom about the future and yet expects the decision-makers to project a distribution of values, in view of community goals, into the future. Yet as characteristic as the future-orientation of the exploitabil-

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323 McDougal & Burke, The Public Order of the Oceans, supra note 95, at 685 n.376.
324 Id. at 687.
326 See McDougal, International Law, Power, and Policy, supra note 157, at 183–84.
ity standard is, it is over-determinative in application. A McDougalian decision-maker entrusted to project a distribution of values into the future consonant with community goals when interpreting and applying the exploitability standard in a particular case must take into account the participants, their objectives, perspectives, and situations, and the effects and outcomes of the distribution in question. With the bipolarity of value systems and the often ex ante assignment of participants and their objectives to either side of the pole, it is no longer a matter of contextual interpretation to predict how the exploitability standard would be used as a guide to determine cases in practice.

On other occasions, however, contextual interpretation addresses what McDougal identifies as normative-ambiguity surrounding the application of rules. The application of Article 27(3) of the Charter to the Security Council Resolutions of June 1950 (Resolutions) condemning the Korean attack and authorizing the members of the United Nations (U.N.) to furnish necessary assistance to the Republic of South Korea to repel the attack and restore international peace is an exemplary case in which McDougal criticized those who purported to find a “literal” or “objective” meaning in Article 27(3). In a heated style, McDougal contends that commentators who find that the Soviet absence and lack of concurring vote renders the Resolutions invalid understand Article 27(3)’s provision that decisions of the Security Council on all matters other than procedural “shall be made by an affirmative vote of seven members including the concurring votes of the permanent members” to mean “the concurring votes of all five permanent members, who must be present and voting.” Such commentators are guilty of the “fallacy of univocalism” by thinking that Article 27(3) has unambiguous meaning in no need of interpretation, and of the “fallacy of detailism” in trying to project “a minutely detailed intent into the future” where subsequent interpreters will give priority to that intent over more general objectives.

In a characteristically inflated representation of the opponent, McDougal is here responding to an argument by Leo Gross, who, ra-

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327 See id. at 182–83.
328 See McDougal, International Law, Power, and Policy, supra note 157, at 149–57 (discussing the limitations of “unambiguous meanings” in the context of North Korea’s attack on South Korea in 1950).
330 See McDougal, International Law, Power, and Policy, supra note 157, at 149.
331 Id. at 151–52.
ther than invoke a literal meaning for Article 27(3), in fact seeks to offer an interpretation thereof that is compatible with the policies and purposes of the drafters as well as the history of the subsequent practice of the U.N. By making a distinction between abstention and absence and giving a privileged position to the principle of unanimity—which by virtue of established practice, and in fact contrary to a strict reading of the Charter, has been understood not to be tarnished by abstention—Gross is after a purposive interpretation of Article 27(3). He seems to give equal weight to the original intent and the evolution of the relevant practice of the U.N. members to conclude that the interpretation of Article 27(3), “like other such questions which have arisen in the past, . . . is believed to be susceptible of objective and judicial determination.” This, of course, is different from what McDougall considers to be the defect in the argument against the legality of the Resolutions, namely, the underlying “assumption that the words of Article 27(3) have an ‘unambiguous’ meaning which makes their interpretation unnecessary.” McDougall’s charge derives from his skepticism about “ordinary meaning,” a skepticism about whose implications he nevertheless remains inconsistent. It is fair to say that McDougall’s

333 See id. at 256. Gross argues:

This principle [of unanimity] is satisfied, of course, by an affirmative and concurring vote—that is by express consent to the proposed Security Council action. It is also satisfied by abstention—that is by tacit consent to the Council action. It is not satisfied when there is neither express nor tacit consent to the proposed Council action. . . . The same cannot be said of absences.

Id.
334 Id. (concluding that interpretations of Article 27(3) that equate absence with abstention find very little support in the Article’s text or history).
335 Id. at 257.
337 McDougall seems to accept the implications of “ordinary meaning” when he says:

Unless persuasive evidence is established to the contrary, assume that the terms of an agreement are intended to be understood as they are generally understood by the largest audience contemporary to the agreement to which both parties belong. The probabilities are that the more people who share a meaning, the more likely the particular parties are to have had that meaning.

McDougall, et al., The Interpretation of Agreements and World Public Order, supra note 274, at 59. Elsewhere, he notes:

Unless there are excellent grounds for the view that some idiosyncratic meaning was shared by the agreement-makers, the community decision-maker is justified in adopting, preliminarily, the ordinary usages that were current in
search for the purposes of the provision under controversy looks into the present and future of the U.N. and its survival, whereas Gross hankers after such purposes as established at the time of the drafting and evolution of the Charter. The divide is less a difference in their regard for context than it is a difference considering context both as it is already shaped and as it ought to be shaped by appropriate policy choices.

Neither this particular controversy nor the aptitude of McDougal’s depiction of his opponent as oblivious to context need detain us any longer. Nor are we concerned with a consideration of McDougal’s rejection of “ordinary language,” beyond noting that in this case, as in the Cuban quarantine, his censure of misreading the text is at best curious. One should ask, what if Article 51 of the Charter did in fact read “if, and only if, an armed attack occurs,” or Article 27(3) in fact read, “the concurring votes of all five permanent members, who must be present and voting?” If semantics cannot afford to furnish any degree of closure under any circumstances, why does McDougal still take the trouble of word juggling at all? Whatever ambivalence there may be about dispensing with the text altogether, the crucial point is that the considerations of context are not supposed to bear any relevance to determining the semantics of the text.

What McDougal hopes to make persuasive is:

[T]hat the language of Article 27(3) can dictate no particular interpretation and that any decision about the constitutionality of the Korean resolutions, whether for or against, must depend upon policy choices—and policy choices that may be made with varying degrees of consciousness and, hence, also with varying degrees of rational consideration of relevant factors.

the appropriate audiences. . . . When private parties enter into arrangements that they expect to make effective in case of dispute by involving the decision-makers of the community, it is reasonable to ask that they employ words with “public” rather than esoteric significations.

Id. at 69.

338 Compare McDougal, *International Law, Power, and Policy*, supra note 157, at 152 (concluding that “the words of an international agreement cannot be taken as timeless absolutes” but must be contextualized), with Gross, supra note 332, at 251–53 (examining the discussions surrounding Article 27(3) at the San Francisco Conference to draft the U.N. Charter).

339 For an interesting critique of McDougal’s rejection of “ordinary meaning” and his behavioristic theory of semantics that views reality as non-verbal, see Chimni, supra note 151, at 83–99.


341 Id. (emphasis added).
“Rational consideration of relevant factors” could indeed guide the interpreter to vistas of the future where relevance of the law survives the passage of time, but this could happen only if it is not pigeonholed in an unjustified bipolar evaluative framework. To McDougal, the legality of the Resolutions is a matter of “interpretation for survival,” but at the time, one could just as well have put on the table other possibilities for consideration—whether unanimity would not be more germane to the survival of the U.N., for instance. The threshold of inquiry, however, was cut too short to give way to such questions, as the divide between the two poles of values painted a natural face to much of what was well in need of justification.

Overall, McDougal expects the contextualist framework to address three kinds of indeterminacy. The first relates to his rejection of “ordinary meaning”—rules come in words, and words possess no “ordinary meaning.” The second class, which is the most interesting of all but is not discussed here, derives from complementarity of norms or concepts—norms come in pairs of opposites. Finally, regardless of these two cases, a rule must be tested each time afresh for conformity to the expectations of parties through empirical methods of social science (such as content analysis, mass interviews, and participant observation). McDougal draws no distinction between different causes of indeterminacy when recommending a policy-oriented, contextualist framework. It must be assumed, therefore, that a policy-oriented scholar or decision-maker does not employ contextual factors to address indeterminacy understood as a matter of degree, but rather taken as an inclusively pervasive character of meaning. Nor is she to apply any sorts of discrimination in selecting the relevant contextual factors or their application based on the specific source of indeterminacy in a

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342 McDougal & Gardner, The Veto and the Charter, supra note 329, at 258.
343 Id. at 263–69.
344 Id.
345 Id. at 266–68.
346 See McDougal et al., The Interpretation of Agreements and World Public Order, supra note 274, at xviii. The authors note:

The approach which seeks genuine shared expectations does not neglect the words of a purportedly final text, if any exists. It does, however, regard any initial version of their relation to shared expectations as provisional, and requires that the interpreter engage in a course of sustained testing and revision of preliminary inferences about the pertinent subjectivities. And of course this calls for scrutiny of the whole context of communication.

Id.
347 See id.
particular case. What is certain is that in none of the cases, regardless of the specific source of indeterminacy, are contextual indices used by McDougal to help interpret the text (which may after all be considered as the original point in the process of interpretation). Instead, they are used to (re)construct a factual ground which will in turn serve to justify the desired, ad hoc application of a rule or standard.

To take stock, I am pursuing a two-fold argument with no parity of emphasis. The first, and less cardinal one to the overall thesis about the crippled contextualist claims of the NHS, is an argument about a complete disjunction between pragmatics and semantics in McDougal’s scheme of contextual interpretation. The second, and central argument to the critique of the NHS’s contextualism, seeks to expose the (over-)determinative role of the value category in McDougalian contextualism, and thereby, to reveal the futility of its sophisticated conceptual framework.

On the relationship between semantics and pragmatics in the contextual framework designed by policy-oriented jurisprudence, despite his self-avowed skepticism about the possibility of inferring any determinate meaning from the text, a great deal of ambivalence could be detected in McDougal’s treatment of language of the law. Even in cases where he finds that the text is a good starting point, McDougal does not find it necessary, in theory or in practice, to employ contextual factors to determine a meaning for the text with any minimal consideration of the text itself. Instead, a series of contextual indices is used to construct a factual situation which is then considered to demand a particular (and consistently predictable) reading of the text. Contextual factors are used to construct, rather than establish, a factual situation, as the value category is largely determinative of the overall

348 See id. at 97. The authors point out:

Although there is no reason to deny the usefulness of the common or public meanings of words as starting points in the process of interpretation, whenever a principle emphasizing such meanings threatens to become transformed into a final, exclusive procedure, it must be rejected. No acceptable justification can be given for precluding an interpreter, whose goal is to determine the shared expectations of the authors of a document, from proceeding to examine all of the relevant features of the context prior to final decision.

Id.

349 See Chimni, supra note 151, at 94–95.
351 See, e.g., id. at 601–03.
structure of the facts as presented.\textsuperscript{352} As soon as the events and claims under investigation are assessed against the bipolar value category, the factual situation is by and large constructed around the result of that assessment, leaving little room for any further significant interpretive labor.\textsuperscript{353}

Pragmatics, however, need not be severed from semantics in a context-sensitive interpretive practice. Outside a foundationalist zone where one does not expect to find the comfort of semantic foundations to make meaning fully determinate, the work of interpretation makes use of pragmatics to find contingent, contextually determined semantics from within, rather than without, language.

On the (over-)determinative role of the values of human dignity in McDougal’s design of contextual-orientation, a bipolar evaluative category permeates the whole enterprise of contextual analysis with consequences fatal to a project of contextual-orientation. The reasoning of a decision-maker or scholar in any number of particular cases follows a consistent pattern: first constructing the facts based on contextual categories, dominant among which is the value category, and then considering the optimum decision or recommendation as one that would best maintain and advance values of human dignity. In this process, before the investigative analysis of all the potentially relevant contextual factors begins, it is foreclosed by a predictable assignment of those elements to either side of the evaluative divide between human dignity and indignity. Consequently, the entire detailed design of contextual categories is certain to lead to inordinately predictable results.

This over-determination of legal analysis is more striking if one recalls the unjustified status of the values of human dignity and their association with Western liberal democracies against totalitarianism of the East. The preservation of the interests of the United States and its Western allies in the New Haven Jurisprudence does not presage the vanishing predictive power of law in the way it has occupied much of the critiques of Yale’s policy-oriented jurisprudence.\textsuperscript{354} It is not a threat to the

\textsuperscript{352} See, e.g., id. (contrasting the “totalitarian character” of the Soviet Union with the “democratic internal structures” of the United States to frame the discussion of the quarantine).

\textsuperscript{353} See, e.g., id. at 603 (“Even this impressionistic recall . . . of the larger context of threat and response should suffice to suggest . . . that the action taken by the United States was in accord with . . . the requirements of self-defense.”)

\textsuperscript{354} See, e.g., Anderson, supra note 45, at 382. Anderson boldly objects:

The words of the law become mere wisps of sight or sound. Law is policy. Policy is human dignity. Human dignity is fostered in the long run by the success of American foreign policy. Therefore, law is the handmaiden of the national interest of the United States. . . . Law becomes merely an increment to power.
stability or predictability of international law in a world of competing interests. On the contrary, it makes policy-oriented decision-making as predictable as, if not more than, semantic foundationalism. The problem thus lies in the over-determinacy of policy analysis, rather than in the oft-deplored indeterminacy of law in the policy-oriented jurisprudence.

Against the claim that the over-determinacy of policy analysis is the logical conclusion of the unjustified epistemic status of values of human dignity and the centrality of those values in McDougal’s contextual framework of inquiry, one could anticipate two valid questions. First, how could providing justification for normative values of human dignity precisely remedy the over-determinative implications of “rational considerations of relevant factors” in a policy-oriented jurisprudence of international law? Second, what modes of inquiry are available for a pragmatic, problem-oriented jurisprudence of international law to seek justification for normative values in a non-foundational yet cognitive state?

Epistemic justification of values of human dignity in a manner compatible with the overall contextualist framework of a policy-oriented international law would impact both the inventory of values represented as indices of human dignity and the modality in which various participants in the world arena are seen to respect and adhere to, or violate and deny, such values. Grounded in context, relevant values may vary according to the context in use. The list, for instance, may exceed an arbitrary set of the eight preferences of the NHS. It may include development as a value when economic and social rights are concerned, or the equality of access, rather than security, as a value when hydrogen bomb testing was questioned; or, it may include the equilibrium of military means on a large scale when the relationship between the legality of the use or threat of nuclear weapons and military necessity is in question. It may even include reproductive rights, contrary to McDougal’s (or rather McNamara’s) unfounded Neo-Malthusian thesis about the growth of population as the greatest threat to human rights. In

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355 See generally McDougal & Schlei, The Hydrogen Bomb Tests, supra note 37, at 686. McDougal justified the legality of the hydrogen bomb test in the high seas with an argument for security given the threat posed by totalitarianism.

the same way that the values relevant to policy-making in a particular context may vary from those relevant in another context, a contextually-grounded normative framework of inquiry cannot capture the relationship between participants in the world arena and values of human dignity in a binary opposition without proper empirical investigation—an investigation which would perhaps establish fidelity to such values as a matter of degree. 357 Contrary to McDougal’s contextual framework of inquiry where a set of predetermined postulated values in practice defines the totality of the context in question, values grounded in context work holistically in relation to other contextual categories to render a meaningful configurative policy analysis possible. 358

Having evaluated McDougal’s promises of contextualism, I now turn to the second pragmatist claim of the NHS—problem-solving orientation—to see how it fares in relation to the normative commitments of Lasswell and McDougal.

IV. THE NEW HAVEN JURISPRUDENCE AND PROBLEM-ORIENTED INTERNATIONAL LAW

The previous Part attempted to link the central position of human dignity in policy science to its contextualist framework of inquiry. I suggested that the unjustified status of values at the center of the policy-oriented jurisprudence fatally blunts the contextualist edge of inquiry so much so that the considerations of those values over-determine the results of decision-making in a predictable manner unrivaled by semantic foundationalism. In this part, I address the question of the impact of the normative goals of the New Haven Jurisprudence on its pragmatist, problem-oriented method of inquiry. I will consider the relationship between goal or value clarification with other intellectual tasks recommended to the policy science analyst to demonstrate how the NHS’s treatment of human dignity adversely affects the performance of those intellectual tasks.

The end desired by the Church and by all men of good will is the enhancement of human dignity. That is what development is all about. Human dignity is threatened by the population explosion—more severely, more completely, more certainly threatened than it has been by any catastrophe the world has yet endured.

ROBERT McNAMARA, ONE HUNDRED COUNTRIES, TWO BILLION PEOPLE: THE DIMENSIONS OF DEVELOPMENT 46 (1973), quoted in McDougal et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra.

357 See Young, supra note 43, at 69. 358 See id.
While the futility of contextual-orientation in policy science, as was argued, is the logical conclusion of the over-determinative role of the epistemically unjustified value category, it is in fact the performance rather than the nature of the recommended intellectual tasks, as evidenced by McDougal’s work, which contradicts pragmatic methods required for a policy-oriented jurisprudence. If McDougal had properly employed any of his own recommended intellectual tasks to corroborate the factual or normative assumptions underlying the New Haven Jurisprudence, each of the tasks could potentially have aided a problem-solving approach to the world social process. Once the grip of the postulated value goals on the operation of the NHS’s recommended intellectual tasks is exposed, the urge for a pragmatic method of inquiry into the justification of normative values presents itself as an alternative difficult to escape.

To avoid the confusion caused by the complementarity and ambiguity inherent in conventional legal rules, a policy-conscious scholar or decision-maker must take up a series of intellectual tasks to conduct a configurative inquiry into any problem under consideration.\textsuperscript{359} In a policy-oriented inquiry, the performance of these tasks need not follow a rigid order isolating the tasks from one another.\textsuperscript{360} When studying specific questions in context, the policy analyst must employ a configurative approach to synthesize the results compelled by the performance because each operation draws upon a particular set of skills.\textsuperscript{361} The five intellectual tasks developed by Lasswell and adopted by McDougal define the method of inquiry in a directional fashion by postulating a normative vision for the social world, scientifically assessing the demands and conditions for its realization, investigating the historical trends relevant to its formation, and projecting a future in which either the envisioned worldview is realized, or barring that, a viable alternative vision takes over.\textsuperscript{362} A vertical thread, however, seems in practice to run through these various modes of inquiry, shaping up the scientific, historical, and developmental thinking according to the demands of goal postulates. Liberal optimism, if not determinism, infused into the policy-oriented intellectual tasks, thus, leaves but a chimera of scientific and historical modes of investigation.

\textsuperscript{359} See 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 196.
\textsuperscript{360} Id.
\textsuperscript{361} Id.
\textsuperscript{362} See Lasswell, A Pre-View of Policy Sciences, supra note 158, at 39.
A. Goal Clarification

At a time when fundamentalism and localism present a real obstacle to intercultural value clarification, the scholar and decision-maker of international law ought to act differently from elites of smaller communities who have historically concealed their normative goals in the obscurity of natural law or “mysticism of historicism or scientism.” The policy-oriented jurisprudence, conscious of the fact that the artifact of law is used instrumentally for social change or stability, requires that the driving goals for the pursued social consequences be clarified in unequivocal terms. It requires that the observer or decision-maker use a secular technique to clarify the values they envision to be actualized in an ideal social structure in the future. Although goal clarification hardly dispenses with the wisdom of the past altogether, because veneration of the past could forestall a vision of change, the policy-oriented approach rules out “obsessive retrospectivity” in favor of a variety of methods such as disciplined imagination” and even “free fantasy techniques.” Whatever technique is in use, the overall goals must be clarified from a universal, as opposed to parochial, observational standpoint and in an empirical, rather than trans-empirical, fashion. When “instant Armageddon” is no longer a mere fancy, a policy-oriented approach to international law must adopt the goal of minimum order in order to minimize unauthorized coercion, even though minimum order is always pursued with a view of giving the best approximation to other, more ambitious, social goals. The goals of “optimum order” are the overriding goals of human dignity values, the shared desiderata in the global community.

Minimum order is attainable when the overarching values of the worth and dignity of man are realized. How precisely the abundance of values of dignity are widely shared in a community reduces the happenstance of conflicts is what policy science takes to be self-evident. The presumed, rather than established, link between peace and security on the one hand, and the realization of the dignity of man on the other, is

363 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 197.
364 See id. at 197–98.
365 Id. at 197.
366 Id.
367 Id. at 198.
368 See id.
369 1 McDougal & Lasswell, Jurisprudence for a Free Society, supra note 7, at 198.
370 See id.
nonetheless the outer layer of a deeper American creed—a pragmatic, liberal faith in necessary progress. It is this faith, rather than disguised natural law residua or merely some ad hoc arbitrary imposition of discretion, that ultimately explains the unreflective status of values in the New Haven Jurisprudence.

Not all readers of McDougal who are critical of the status of values of human dignity at the center of his jurisprudence, and certainly not McDougal himself, would agree. McDougal insists that the enlightened intellectual or decision-maker is one who consciously defines her observational standpoint and accordingly clarifies or postulates goal values not based on “faith” or “logical (syntactical) systems [which] are ambiguous in empirical reference unless they are explicitly related to observation,” but rather by empirical verification.\footnote{See 2 id. at 759–63.} The epistemic implications of the inquirer’s standpoint will be most manifest and considered in scientific thinking. McDougal strives to maintain a comprehensive naturalism of discourse by an overbearing emphasis on the importance of eschewing logical or trans-empirical methods and adopting empiricism to establish value postulates.\footnote{See 1 id. at 315.} The NHS, however, fails to offer any considerable exemplar of an empirical inquiry into its goal postulates.

To avoid an absolute or a priori system of value-variables, McDougal vehemently insists on an ever-increasing, common trend of rising demands for certain values worldwide, manifested in the national constitutions as well as the Charter and the Universal Declaration of Human Rights.\footnote{See McDougal, \textit{International Law, Power, and Policy}, supra note 157, at 198; Myres S. McDougal, \textit{Law as a Process of Decision: A Policy Oriented Approach to Legal Study}, 1 Nat. L.F. 72, 77 (1956); Myres S. McDougal & Gertrude C.K. Leighton, \textit{The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action}, 59 Yale L.J. 60, 61 (1949) (“It is for values such as these [eight values] that men have always framed constitutions, established governments, and sought that delicate balancing of power and formulation of fundamental principle necessary to preserve human rights against all possible aggressors, governmental and other.”).} Given that these demands are made in “different levels of abstraction and with little systematic ordering,” the intellectual task of goal clarification must use the highest level of systematization (eight value categories) which is comprehensive and applicable to any particular context by using appropriate “operational indices.”\footnote{McDougal, \textit{International Law, Power, and Policy}, supra note 157, at 189.} Yet the high level of systematization of the eight categories has not been supplemented with additional values throughout McDougal’s work such that
the list would no longer be exhaustive,\(^{375}\) in the same way that operational indices have done little more than apply the eight staple value categories to a particular discourse. So despite an empirical façade,\(^{376}\) systematization remains little more than the categorization of abstract preferences, indices little more than the translation of such preferences in context, and goal clarification tantamount to a declaration of fidelity to certain values. Read in this light, goal clarification is therefore more a psychoanalytical exercise for the inquirer than an epistemic obligation.

Lasswell and Kaplan make a stronger claim that these desired events are common to human nature, though different cultures afford them varying degrees of importance: “No generalizations can be made a priori concerning the scale of values of all groups and individuals. What the values are in a given situation must in principle be separately determined for each case [through specific empirical inquiry].”\(^{377}\) Except for citing a few domestic and international manifestos, hardly any empirical inquiry has been carried out to support the claim that there is a universal demand for the eight chosen values or to justify an assumption of parity in their desirability as constitutive of a democratic society.\(^{378}\) The

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\(^{375}\) See id. McDougal notes:

The highest level systemization and description we have proposed is in terms of the eight values: power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude, and we have offered brief, initial definitions. By the giving of further appropriate operational indices to these terms, they may be made both completely comprehensive and sufficiently detailed for any particular investigation.

Id.

\(^{376}\) As Arthur Brodbeck puts it when speaking of the absence of scientific warrant in policy science’s value system:

[T]he resulting set of abstract terms does not strike us as authoritatively binding for science. Since it is possible to smuggle in hidden postulates by the way one chooses Categories to form a set . . . . Many feel, for instance, that it is wrong to see legal institutions as more highly governed by “power” than by “rectitude,” or to see art as more highly governed by “skill” than by “enlightenment” (bypassing as this does the whole history of the idea of beauty in human affairs), or to see religion as more governed by “rectitude” than it is by a sense of love that clearly does not fit into any one of the categories, certainly not the category of “affection” as formulated.

Brodbeck, supra note 282, at 245.

\(^{377}\) Lasswell & Kaplan, Power and Society, supra note 243, at 56.

\(^{378}\) As Terry Nardin suggests:

The clarification of values is supposed to be a purely empirical activity uninfluenced by preconceived moral principles, but at the same time certain values are
NHS’s claim to a natural view of ethics lacking a proper, warranting empirical inquiry, it must be noted, is not unique to policy science. Nor does it in and of itself confirm traces of natural law or arbitrary preferences of the masters of Yale’s jurisprudence. To find marks of natural law in the New Haven Jurisprudence would demand a canvassing of the intellectual background and heritage of its founders—a task yet to be fulfilled by any critic of New Haven’s jurisprudence. The accusation of arbitrary preferences, however, derives from a negation rather than an affirmation because most critics find themselves bound to conclude that absent any justification for values, they must be the result of some arbitrary preferences of Lasswell and McDougal.379

excluded from the empirical canvas because they are morally offensive. The contradiction is evident. Policy-oriented jurisprudence must be guided by values that are neither transcendently derived nor, McDougal’s own evidence and arguments suggest, universally shared. In the end, therefore, the value of human dignity is simply, postulated.

Terry Nardin, Law, Morality, and the Relations of States 204 (1983); see Julius Stone, Approaches to the Notions of International Justice, in The Future of the Legal Order 372, 450 (Richard Falk & Cyril Black eds., 1969) (arguing that the real difficult choice between values arises for the decision-maker just when the list has been offered, as not all the values could be equally secured either in general or in a particular context).

379 This is not to discount the valuable insights offered by some of the critical assessments of the NHS’s value system. The most sophisticated of these accounts is presented by David Little in Toward Clarifying the Grounds of Value-Clarification: A Reaction to the Policy-Oriented Jurisprudence of Lasswell and McDougal, 14 Va. J. Int’l L. 451 (1974). Little begins with the reasons Lasswell and McDougal give for the essential importance of value clarification, that is, to facilitate the implementation of these values as constitutive of a democratic commitment, and to ensure rationality in decision-making—what McDougal calls “the quest for ‘rationality’.” McDougal, International Law and Social Science, supra note 86, at 80. Given that Lasswell and McDougal deliberately refrain from offering any justification for what they introduce as values of human dignity, Little believes these values could be taken either as mere postulates lying beyond rational justification, or as self-justifying or self-evident. In the former case, supplying rational justification for values is impossible and irrelevant; in the latter case, while further justification would be useful, it would only illuminate why such values are self-justifying and thus unavoidable. See Little, supra, at 453. Little finds evidence for fluctuating between these two positions in policy science, but he unequivocally adopts the latter view, arguing for a strong link in the New Haven Jurisprudence between self-evident values of human dignity and rationality, in the sense that since these values guarantee a space for decision-making free from frustration or coercion and provide the widest distribution of free choice and dignity, their adoption is considered to be necessary or unavoidable for any rational decision-maker. See id. at 454.

The ingenuity of Little’s analysis is in linking the status of values to an important distinction that Lasswell, and thus McDougal, makes between principles of content and principles of procedure. Principles of content relate to the objects and states of affairs desired by individuals as a result of dispositional and environmental factors, and are not subject to rational justification. The content of values is a causal and not a rational matter; it would be a mistake to try to justify rationally what is empirically or accidentally determined. See id. at 455. Individuals can control these values first by distancing themselves from the val-
The NHS’s evasion of the justification of values can best be understood when read against the flaws plaguing Dewey’s pragmatic view of value and ethics.\textsuperscript{380} In an attempt to break away from a fact/value distinction and at the same time reject the “empirical theory of values” which takes what is enjoyed and a value to be one and the same, Dewey’s concern is to distinguish between \textit{de facto} and \textit{de jure} statements, that is, between the desired and the desirable.\textsuperscript{381} If “X is desirable” is to be taken as a \textit{de jure} statement, it would have to mean “X ought to be desired”, rather than merely “X is consistently desired.”\textsuperscript{382} Morton White believes that Dewey’s naturalist view has not been successful in showing how “X is desirable” possesses any more \textit{de jure} quality than “X is desired.”\textsuperscript{383} White reads Dewey to suggest that the distinction between “a report of immediate sensation” and “an objective property of a thing” finds an analogue in value judgments as well.\textsuperscript{384} Therefore, as in the statements, “X looks red to me now,” “X is (really) red,” and “X is really red = for any normal person Y, if Y looks at X under normal conditions, X looks red to Y”, in value judgments the analogue to such statements would be: “X is desired by me now,” “X is really desirable,” and “X is desirable = for any normal person Y, if Y looks at X under normal conditions, X is desired by Y.”\textsuperscript{385} White convincingly questions if the third sentence in each pair has any more \textit{de jure} quality than the second ones—that is, whether X being desirable to Y under normal conditions gives any sharper normative edge to X being really desired.\textsuperscript{386} If “X is desirable” is no more \textit{de jure} than “X otherwise and consciously clarifying them, and then manipulating them toward the realization of preferred events by a systematic operationalization of their content. This is performed by using principles of procedure that are entirely rational. See id. at 456. Little uncovers a confusion in Lasswell and McDougal’s language and argues that the principles of rationality cannot intelligibly be said to be empirically grounded, because those principles should stand as the frame of mind that “is imposed on the empirical data in order to make sense of it.” Id. at 457. Further, to the extent that value judgments are constituted based on principles and conditions of rationality, they also cannot be seen as empirically grounded. So rather than avoid the questions and problems that “speculative” or “trans-empirical” or “merely logical” philosophy has traditionally entertained, Lasswell and McDougal land precisely in the middle of the problematic. See id. Little goes on to find the Kantian solution to this conundrum more successful than the NHS’s evasion of the question altogether. See id. at 458–60.

\textsuperscript{380} See Morton White, \textit{Essays and Reviews in Philosophy and Intellectual History} 155 (1973) (critiquing the Deweyan naturalist view of value and ethics).

\textsuperscript{381} See id. at 156.

\textsuperscript{382} See id. at 157.

\textsuperscript{383} Id. at 160.

\textsuperscript{384} See id. at 160–61.

\textsuperscript{385} Id. at 159–60.

\textsuperscript{386} See White, \textit{supra} note 380, at 160.
is really red,” then it is hard to see how “X is desirable” is more than “X is desired.” Stated another way, “X is really red” if looked at under normal conditions does not mean “X ought to look red” in a moral sense, and nor does “X is desirable” if looked at under normal conditions. So if “X is desirable” is no more de jure than “X is desired,” Dewey has not succeeded in showing how “desirable” could mean “ought to be desired.”

In *The Quest for Certainty*, Dewey seeks to establish the possibility of scientific verification not just for what is desirable, but also for what ought to be desired. Just as “normal conditions,” which Dewey sometimes calls “laboratory conditions,” are the testing platform for attributing any characteristics to objects, the desired can be equated with the desirable only under certain ascertainable conditions (whether of a sociological or circular character is unclear). Likewise, Lasswell, and by way of intellectual association, McDougal, considers the desired values of human dignity to be what ought to be the normative goal of a jurisprudence for any democratic society, with the addition of a further defect that, despite fervent claims to the contrary, policy science falls short of offering any evidence to ascertain the desired in the first place. Some object to the universalizing claims of the NHS, arguing that the parochial nature of its democratic values of human dignity reflects American values, but this concern should be secondary to the greater imperfection of assuming, rather than establishing, consensus, or the possibility thereof, about the desirable, whether domestically or on the international level.

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387. See id.
388. See id.
389. See id. at 161.
390. See id. at 155–56.
391. Cf. McDougal et al., *Human Rights and World Public Order*, supra note 356, at 91 (postulating human dignity as a desired value without regard to derivation or justification).
393. In this respect, compare Lasswell’s view of values with another behaviorist, Paul Kecskemeti. In contrast to Lasswell, Kecskemeti, attentive to the complexity of reaching consensus on “higher values” in any social setting, also seeks the possibility of rational consensus. So far as values are concerned, however, he rejects that such a consensus could be based on strictly scientific grounds. The alternative for Kecskemeti is not the rejection of a rational value discourse, but rather to suggest that those engaged in a discourse on “higher values” inevitably adopt certain postulates to serve as the framework for subsequent discourse. What is important, however, is that according to Kecskemeti, the rejection of such postulates does not involve a logical contradiction or a factual error. Nevertheless, it has
It is a faith in “human perfectibility” and in the propitious potential of the progressive age that draws policy science to the promotion of human dignity:

By taking human dignity as our central focus, we are in step with the ideal values of the American tradition, and with the progressive ideologies of our epoch. Liberalism and socialism are united in affirming the free man’s commonwealth as a goal of human society. That man’s dignity is not to be realized in this world is the principal forecast of whoever takes a dim view of human perfectibility.394

This view of human perfectibility, as Bernard Crick agrees, sets Lasswell apart from both the natural law tradition or “the self-evident propositions of 1776.”395 Those who possess “a dim view of human perfectibility” are considered “moral mavericks.”396 The problem is that Lasswell and McDougal do little to show that “moral mavericks” empirically may not outnumber the enlightened optimists.

It appears that while Dewey’s natural view of values and ethics suffers from a genuine flaw in moving from “desired” to “ought to be desired,” and is thus unable to provide a sufficient ground for values, Lasswell’s presentation of values as mere preferences tries to temporarily evade the problem of the justification of normativity.397 To shape preferences such that certain events are viewed as what ought to be desired is left to the field of individual and social psychology, as Lasswell’s attention to the role of propaganda manifests. The obligation of goal clarification incumbent on the scholar or decision-maker is a deep psychoanalytical exercise to clarify all dispositional and environmental ele-

395 Bernard Crick, The American Science of Politics, Its Origins and Conditions 196 (1959). Earlier in the same volume, Crick is hesitant to reject the possibility of a “continued implicit” adherence to the tradition of “natural rights” by Lasswell. See id. at 192.
396 See McDougal & Lasswell, Legal Education and Public Policy, supra note 5, at 212.
397 See White, supra note 380, at 160; McDougal, International Law, Power, and Policy, supra note 157, at 189.
ments that make up the aggregate objectives that are pursued in decision-making.\footnote{See McDougal, International Law, Power, and Policy, supra note 157, at 189.}

Lasswell’s individualism and reliance on psychology aside, in the post-philosophical framework of policy science, the NHS’s values in practice do not epistemically live up to the verification standards of empirical science, and thus remain non-cognitive. The other contemplative and manipulative methods of New Haven’s problem-solving inquiry—presented as intellectual tasks for a policy-oriented jurisprudence—do little more to address the epistemic status of postulated goals. The NHS instead carries out these tasks in a manner that best reinforces the value postulates of human dignity.

B. Trend Thinking

The problem-solving approach here is a historical one. The study focuses on past trends towards or away from postulated goals to systematically understand how past practices have approximated those goals.\footnote{See, e.g., Lasswell, A Pre-View of Policy Sciences, supra note 158, at 15.} The policy-oriented international lawyer bears a great responsibility to use “a comprehensive cognitive map”\footnote{See id.} in order to avoid any impressionistic or anecdotal use of the past “in terms of isolated tidbits of doctrine and practice.”\footnote{Id.} This is in fact a methodological tool that, in a naturalistic view of values, could at least provide historical proof for “the desired.” It could also test the continuity of the “desired” events or preferences (and as such their desirability, albeit without establishing any de jure status more than the historical continuity of the demand): “Having postulated the overriding goal of human dignity on the most inclusive possible scale, the principal questions to be answered are whether values are becoming more abundant and more widely shared, and whether institutional practices are more or less well-adapted to the requirements of the fundamental objective.”\footnote{Id. at 787.}

The recommended historical approach seems in theory to avoid the two extremes of historical pitfalls: the objectivity mirage and the exile to the island of pure subjectivity. Lasswell and McDougal are clear that the policy relevance of trend thinking is that “trend knowledge discloses the degree of congruence or discrepancy between preference and

\footnote{See McDougal, International Law, Power, and Policy, supra note 157, at 189.}
fact.” But the inquirer nevertheless consciously carries a myriad set of preferences into the reconstruction of facts depending on context.

McDougal’s operationalization of trend thinking, which is largely presented in the context of human rights, however, leaves much to be desired in objectivity. A Marxist reading of McDougal’s description of the development of human rights in connection with the culture of cities, for instance, reveals the frailty of his historical claim. His progressive reading of the history of urban life and “the respect revolution” happily concludes with a hymn that “in the interdependent urbanizing globe, the continual reclustering of conditioning factors has had the net effect of moving the world community towards articulating and attaining the principles of a respect revolution in the name of human dignity and an international public and civic order of human rights.” Chimni exposes McDougal’s simplistic portrayal of the “respect revolution” as the contribution of capitalism and its total disregard for the unequal distributive effect of colonialism and neo-colonialism.

It is worth emphasizing that to concur with critiques of McDougal’s actual performance of trend thinking does not mean that a disciplined historical inquiry would respond to the need for a firm epistemic basis for the normative values at the center of a policy-oriented jurisprudence. It merely, and primarily, suggests that given the lack of empirical grounds for values in demand in Yale’s jurisprudence, proper

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403 *Id.*

404 Some students of the NHS are at times clear on this point:

[O]bjectivity cannot be achieved by simply collecting facts and presuming that they speak for themselves. Facts are not events; they are often the conclusions the observer has drawn from observing events. How the observer collects the facts necessary for his inquiry and how he establishes the causal relationship among them cannot be answered without some preconceptions as to the events he is observing and the goals he seeks.


407 Chimni, *supra* note 151, at 128. Chimni quotes a passage from Ronald Dworkin, that “the pragmatist will pay whatever attention to the past as is required by good strategy,” Ronald Dworkin, *Law’s Empire* 162 (1986), to attribute the New Haven’s manipulative treatment of history to pragmatism. *See* Chimni, *supra* note 151, at 128. Such a view of pragmatism is merely as simplistic as McDougal’s performance of historical inquiry. It would take us too far afield to elaborate on pragmatism and historical inquiry. It suffices here to mention that Chimni’s reading of Dworkin is out of context, as Dworkin’s opposition to pragmatism is here limited to legal interpretation.
historical inquiry can only scrutinize to what degree those demands have been “approximated.”

C. Scientific Thinking

All of the contemplative and manipulative intellectual tasks of policy science facilitate the realization of the postulated goals. They are integrative, in that they are not marked by any order of priority or strict lines of division. The recommended scientific method of analyzing conditioning factors is to enrich the description of trends by eliminating the possibility of mere happenstance and establishing warranted causation between past decisions and preferences.408 It is incumbent on the inquirer here to define a clear “observational standpoint” with regards to any social process in context.409 Defining an observational standpoint does not mean for the intellectual to passively situate oneself in one’s surroundings, but rather, requires that she adopt a conscious social position with regard to those surrounding elements.410 It is vital for the legal scholar to be able to travel between an external and an internal standpoint.411 When engaged with “theory about law,” it is essential for the scholar to take distance from participants in the legal process under investigation, and when studying “theories of law” to look with the view of a participant observer.412

McDougal’s sharp demarcation between the external and internal positions sets him apart not only from positivists,413 but also from Lon Fuller’s sympathizing observer with professional participants,414 from Max Weber’s sociologist who should define an outside standing lest “the juristic precision of judicial opinions . . . be impaired” if sociological, ethical, or economic grounds were to replace “legal concepts,”415 from Eugene Ehrlich’s Professor of Law who inevitably brings “norms

408 See McDougal et al., Theories About International Law, supra note 30, at 206.
409 See id. at 199.
410 See id.
411 See id. at 200.
413 Cf. McDougal et al., Human Rights and World Public Order, supra note 356, at 74 (describing exclusive focus on officials and state actors as “the fatal weakness of the positivist approach”).
that are being taught” into “the science of norms,”416 from Karl Llewellyn’s jurisprudential work addressed to the “individual case” as opposed to the sociologist who addresses himself to the “comforting sweep of the decades,”417 and from the later Llewellyn who attempts to “bridge between sociology and the legal.”418 The difference lies in the fact that McDougal wishes to break the legal professional image by assigning an external observer role to the scholar of enlightenment as she draws on the trend of past decisions and employs the tools of social science to study empirically the causal relationship of those decisions and preferred events.419 This is one step further from most realists,420 who in the latter life of legal realism were concerned with maintaining a balance within the professional outlook of the law—Llewellyn’s reckoning ability being one such attempt.421

If McDougal targets the internal professional image of the law, however, he replaces it with another professional image—the professional image of the policy science scholar of enlightenment.422 The modesty of objectivity that McDougal expects to infuse into the external observational standpoint is not only apparent in his own admission to the presence of identity attachments in any detached scholar,423 but

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421 See generally Llewellyn, supra note 417, at 178–208 (exploring the limits and laws of ideas that can be reckoned through reason). My analysis of the difference between McDougal’s approach and other jurisprudential approaches on the question of observational standpoint here closely follows that of William Morison. See Morison, supra note 23, at 5–13.
422 Cf. McDougal et al., Human Rights and World Public Order, supra note 356, at 369 (defining role of scholar in terms of “professional responsibility”).
423 For example, McDougal addressed the Law of the Sea Institute as follows:

In these remarks, I shall be speaking as a professor, somewhat pedantically lecturing you; this is my vocation, it is my style. I assure you that I do this with no arrogance, but in all humility. Similarly, I cannot divorce myself from the fact that I am a United States national. I do not think any healthy man can escape identifying with his own national community, as well as with larger communities of which it is a member. I have deep roots in the communities of many of you here today. I have taught students from other countries, both at my home and abroad, for over thirty years. Insofar as I can, I intend to try to deal with these problems from the perspectives of citizens of the larger whole
also in the fact that the legal scholar as the policy scientist of democracy is first and foremost expected to define his standpoint with regards to value goals of human dignity before the scientific task begins. Maintaining a credible observational standpoint is as commendable as it is difficult, if there is an overbearing commitment to some postulated values that distinguish policy scientists of democracy from those of tyranny. The NHS sets up the scholar for the impossible task of maintaining an objective observational standpoint, while it simultaneously urges fidelity to some normative commitments in the form of postulates on the international lawyer of human dignity.

D. Developmental Thinking

Once the historical and scientific investigations clarify the past trend of events and the formation and distribution of values, the scholar performs a projective task to hypothesize the probable future trends. This is a detailed analytical exercise in which the policy scientist examines the change, continuity, or orderly fluctuation of factors to predict an identifiable trend and, accordingly, tailor policy decisions toward the realization of predicted future events and preferences. Lasswell develops an intellectual tool called “developmental construct” to address the projective task. Such a prediction of realistic possibilities is necessary for the performance of the policy scientists’ more creative responsibility to manipulate the course of events toward the preferred social vision.

Developmental inquiry, Lasswell’s debt to Marx, nonetheless bears no deterministic implications. The policy scholar of enlightenment projects a future based on the empirically established trends of the

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of mankind. If you prefer, let us adopt the perspectives of the anthropologist who tries to observe both common and special interests and to clarify a common interest. If I fail in this, I would suggest that this is an exercise which all of us should be continually trying.


424 See McDougal et al., Human Rights and World Public Order, supra note 356, at 90–91.

425 See Lasswell, A Pre-View of Policy Sciences, supra note 158, at 68.

426 Cf. id. at 67–68 (utilizing the Marxist model of social progress to predict and influence future development).

427 See id. at 67.

428 See id. at 68–69.
past. On one extreme, there is the optimistic construct with increasing interdependence, advancement of science and technology, and clarification and promotion of human dignity by intellectuals, while on the other extreme there is the garrison state, increasing militarization, concentration of wealth, erosion of individual liberties, and the concentration and censoring of information. These extremes are consistent with the postulated normative vision of the NHS and are not warranted by the results of New Haven’s deficient historical and scientific methods of inquiry. Thus, the projective task is merely a blithely convenient affirmation of the envisioned worldview of policy science, albeit alluringly cloaked in scientific fallibilism.

E. Alternative Thinking

Because Lasswell, and thus McDougal, eschew a deterministic view of history, they equip the policy scientist with proper tools to manipulate events, should the projected future, despite all warranting evidence, appear unrealistic. This is a manipulative and integrative task with a goal to maximize effectiveness with minimum dislocation. In “integrative” solutions, all participants gain, and thus conflicts among potential losers would be avoided. One of the techniques to foster realism together with creativity is to manipulate (shape or modify) the perspectives of the people of the world for an accelerated achievement of the objectives of the world public order of human dignity: “It is hardly a novel insight that the factors—culture, class, interest, personality, and crisis—which importantly condition peoples’ perspectives can be modified to foster constructive rather than destructive perspectives.”

Aside from the naivety embedded in the assumption about a situation in which the distribution of the maximum would leave no losers,

429 McDougal et al., Human Rights and World Public Order, supra note 356, at 92–93.
430 Id. at 438–39.
431 See Chimni, supra note 151, at 134–36 (providing more specific examples of McDougal’s simplistic projection of the future); cf. McDougal et al., Human Rights and World Public Order, supra note 356, at 438–39 (assuming, in the optimistic construct, that scholars will continue to advance human dignity).
432 See McDougal et al., Human Rights and World Public Order, supra note 356, at 92–93.
433 See id. at 93.
435 McDougal et al., Human Rights and World Public Order, supra note 356, at 443.
even judged from the standpoint of the underlying economic premises of Lasswell’s maximization postulate,\textsuperscript{436} and the elitist implications of policing perspectives through the creative intelligence of intellectuals, the realistic view that may be gained as a result of the failure of the initial “developmental construct” does not alter the unrelenting reign of the unjustified values of human dignity.\textsuperscript{437} Failing the scholar’s projected view of the future, she does not take a step back to reevaluate the desirability of the postulated values, but rather persists to homogenize the perspectives of the public (or rather those of the decision-making elites) in a therapeutic manner.\textsuperscript{438} Meanwhile, in practice, the postulated goals of the dignity of man curb any potential methodological significance that historical and scientific tasks might bear for a more realistic policy-oriented approach. The rigid application of human dignity consistent with the values of the New Haven masters fatally neutralizes any emancipatory opportunities that developmental and alternative thinking could provide to change the status quo.

**Conclusion**

This Article presents a new understanding of the New Haven Jurisprudence and a novel assessment of its pragmatist promises. The NHS, the most creative project of disciplinary renewal in the mid-twentieth century, is like the elephant under the touch of men in the dark. Yale’s policy-oriented international law has been understood, _inter alia_, to legitimize U.S. imperialism and to cause the demise of law, to be no more than pseudo-scientific jargon, and to represent pragmatist thinking in international law. One commentator refuses to recognize the NHS as jurisprudence, but nevertheless states that an understanding of modern international law scholarship depends upon an understanding of Yale’s policy science.\textsuperscript{439}

Critical and admiring reactions to the NHS implicitly or explicitly identify Yale’s policy thinking with American pragmatism. Explicit accounts of New Haven’s pragmatism number only a handful and their analyses are both mistaken about pragmatism and unfair to Yale’s sophisticated configurative jurisprudence. Instead of presenting a scheme

\textsuperscript{436} See, e.g., _Lasswell, A Pre-View of Policy Sciences_, supra note 158, at 18–20 (assuming that individuals seek to maximize their values by utilizing institutions that affect resources to achieve preferred outcomes).

\textsuperscript{437} _Cf._ McDougal _et al., Human Rights and World Public Order_, supra note 356, at 90–91 (basing explicitly their analysis in human dignity as a promoted goal).

\textsuperscript{438} See _id._ at 439–40; 443–44.

\textsuperscript{439} See Leiter, _supra_ note 21, at 379.
of philosophical markers of pragmatism, this Article examines two central pragmatist claims of the NHS and assesses their pragmatist potential in light of the dominant, determinative role of postulates of human dignity in legal decision-making. The central argument is that the NHS’s antifoundationalism reverts to a foundationalism of its own as it grants an over-determining role for legal outcomes to a set of values parochial to the New Haven masters. In doing so, Lasswell and McDougall’s foundationalist antifoundationalism fatally blunts New Haven’s promises of contextualism and problem-solving creativity.

Understanding New Haven’s foundationalist pragmatism in light of the internal dynamic between values of human dignity and promises of contextualism and problem-solving orientation enables us to see beyond the fog of the accusations of the NHS’s legitimization of power or affinity with natural law. It also opens the door for a more nuanced appreciation of philosophical pragmatism and its possible contribution to policy thinking in international law in the twenty-first century.

Whether the NHS adopted American pragmatism and impaired its antifoundationalism with a normative foundationalism of its own, or the tradition of pragmatism itself has never entirely escaped foundationalism is a historical question beyond the scope of this paper. Once we acknowledge the inherently contradictory nature of New Haven’s foundationalist pragmatism, however, we are in a position to evaluate the career of the policy-oriented approach and its promises for policy creativity more accurately and with sympathy.
SOCIAL MEDIA, POLITICAL CHANGE, AND HUMAN RIGHTS

Sarah Joseph*

Abstract: In this Essay, the role of social media in progressive political change is examined in the context of the Arab Spring uprisings. The concept of social media is explained, and Clay Shirky’s arguments for and Malcolm Gladwell’s arguments against the importance of social media in revolutions are analyzed. An account of the Arab Spring (to date) is then given, including the apparent role of social media. Evgeny Morozov’s arguments are then outlined, including his contentions that social media and the Internet can be tools of oppression rather than emancipation, and spreaders of hate and propaganda rather than tolerance and democracy. The United States’ policy on Internet freedom is also critiqued. Finally, the role, responsibility, and accountability of social media companies in facilitating revolution are discussed.

Introduction

In early 2011, revolutionary fervor spread across the Arab world. Unarmed and largely peaceful uprisings in Tunisia and Egypt overthrew long-standing dictators, and unprecedented protests arose in most other Arab States. Violent protests erupted in Libya, sparking a civil war between the government and armed rebels. With the aid of an international coalition, the rebels overthrew longtime Libyan dictator Colonel Muammar Gaddafi in August 2011. At the time of writing, the future of the uprisings in Yemen and Syria remains uncertain. Protests spread beyond the Arab world to States as diverse as Uganda, Israel, and Spain.

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The role of social media in these uprisings has been lauded, and the term “Twitter Revolutions” has become ubiquitous.

Does social media really deserve the plaudits it has received? After all, popular revolutions overthrew brutal governments long before the advent of Web 2.0: Iranians overthrew the Shah in 1979, Filipinos overthrew President Marcos in 1986, Communist bloc States in Eastern Europe crumbled one by one in 1989, and huge demonstrations precipitated the fall of Indonesia’s President Suharto in 1998. Vast numbers of Westerners are engaged with social media; is it possible that we are narcissistically trying to inject ourselves into the picture? In this Essay, I will examine the phenomenon of social media and its role in promoting and prompting progressive political change, particularly in autocratic States.

I. What is Social Media?

Social media is defined as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.” Social media is defined as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.”

“Web 2.0” refers to Internet platforms that allow for interactive participation by users. “User generated content” is the name for all of the ways in which people may use social media. The Organization for Economic Cooperation and Development (OECD) specifies three criteria for content to be classified as “user generated:” (1) it should be available on a publicly accessible website or on a social networking site that is available to a select group, (2) it entails a minimum amount of creative effort, and (3) it is “created outside of professional routines and practices.” Although purely commercial websites are excluded under this definition, interactive blogs run by firms are included because the conversation generated therein extends beyond the purely commercial. Emails and text messages are also excluded from the defi-
nition because they are not available via websites or social networks. Nevertheless, mass texting (or mass emailing) operates in a manner similar to social networking sites by facilitating the immediate distribution of information, including information from social media sites, to a large audience in a form that is easily re-transmittable.

There are different types of social media: collaborative projects, virtual worlds, blogs, content communities, and social networking. Collaborative projects involve people working together to create content; Wikipedia is the most famous example of these. Wikipedia is an influential source of global information, partly because a Wikipedia entry will often be among the first retrieved by an Internet search. Online collaboration platforms can also allow people in different locations to share and edit documents together; these can be particularly useful for persons with similar political goals to collaborate on strategy documents. For example, Google Docs were used to convey protest tactics and demands during the Egyptian uprising in early 2011.

Blogs, the most rudimentary form of social media, involve the creation, by a person or group, of web-based content on any topic of the author’s choice. Individuals may interact with a blog by commenting on its content. Originally, blogs were mainly text-based; now, many incorporate pictures and videos. Video blogs (vlogs) are also becoming more common; Mohammad “Mo” Nabbous ran a “television station” in Benghazi—the rebel stronghold in Libya in early 2011—that could classify as a vlog through which Nabbous reported events in his city to the world via a live video stream. Blogs are key tools for dissident activity in States that control mainstream media.

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8 Virtual worlds include virtual games or virtual social worlds such as Second Life. In the former, “players” must adhere to game rules and protocols. In the latter, players “essentially live a virtual life” and are constrained by little more than “basic physical laws such as gravity.” See Kaplan & Haenlein, supra note 4, at 64. Virtual worlds are not particularly relevant to this essay, though it is worth noting the existence of new gaming developments relevant to human rights, such as games designed to teach people about social justice. See Laura Stampler, America 2049 Facebook Game Promotes Social Justice, HUFFINGTON POST (Apr. 19, 2011, 10:55 AM), http://www.huffingtonpost.com/2011/04/19/facebook-game-social-justice-america-2049_n_850892.html.

9 See Kaplan & Haenlein, supra note 4, at 62–63.
11 See OECD Report, supra note 7, at 36.
12 See id.
13 Nabbous was killed by a sniper on March 19, 2011, while reporting on the Gaddafi regime’s claims that it was adhering to a ceasefire in the wake of the UN’s authorization of the use of force. See Matt Wells, Mohammed Nabbous, Face of Citizen Journalism in Libya, Is Killed,
Content communities are sites where users can share content with other members of their online community. Well-known examples of these communities include Flickr, for photos, and YouTube, for video. Sites like these are invaluable resources for exposing government brutality to the world. The video of the killing of Neda Agha-Soltan during the Iranian protests of 2009 is a particularly poignant example. The video “went viral” and drew widespread condemnation of the Iranian government’s tactics.

Finally, people share information on social networking sites, of which Facebook and Twitter are among the most popular. These sites are very versatile, enabling the sharing of text, pictures, videos, audio files, and applications. Facebook enables users to create a profile page and share information with an unlimited number of virtual “friends.” These “friends” are usually known to the user in real life, but this connection is not essential. For groups, brands, or companies, it is more common to set up pages that attract an unlimited number of “fans” who do not have to be approved. The user chooses whether to limit access to their profile by adjusting an intricate series of privacy settings. The site has become phenomenally popular; as of September 2011, the company boasted 800 million active users—more than ten percent of the world’s population.

The micro-blogging site Twitter allows users to “tweet” text-based content of up to 140 characters to a global audience. Users share a surprising amount of information in 140 characters by including links to articles, pictures, photos, videos, and audio streams. A user’s tweets are immediately visible to “followers,” though a user can institute controls over the persons who can follow his or her feed; all users can “block” other users to deny them access to the feed. Ordinarily, though, a person can follow any other person such that, unlike a Facebook user’s relationship with “friends,” a Twitter user may know very few of his or her followers. Further, most tweets are public and searchable on the Internet, and are easily distributed via the “retweet” function. Twitter is an extraordinary source of information, partly because it links vast numbers of people otherwise unknown to one another. In this context, users often learn more from strangers than from friends. Twitter is also searchable by topic. Tweets can be organized by “hashtags,” which indi-
cate that a particular tweet relates to a certain topic. For example, stories about the uprising in Tunisia were often tagged “#Tunisia,” making it easier for people to find tweets on that topic. In April 2011, Business Insider reported that there were 21 million active Twitter users. While its user base is only a fraction of Facebook’s, Twitter is becoming an extremely influential source of real-time news.

One common characteristic among social media sites is that they tend to be free and are therefore widely accessible across socioeconomic classes. Anyone can create a Facebook or Twitter account, upload a YouTube video, or write a WordPress blog without cost. Of course, access to social media depends upon access to the Internet, which is ubiquitous in the West but less available in the developing world. Internet access is expanding rapidly, however; as of February 2011, one-third of the world’s population has Internet access.

A crucial development is the advent of mobile social media. Mobile phones with Internet capabilities are becoming common, and mobile phone usage in the developing world is far more extensive than usage of personal computers. Mobile phone subscriptions are even increasing exponentially in notoriously closed societies like North Korea. Smartphones and other phones with Internet capabilities are also becoming more common, especially as earlier generations of phones are replaced. In July 2011, the Sydney Morning Herald reported that global mobile penetration is predicted to reach one hundred percent by 2016, and that half of all mobile phones will be Smartphones with

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20 See Kaplan & Haenlein, supra note 4, at 67.


Internet access. Indeed, trends indicate that soon anyone with a phone will be able to access social media at any time, in any place.

II. MALCOLM GLADWELL AND THE SKEPTICS

Malcolm Gladwell is a prominent skeptic of the importance of social media in progressive social and political change. In an October 2010 article in the *New Yorker*, he argues that real social change is brought about by high-risk meaningful activism, pointing to a number of famous examples: the 1960s sit-ins by black college students in Greensboro, North Carolina; the year-long Montgomery bus boycott organized by Martin Luther King, Jr. in 1955 and 1956; and Australia’s indigenous “Freedom Ride” and the “Green Bans.” According to Gladwell, such movements are characterized by strong group identity and cohesion with strong ties.

Gladwell argues that social media connections promote weak ties and low-risk activism, or “slacktivism.” He argues that “liking” something on Facebook, or retweeting a story, requires little effort, yet those actions might lull the protagonists into thinking they are doing something meaningful. Gladwell caustically notes that “Facebook activism succeeds not by motivating people to make a real sacrifice but by motivating them to do the things people do when they’re not motivated enough to make a real sacrifice.”

Gladwell also argues that successful activism requires strategic hierarchies, with a careful and precise allocation of tasks, like the structure used to sustain the Montgomery bus boycott. Social media, he argues,

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27 See Gladwell, supra note 24. People can express their approval of something on Facebook by clicking on a “like” button.

28 Id.

29 See id.
creates loose and essentially leaderless networks he does not believe are capable of organizing revolutions:

Because networks don’t have a centralized leadership structure and clear lines of authority, they have real difficulty reaching consensus and setting goals. They can’t think strategically; they are chronically prone to conflict and error. How do you make difficult choices about tactics or strategy or philosophical direction when everyone has an equal say?30

As a chilling example of his thesis, Gladwell notes that Al Qaeda, which engages in a very extreme form of activism, “was most dangerous when it was a unified hierarchy,” rather than a loosely affiliated network of cells.31 Finally, Gladwell claims that social media is a conservative force—that it distracts people from “real” activism by deluding them into thinking that they are effecting change when in reality they are not. In his words, “it makes it easier for activists to express themselves but harder for that expression to have any impact.”32

Evgeny Morozov, visiting scholar at Stanford University, has also commented on the tendency of the Internet to distract people from important issues. He believes that few use it for political activism, while people use the Internet in huge numbers to view pornography, play games, watch movies, or share pictures of “lolcats.”33 While these trivial uses of the Internet and social media are well known in the West, there is no reason for the situation to be different in authoritarian States. Morozov cites the apparent de-politicization of East German youth caused by access to West German television as an example of the lethargy that can be induced by popular but unserious pastimes.34 Is it possible that the Internet is helping to spawn a version of Aldous Huxley’s Brave New World of hedonism and triviality? Need Big Brother no longer

30 See id.
31 Id.
32 Id.
34 Morozov, supra note 33 at 65–68 (citing Holger Lutz Kern & Jens Hainmueller, Opium for the Masses: How Foreign Media Can Stabilise Authoritarian Regimes 17 Pol. Analysis 377–99 (2009)). Indeed, Morozov notes the tendency in the West to believe that Internet use in authoritarian States focuses on noble causes and emancipation, while acknowledging that it is not generally used for that purpose in the West. For example, President Obama extolled the emancipating virtues of the Internet when visiting China in 2009, but six months later in a speech in Virginia, he said that the net could be a distraction and a diversion. Id. at 242.
fear revolt because the population is too busy chattering about Big Brother on social media?

Morozov notes the danger that the sheer volume of information available through social media—coupled with its increased general availability via the Internet and 24/7 news cycles—creates shorter attention spans in which important news is quickly supplanted by new developments elsewhere. For example, the “Twitterverse” flocked to read and retweet news of the ultimately unsuccessful Iranian uprising of June 2009. Yet the story was swiftly cast aside upon the death of pop megastar Michael Jackson.35 While social media may create quicker and louder conversations, those conversations may tend to be shallow, short, and easily displaced by the newest “big thing.”

III. CLAY SHIRKY AND THE BELIEVERS

Not all commentators share Gladwell’s skepticism of the power of social media. New York University media professor Clay Shirky believes that social media is an important new tool for promoting social and political change. In a January 2011 article in Foreign Affairs, written before the Arab Spring, he cites a number of examples where social media was the catalyst for significant political change, such as its role in coordinating protests that ultimately forced out Moldova’s communist government after a fraudulent election in 2009.36 Shirky argues that “political freedom has to be accompanied by a civil society literate enough and densely connected enough to discuss the issues presented to the public.”37 He endorses the theory of sociologists Elihu Katz and Paul Lazarsfeld that the formation of well-considered political opinions is a two-step process.38 The first step requires access to information; the second, use of that information in conversation and debate. Under this framework, Shirky argues that social media has revolutionized how people form political opinions and has made information so widely accessible that more people than ever are able to develop considered points of view.

35 Id. at 66.
37 Id. at 34.
A. Step One: Access to Information

By making “on the ground” eyewitness accounts widely available, social media has expanded access to information in an important new way. Reporting is no longer confined to traditional sources like journalists; instead, social media grants access to unfiltered information related by any person affected by an event who chooses to share the story. For example, a key voice on Twitter during the Arab Spring has been @angryarabiya,39 the daughter of Abdullhadi Al Khawaja, a human rights activist in Bahrain who was jailed for life in June 2011 for dissident crimes. Her tweets have been followed closely by those monitoring developments in the Arab uprisings.

Furthermore, information is spreading faster and farther: @angryarabiya’s tweets reach a global audience in real-time. This means that information from far corners of the world is accessible to exponentially larger and more geographically diverse groups. Although in the context of a revolution the most important audiences for such information are the local people, regional and global audiences help to ensure that a person’s message is heard and spread. This attention also means that an activist’s disappearance is more likely to be noticed and reported.40 Knowledge that their message is widely available may even embolden activists, reinforcing “their conviction that they are not alone.”41

Social media also expands access to evidence of human rights abuses beyond that offered by the mainstream media and non-government organizations (NGOs), and penetrates veils of secrecy thrown up by repressive regimes.42 “[T]echnology has allowed us to see into many parts of the world that were previously shrouded by oppressive governments or geographical boundaries.”43 Anyone in the vicinity of an event with audacity and a camera can document brutality and spread it on the Internet. And the proliferation of camera phones means this information often can be disseminated instantaneously. In-

39 Every username on twitter commences with the symbol “@”.
deed, the way NPR’s Andy Carvin reported on the Arab Spring epitomizes this new type of reporting: a marriage of sorts between traditional and social media. Carvin’s novel approach, curating and retweeting information from verified sources on the ground, has received widespread acclaim.44

Moreover, social media amplifies the message of its users.45 In late April 2001, for example, the New York Times reported that written accounts, photos, videos, and other information from demonstrators in Syria were being relayed around the world via social media by a small, dedicated group of roughly twenty Syrian exiles scattered across the globe.46 The work of this relatively tiny team of activists helped ensure that the world was kept aware, in real time, of the Syrian government’s attacks on unarmed and generally nonviolent protesters.47 It is worth noting in this regard that at the time of writing the number of civilian deaths attributed to the Assad regime’s crackdown by the U.N. was more than five thousand over nine months.48

By comparison, in 1982 the Syrian army apparently massacred tens of thousands of residents of the town of Hama in roughly one month. The world did not learn of the killings until much later, and even then the information that emerged was incomplete and difficult to verify. The extent of the Syrian government’s brutality did not become fully known to the world until years later, and by then it was far too late. Today, through the work of cyber activists, the Syrian government came under immediate pressure to refrain from cracking down violently on dissident protests. Indeed, the regime has been confronted with the reality that it “had almost entirely ceded the narrative of the revolt to its opponents at home and abroad.”49

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Finally, outside the social media field, an important new platform for information access is taking shape with the emergence of WikiLeaks.\(^{50}\) Described as a “whistleblower” site, WikiLeaks received information through a secure website from individuals within governments, corporations, and organizations, and posted the original documents online. In 2010 and 2011, working in part with news outlets in the United States and Europe, WikiLeaks released huge tranches of classified information, allegedly leaked to it by a soldier in the U.S. Army: the information included military documents from the wars in Afghanistan and Iraq and thousands of State Department cables.\(^{51}\) The WikiLeaks model will almost certainly evolve and be replicated, posing the most significant challenge to date to the secrecy of government, corporate, and even personal information.

B. Step Two: Conversation & Debate

Access to information leads to conversation and debate, through which “political opinions are formed.”\(^{52}\) Shirky argues that “access to information is less important, politically, than access to conversation.”\(^{53}\) Social media is a great facilitator of mass conversation. After all, conversation is among its primary purposes.\(^{54}\) Social networks, and the Internet as a whole, are of course awash with trivial exchanges. But there is also much meaningful debate. A novel aspect of conversation on social networks is that it is not limited merely to one-to-one conversation; the unique capabilities of social networks enable conversation from many-to-many.\(^{55}\)

Shirky’s point regarding the effectiveness of conversation via social media is borne out by the steps States take to block, limit, and monitor social networks. The United States recently underscored the political

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\(^{52}\) See Shirky, *supra* note 36, at 34.

\(^{53}\) Id. at 35.

\(^{54}\) See Zeynep Tufekci, *Delusions Aside, the Net’s Potential Is Real*, Atlantic (Jan. 12, 2011), http://www.theatlantic.com/technology/archive/2011/01/delusions-aside-the-nets-potential-is-real/69370. Tufekci discussed the reaction on social media sites to the January 2011 attempted assassination of U.S. Congresswoman Gabrielle Giffords: “Every internet community I am part of is roiled and there is widespread discussion on most of them about the event. Fifteen years ago, we’d all be watching TV, not communicating with each other.” Id.

power of online conversation by concentrating its foreign policy efforts on promoting Internet freedom on social media rather than Web 1.0 tools.\textsuperscript{56}

Furthermore, under Ethan Zuckerman’s “cute cat” theory of digital activism, it is very difficult for States to shut down popular sites where the majority of people engage in trivial activities.\textsuperscript{57} That is, shutdowns of popular social media sites will aggravate those who were previously apathetic, including supporters of the regime.\textsuperscript{58} Those who lose access to their “cute cats” may become politicized and interested in learning more about available “anonymous proxies,” which can be used to gain access to censored sites.\textsuperscript{59} In Zuckerman’s view, the dominance of trivia on social networking sites is in fact beneficial for the use of such sites by activists.\textsuperscript{60} A related danger for governments in shutting down certain sites is that they may focus greater attention on those sites than would have otherwise existed; the previously apathetic suddenly develop the curiosity to find out what all the fuss is about.\textsuperscript{61} Finally, shutting down social media can necessitate shutting down the Internet and mobile phone networks, which entails great economic costs.\textsuperscript{62}

\begin{itemize}
\item[57] See Zuckerman, supra note 40. In 2005, Zuckerman co-founded Global Voices, a site that collates, translates, and reports from social media in the developing world, and is the director of MIT’s Center for Civil Media. Ethan Zuckerman Biography, MIT Media Lab, http://www.media.mit.edu/people/ethanz (last visited Jan. 6, 2012).
\item[58] See Shirky, supra note 36, at 37.
\item[59] See Zuckerman, supra note 40.
\item[60] See id.
\item[61] See Shirky, supra note 36, at 39; Zuckerman, supra note 40. For example, in 2006 activists in Bahrain discovered through Google Maps that a significant amount of land in Bahrain—a “small, crowded nation”—is owned by the royal family. One activist created and distributed PDF copies of the Google Maps image. In response, the Bahraini government blocked access to Google Maps, which only increased interest in the images. Zuckerman, supra note 40.
\item[62] See The Economic Impact of Shutting Down Internet and Mobile Phone Services in Egypt, OECD, http://www.oecd.org/document/19/0,3746,en_2649_201185_47056659_D1_1_1,00.html (last visited Jan. 6, 2012). The OECD estimated the economic cost to Egypt of shutting down the Internet and mobile phone networks for five days during the protests in January and February 2011 to be US$90 million in “direct costs” and far more in “indirect costs.” See id.
\end{itemize}
IV. The Arab Spring and Social Media

So what role has social media played in the Arab Spring? Certainly, social media alone did not cause the revolutions and demonstrations. The underlying cause of all the uprisings has been mass dissatisfaction with incompetent, corrupt, and oppressive systems of government and growing gaps between rich and poor. Skyrocketing food costs, which ironically have been caused by global conditions rather than local economic incompetence, have deepened dissatisfaction.

A. A Social Media Profile of the Region

Large percentages of Arab populations are under thirty years old and are far more educated than their parents. Many resent being unemployed and are frustrated by an apparent lack of future opportunities. Many are also tech-savvy and use social media: people under thirty constitute 70% of Facebook users in the region. A study by the Dubai School of Government estimated that the number of Facebook users in the region almost doubled from 11.9 million in 2009 to 21.3 million in 2010. The growth in Facebook users in the region in the first quarter of 2011 was a further 30%. As of April 2011, Facebook penetration was 1.37% in Yemen, 1.94% in Syria, 3.74% in Libya, 7.66% in Egypt, 13.1% in Palestine, 21.25% in Jordan, 22.49% in Tunisia, and 36.83% in Bahrain. Twitter is not nearly as popular as Facebook; its active user base constitutes less than 1% of the population in the Arab world, excluding the Gulf States and Lebanon. One reason for the small user base is that Twitter does not yet offer an Arabic interface, though one was scheduled to launch in 2011.

B. A Twitter Timeline of the Uprisings

Tunisia witnessed the first major demonstrations of the Arab uprisings and the first ousted dictator, President Zine el Abidine Ben Ali. In 2008, Zuckerman drew attention to sophisticated cyber activism in Tu-

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64 For comprehensive data on the use of social media in Arab States, see generally Dubai Sch. of Gov’t, Civil Movements: The Impact of Facebook and Twitter (2011) [hereinafter Dubai Civil Movements Report], and Dubai Sch. of Gov’t, Facebook Usage: Factors and Analysis (2011) [hereinafter Dubai Facebook Usage Report].
nisia, including “mashups” of iconic videos designed to mock Ben-Ali, and the use of data from a plane-spotting website to determine that Ben Ali’s personal jet travelled more often than he did, which lead to the exposure of his wife’s European shopping junkets.66

WikiLeaks stirred simmering Tunisian discontent when, in partnership with The Guardian, it released leaked U.S. State Department cables detailing the United States’ opinion of and dealings with the decades-old Ben Ali regime. The cables alleged gross corruption within Ben Ali’s family and systematic oppression by the regime.67 In fact, TuniLeaks—a site linked with Nawaat, a Tunisian dissident site—released the leaked cables a few days earlier than WikiLeaks.68 The existence of corruption was common knowledge within Tunisia, but publication of the cables brought the issue starkly into the open. This clear evidence of Western complicity in, or at least tolerance of, the egregious conduct of the Ben Ali regime sparked outrage and conversation in both real and virtual communities.69

On December 17, 2010, in the Tunisian town of Sidi Bou Zid, the police told a young street vendor named Mohammed Bouazizi that he could not continue his business unless he paid a bribe that he could not afford. After the governor declined to hear his grievance, Bouazizi set himself on fire in protest. News of his self-immolation spread throughout the town, sparking protests and clashes with police.70

Videos of the Sidi Bou Zid protests were uploaded to Facebook, which, unlike other video sharing sites, was not blocked in Tunisia. In-

66 See Zuckerman, supra note 40.
68 The cables had been leaked to TuniLeaks from within WikiLeaks by someone who was apparently upset that WikiLeaks was releasing the cables through mainstream media rather than citizen media. See Ethan Zuckerman, Civic Disobedience and the Arab Spring: My Heart’s in Accra Blog (May 6, 2011, 4:20 PM), http://www.ethanzuckerman.com/blog/2011/05/06/civic-disobedience-and-the-arab-spring/.
deed, Ben Ali’s attempt to censor Facebook in 2008 simply encouraged
more Tunisians to join via proxy sites, an episode that may be a real life
manifestation of Zuckerman’s “cute cat” theory. Websites like Nawaa
curated and captioned Sidi Bou Zid videos that Al Jazeera, the Qatar-
based cable network, in turn broadcast to the region. Though officially
blocked in Tunisia, Al Jazeera was nevertheless able to broadcast citizen
media from the ground into the country via satellite. Given that print
and broadcast media was controlled within Tunisia, social media served
a vital role in spreading word of the uprising. A Facebook group enti-
tled “Mr President, Tunisians are setting themselves on fire” was estab-
lished, while Tunisian Twitter users spread the hashtags #bouazizi,
#tunisia, and #sidibouzid to show solidarity with the protesters and to
organize and galvanize country-wide protests. The Dubai School study
found that the number of Facebook users in Tunisia increased by 8% in
the first two weeks of January 2011 alone.

Regarding international reporting of events in Tunisia, social me-
dia was the “canary in the coal mine,” as it has been for all of the Arab
revolts since. Global Voices—a website that monitors, collates, trans-
lates, and sources stories from social media in the developing world—
began reporting early on the Tunisian demonstrations. By December
30, 2010, Global Voices noted the seepage via social media of news of
the unrest from within Tunisia, though mainstream media coverage
other than Al Jazeera was still absent. Among the tweets highlighted
in that story was the following from Egyptian activist Wael Nofal:
“@stephenfry Are you following what’s going on in #SidiBouZid #Tuni-
sia? It’s odd why western media turned face away, unlike #Iran last

71 See Open Net Initiative, Internet Filtering in Tunisia 2–3 (2009), available at
http://opennet.net/research/profiles/tunisia; Zuckerman, supra note 68 (discussing Sami
ben Gharbia’s view that “[r]eacting to censorship taught Tunisians how to disseminate
information through alternative paths and helped them use social media for advocacy in a
time of crisis.”).
72 See Hisham Almiraat, Tunisia, Algeria: The Revolution Will Not Be Televised, Global
Voices (Jan. 10, 2011, 10:06 GMT), http://globalvoicesonline.org/2011/01/10/tunisia-
algeria-the-revolution-will-not-be-televised/.
73 See Andy Carvin, Sidi Bou Zid: A Jasmine Revolution in Tunisia, STORIFY (Jan. 17, 2011),
74 Ryan, supra note 70.
75 Dubai Facebook Usage Report, supra note 64, at 3.
76 See Lina Bena Mhenni, Tunisia: Unemployed Man’s Suicide Attempt Sparks Riots, Global
Voices (Dec. 23, 2010), http://globalvoicesonline.org/2010/12/23/tunisia-unemployed-
mans-suicide-attempt-sparks-riots/.
77 Amira Al Hussaini, Tunisia: The Cry of Protesters Echoes Around the World, Global Voices
(Dec. 30, 2010), http://globalvoicesonline.org/2010/12/30/tunisia-the-cry-of-protesters-
echoes-around-the-world/.
year.” Nofal’s interesting attempt to spread the message through British
comedian and prolific tweeter Stephen Fry—who at the time had over
one million followers on Twitter—demonstrates the diverse avenues
social media offers for spreading a story effectively. Nevertheless, by
January 12, only two days before Ben-Ali’s fall, Ethan Zuckerman post-
ed a blog on the lack of mainstream media coverage entitled “What if
Tunisia Had a Revolution, But Nobody Watched?”

Of course, once Ben Ali fled the country on January 14, the world
started paying attention to Tunisia. Overwhelming support expressed
via social media from its Arab neighbors, along with a feeling of “we
can do it too,” became immediately apparent. A prescient tweet from Al
Jazeera’s Dima Khatib a day later read: “No Arab leader is sleeping to-
night. #SidiBouzid has invaded their bedrooms.” This was likely true
for Egyptian President Hosni Mubarak, who soon encountered the
#sidibouzid spirit himself.

Social media-driven protests existed in Egypt prior to the 2011 rev-
olutions. In 2007, a young activist named Ahmed Maher noticed that
the Facebook page for the Egyptian football team had attracted 45,000
“fans,” and wondered if a political movement could be formed on
the network. In March 2008, Maher and colleague Israa Abdel-Fattah cre-
ated a Facebook page called “April 6 Youth,” which supported a
planned industrial strike and promoted it through emails and viral
“marketing.” The page attracted 70,000 members in three weeks, turn-
ing the strike into a major protest that embarrassed the Mubarak re-
gime. Group members subsequently used the page to share organiza-
tional tactics and other information in preparation for additional
protests. Members also fostered online and face-to-face connections
with Serbia’s Otpor movement, which had helped remove Slobodan
Milosevic from power in 2000 through non-violent demonstrations. Al-
though the April 6 Youth group attempted to organize other major
protests, such as a beach protest in Alexandria, police thwarted the at-
tempts after monitoring the group’s online activities. Interviewed after

78 Ethan Zuckerman, What if Tunisia Had a Revolution, but Nobody Watched?, My
01/12/what-if-tunisia-had-a-revolution-but-nobody-watched/.
79 See Angelique Chrisafis, Zine al-Abidine Ben Ali Forced to Flee Tunisia as Protesters Claim
world/2011/jan/14/tunisian-president-flees-country-protests.
80 Sarah Joseph, Social Media and Human Rights, MONASH UNIV. (June 16, 2011),
the 2011 Egyptian revolution, Maher claimed that those failed protests in fact represented an important step in the group’s progress:

Because of this day, we know we are an important group. They came for us right away. Why? Because we are a real problem for them. Thanks to that day, people all over Egypt and outside of Egypt—they know us. They know of this group that is against the government and that we are dangerous to the regime.\(^8^1\)

After Tunisia, the April 6 Youth movement, along with important social media allies, saw an opportunity to turn their annual but “little-noticed” protest on Egypt’s Police Day (January 25) into a much larger demonstration.\(^8^2\) The hashtag #jan25 began trending,\(^8^3\) calling people to attend rallies and signaling to the media and the outside world to watch out for major protests in Egypt on January 25. Tens of thousands of people turned out, prompting the swift organization—again by social media—of another protest, a Day of Rage, on January 28.\(^8^4\) The momentum of protest snowballed into seventeen days of massive demonstrations that ultimately forced the resignation of Mubarak on February 11.\(^8^5\)

Beginning on January 27, Egypt shut down its Internet for five days, disrupting social media communications. However, the Internet blackout probably backfired by provoking a surge in protest activity, because getting out in the streets was the only way “to find out what was happening.”\(^8^6\) According to the Dubai School survey, over half of the respondents in Egypt (56.35%) and Tunisia (59.05%) felt that blocking

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\(^8^1\) Wolman, supra note 11, at location 487 (quoting Waleed Rashed, April 6 Youth founder). In this e-book, Wolman provides a discussion of how the April 6 Youth movement developed in Egypt.


\(^8^3\) A “trending” topic on Twitter is one that experiences a surge in discussion, rather than one that appears on a regular basis. Hence, a topic that is constantly discussed at a high level (such as “Justin Bieber”) does not trend, whereas a topic that becomes “hot” compared to previous levels does trend. This enables Twitter to identify global and local trends. See About Trending Topics, Twitter Help Center, http://support.twitter.com/entries/101125-about-trending-topics (last visited Jan. 6, 2012); cf. Wolman, supra note 11, at location 322 (explaining the origins of the hashtag #jan25, which highlights how users can create trending hashtags).

\(^8^4\) Wolman, supra note 11, at locations 389–400, 456).


the Internet mobilized people to “find creative ways to organize and communicate.”

Mainstream media coverage of the protests accompanied social media coverage. Coverage of the Arab protests since Tunisia’s have consisted of a mixture of social and traditional media. Given that the action is taking place in its backyard, it is not surprising that Al Jazeera has led the way. Al Jazeera pioneered the integration of traditional services with social media, ensuring that its syndicated stories are prompted and informed by a multitude of citizen journalists on the ground.

This model was crucial in spreading the news of Bouazizi and Sidi Bou Zid, news that spread with devastating effect to Tunis, Cairo, Benghazi, and beyond. Unlike in Tunisia, in Egypt the coverage was live. In Cairo, Al Jazeera trained its cameras—which had not been allowed into pre-revolution Tunisia—on Tahrir Square, the iconic site of the main protests, for the entire protest period. Egypt became the biggest story in the world as the protests rolled on to the increasingly inevitable climax of Mubarak’s downfall.

Just as the iconic #jan14 and #sidibouzid hashtags for Tunisia led to #jan25 trending for Egypt, Twitter hashtags for planned “days of rage” in other States also began trending: #jan30 in Sudan, #feb3 in Yemen, #feb5 in Syria, #feb12 in Algeria, #feb14 in Bahrain, and #feb17 in Libya. The Dubai School study reveals that calls to protest in the region, which first appeared on Facebook, resulted in actual street protest in all but one instance. This does not mean that the relevant Facebook pages “were the defining or only factor in people organizing themselves on these dates, but as the initial platform for these calls, it cannot be denied that they were a factor in mobilizing movements.”

In Sudan, the Al-Bashir government quickly stifled the planned protests. In Algeria, although protests were not as heated or as constant as in other parts of the Arab world, they resulted in some welcome reforms such as the lifting of a long-standing state of emergency. In Yemen, protests began on the scheduled day and continue to the time of writing; President Saleh is clinging to power and his days as leader ap-

87 Dubai Civil Movements Report, supra note 64, at 7.
88 See Rachel McAmy, #media140—Al Jazeera’s Early Start Reporting Revolutions, Journalism.co.uk (April 26, 2011), http://www.journalism.co.uk/news/-media140---al-jazeera-s-early-start-reporting-revolutions/s2/a543674/.
89 See generally Tweets from Tahrir (Nadia Idle & Alex Nunns eds. 2011) (providing a unique account of the Egyptian Revolution told entirely through contemporaneous tweets).
90 Dubai Civil Movements Report, supra note 64 at 4 (indicating that the call to protest in Syria initially failed).
91 Id. at 5.
pear to be numbered. In Syria, protests were thwarted on the original planned date of February 5, but erupted belatedly in March, and have continued to the present, despite the government’s demonstrated willingness to use deadly force against protestors. The violent response continues to isolate President Assad’s regime from the international community. In Bahrain, protests began as scheduled on February 14 and an enormous percentage of the country’s population mobilized to call for reforms of the monarchist government. Nevertheless, the Bahraini government—with the aid of its Gulf allies in Saudi Arabia, Qatar, and the United Arab Emirates—seems to have successfully cracked down on the opposition. It has, for the time being, put the protest genie back in the bottle, though outrage continues to be voiced via social media, such as by @angryarabiya.

Finally, in Libya, protests began in Benghazi and quickly spread throughout the country. After a reportedly brutal response by Muammar Gaddafi, the unarmed protests quickly morphed into an armed rebellion and civil war, and the rebels were supported by NATO air-power authorized by the United Nations (U.N.). In August 2011, Gaddafi was forced to flee the capital Tripoli and a transitional government took power. On October 20, 2011, Gaddafi was killed after being captured by rebel forces. Given the very different trajectory of the Libyan uprising—namely, its rapid metamorphosis from unarmed protests to armed rebellion to international war—the importance of social media as a catalyzing force for revolution took a back seat. Twitter’s influence paled in comparison to NATO bombs.

While the “Twitter revolutions” outside Egypt and Tunisia have not been as successful, the contagion effect—including the enthusiasm whipped up by trending hashtags, dissident Facebook groups, and mainstream media—continues to threaten some of most oppressive regimes in the world. At the very least, the Twitter revolutions reveal that the apparent stability of these regimes often is merely a facade.

C. Leaderless Revolutions

In light of Gladwell’s assertion that successful social movements require organized hierarchies rather than loose networks, it is interesting to note that the Arab protests lack a hierarchy. Traditional organized
anti-government bodies, like the Muslim Brotherhood in Egypt, or prominent opposition figures, such as Egypt’s Mohammed El-Baradei, came to the protests late and had little or no leadership role. The faces of the Arab revolutions have not been icons like Martin Luther King, Jr., Ayatollah Khomeini, Corazon Aquino, Alexander Dubcek, Vaclav Havel, or Lech Walesa, but rather unknown figures like Mohammed Bouazizi and Khaled Said, a young man beaten to death by Egyptian police in 2010, whose deaths were associated with oppressive regimes and generated viral outrage online.

Among the organizers in Egypt were Ahmed Maher, founder of the April 6 Youth movement, and Wael Ghonim, a Google executive who set up the Facebook page “We are all Khaled Said” after Said’s murder. Ghonim helped the protests come about, but he was not a “leader” per se. Due to the fact that he disguised his identity as administrator of the “Khaled Said” page, few actually knew who he was until he disappeared at the hands of the police.94 His release twelve days later, by which time his identity was widely known, provided a boost to the protests at a time when they seemed to be waning.95 One organizer in Tunisia, a blogger named Slim Amamou, was arrested on January 6, only to be appointed the Minister for Sport and Youth in the post-Ben Ali government when he was released after Ben Ali’s flight.96 The loose networks at work in Tunisia, Egypt, and other Arab States have proven to be quite resilient, and perhaps harder to break than a smaller clique-ish hierarchy.97 Indeed, Executive Director of Human Rights Watch Ken Roth pointed out a key advantage of leaderless revolutions: it is not as easy to decapitate


them as it was with some of the failed “color revolutions” in the former Soviet States.\footnote{See Kenneth Roth, \emph{New Laws Needed to Protect Social Media}, \textsc{GlobalPost} (Apr. 14, 2011), http://www.globalpost.com/dispatch/news/opinion/110413/facebook-twitter-social-media-revolution.}

Gladwell’s suggestions regarding networks and hierarchies are probably more relevant in assessing the aftermath of the revolutions in Tunisia and Egypt. Regarding the latter, there is widespread concern that the revolution will be co-opted by more conservative but better organized groups like the Muslim Brotherhood, and taken out of the hands of the more liberal youth who brought about the revolution in the first place.\footnote{See, e.g., William McCants, Op-Ed., \emph{Al Qaeda’s Challenge}, \textsc{N.Y. Times} (Aug. 22, 2011), https://www.nytimes.com/2011/08/23/opinion/23iht-edmccants23.html; Sherif Tarek, \textit{Egypt's Muslim Brotherhood and Ruling Military: Deal or No Deal?}, \textsc{AhramOnline} (Sept. 28, 2011), http://english.ahram.org.eg/NewsContent/1/64/22042/Egypt/Politics/-Egypts-Muslim-Brotherhood-and-Ruling-Military-Deal.aspx (exploring whether the Muslim Brotherhood struck a behind-the-scenes power-sharing deal with Egypt’s Supreme Council of the Armed Forces).} A sophisticated level of organization is required to form political parties and run for office in the new “democratic” Egypt. While loose networks may play a key role in forcing dramatic and profound political change, more organized hierarchies are needed to anchor that change, otherwise counter-revolutionary hierarchies might take advantage of the chaos to reverse or pervert the course of events.\footnote{See, e.g., Esther Dyson, \emph{Change-Is-Hard.com}, \textsc{Slate} (May 19, 2011, 3:07 PM), http://img.slate.com/id/2295106/ (noting that the Internet has proven to be an important and necessary tool in social revolutions, but that it is not by itself sufficient to ensure permanent change).} Nevertheless, the same Egyptian youth returned to Tahrir Square in huge numbers to press the army, which currently controls Egypt in the post-Mubarak vacuum, to push forward with democratic reforms.

\section*{D. Conclusion on the Role of Social Media in the Arab Spring}

In September 2011, the University of Washington released a study based on an analysis of tweets during the revolutions in Tunisia and Egypt, and used that analysis as a proxy to conclude that social media played a central role in shaping political conversations inside and outside the Arab region in early 2011.\footnote{See Howard et al., \textit{supra} note 86, at 2–4. For another analysis of the role of social media in the Arab Spring, see Zeynep Tufekci and Christopher Wilson, \textit{Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square}, \textit{7 J. Comm.} (forthcoming 2012) (on file with author).} Before and after the revolutions, social media was used to spread information about liberty, revolution,
and freedom. Spikes in “online revolutionary conversations often preceded major events on the ground.”102 Social media also helped spread the revolutionary contagion across the region; for example, advocates of democracy in Tunisia and Egypt picked up significant numbers of followers in countries that later had uprisings of their own. Interestingly, the viral messages of the time increasingly emphasized messages about democracy, liberty, and freedom, as opposed to economic issues or Islam.103 While “[s]ocial media alone did not cause political upheaval in North Africa,” it “altered the capacity of citizens and civil society actors to affect domestic politics.”104

The Dubai School survey, which was distributed to Tunisian and Egyptian Facebook users in March 2011, revealed the following information about the primary uses of Facebook in early 2011:

- Organizing actions and managing activists (Egypt 29.55%; Tunisia 22.31%);
- Spreading information to the world about the civil movement (Egypt 24.05%, Tunisia 33.06%);
- Raising awareness inside the country on the movement (Egypt 30.93%, Tunisia 31.4%); and
- Entertainment or other (Egypt 15.46%, Tunisia 13.22%).105

Similarly, considering the popularity of the hashtags #egypt, #jan25, #libya, #bahrain, and #protest, along with surges on the dates of major protests, it appears that political issues dominated Twitter use in the region.106 These results indicate that social media fulfilled the functions in Shirky’s two steps by providing information and facilitating conversation about political matters.

In the Arab uprisings, the key steps of “galvanization” and “organization” followed Shirky’s two steps.107 Regarding the former, social media revealed the depth of feeling and commitment on an issue; it is easier to desire change and to be willing to act to effect it if one knows that others feel the same way. The same point is made in the University of Washington study: “[T]he public sense of shared grievances and potential for change can develop rapidly.”108 Regarding “organization,” social

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102 Id. at 3.
103 See id. at 13.
104 Id. at 23.
105 See Dubai Civil Movements Report, supra note 64, at 6.
106 Id. at 19–22.
107 See Shirky, supra note 36, at 34; see also Joyce, supra note 42, at 25.
108 Howard et al., supra note 86, at 23.
media clearly synchronized the actions of the galvanized many, as exemplified by the January 25 protests in Egypt. As Shirky argued in April 2011, “these tools alter the dynamics of the public sphere” by allowing citizens to “coordinate more rapidly and on a larger scale than before these tools existed.”

This organization function is particularly important in the context of States that tightly control access to traditional sources of information and means of communication. Indeed, Gladwell’s dismissal of social media can be criticized for ignoring the political role of social media in developing states.

There is little doubt that the “weak activist” tool of social media has been used in the Arab world by a loose network of people to encourage or facilitate their taking of very great risks. They poured out onto the streets—a long way from clicking “like”—to demonstrate against and even overthrow some of the world’s longest lasting and most brutal dictatorships.

V. THE FORCES OF LIGHT AND DARKNESS

The highly visible use of social media to foment Arab revolutions may change the way oppressive States confront the medium. When the alternative is revolution, the comparatively minor risk of a “cute cat” backlash may be worthwhile. A recent report from Freedom House indicates that Internet freedom decreased overall in thirty-seven studied countries. Furthermore, some States, such as China, now possess the technology to selectively censor content, such that activist pages may be filtered out while the cute cats remain. That said, most authoritarian States do not yet have the resources to impose such technically sophisticated censorship.

A major criticism of the role of social media in revolutions is that social media and the Internet can facilitate oppression as easily as they can facilitate pro-democracy activism. Cell phones and GPS systems make it much easier to track people. Iran and Belarus, for example, used the Internet to identify, locate, and target online dissidents. China recently conducted a major crackdown on bloggers and other activists.

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111 See Zuckerman, supra note 40; see also Morozov, supra note 33, 96–99.
in the wake of post-Egyptian revolution call for a “jasmine revolution” in China.

Further, social media creates new risks of repressive surveillance. Data from relevant sites can provide information about a particular dissident and that person’s connections; social media can therefore facilitate the uncovering of an entire dissident network rather than just one person. While seasoned dissidents may be cautious, they cannot control the activities of enthusiastic but inexperienced “fans” who might talk about their Facebook page. Another danger is that search engines can streamline surveillance; government secret services can data-mine particular keywords to spot likely subversive activity much more efficiently than by intercepting “snail mail.” New technologies—such as facial recognition software that can facilitate the identification and subsequent persecution of protesters who bravely or inadvertently ended up on YouTube—are similarly problematic.\(^\text{112}\)

One response is to fight the dangers of new technology with newer technology. For example, Whisper Systems, a California company, donated its encryption software to assist the Egyptian protesters in protecting mobile phone messages from government surveillance.\(^\text{113}\) In early 2011, Hillary Clinton announced that $20 million had been awarded from 2007 to 2010 “to support a burgeoning group of technologists and activists working at the cutting edge of the fight against Internet repression,” and that another $25 million would be awarded in 2011.\(^\text{114}\) In the battle of technologies, however, there is no guarantee that free enterprise favors freedom. The British firm Gamma International, for example, offered spyware to the Egyptian government to facilitate surveillance of demonstrators.\(^\text{115}\)

A problem with relying on technological experts to battle authoritarianism is that technological expertise does not necessarily include an understanding or appreciation of the possible social and political consequences of new technologies. Internet companies, for example, are using new filtering techniques to tailor content to one’s perceived tastes,
including one’s political preferences. Google now personalizes search results, and Facebook personalizes users’ news feeds. Users may notice that the advertisements that pop up in Google searches and on Facebook seem oddly relevant. This bespoke Internet experience is possible because Internet sites harvest information about people to draw conclusions about what those people want to see in their searches and Facebook feeds. It is designed to assist marketers and to enhance one’s Internet experience. A frightening aspect of this development, however, is that such technology would be extremely useful to authoritarian regimes seeking to identify political opponents, or even “cultural opponents” such as, in many States, gays and lesbians. It seems unlikely that technology companies have considered such inherent dangers in developing this new personalized version of the Internet.

The fact is that revolution is always a dangerous business. As noted above, contrary to Gladwell’s assertions, social media can prompt high-risk activities. It will be very difficult for a “Twitter Revolution” to succeed, however, if a regime responds with brutality and oppression, as Iran did against the Green movement in 2009 and as Bahrain did in early 2011. Nevertheless, unfinished Twitter Revolutions, having exposed the underlying resentment against and vulnerability of an oppressive regime, plant seeds that may grow in the future. In this regard, I note that Syrians seem to have responded to the murderous suppression of protests by the Assad regime by mounting more and ever larger protests. Thus, at the time of writing, the success of Assad’s heinous and oppressive tactics is far from assured.

A. The United States Leads the Way (Not)

In early 2010, U.S. Secretary of State Hillary Clinton declared in a speech on Internet Freedom that the U.S. State Department was “supporting the development of new tools that enable citizens to exercise their rights of free expression by circumventing politically motivated

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116 See generally Eli Pariser, The Filter Bubble (2011) (describing how companies customize search results, a trend that threatens to control how the public consumes and shares information as a society).

117 See Morozov, supra note 33, at 158-67.

She left no doubt that the United States would promote offshore cyber-activism and its interests:

> We want to put these tools in the hands of people who will use them to advance democracy and human rights . . . [W]e will work with partners in industry, academia, and nongovernmental organizations to establish a standing effort that will harness the power of connection technologies and apply them to our diplomatic goals.\(^\text{120}\)

Despite the stated goal, there have been hiccups in the implementation of Clinton’s plan. For example, a major blunder occurred when the United States planned to facilitate the export of Haystack, technology that was supposed to circumvent censorship and protect privacy. The technology, however, turned out not to be so secure; users that installed the technology in places like Iran would have been put in considerable peril.\(^\text{121}\)

Furthermore, other aspects of U.S. foreign policy undermine its stated goal of facilitating global Internet freedom. Its sanctions on Iran, for example, obstruct the ability of American companies to provide important information systems in that country. Ironically, the U.S. government’s call to Twitter to maintain its connections in Iran during the uprising of mid-2009 was probably a call to Twitter to continue breaking U.S. sanctions.\(^\text{122}\) Thus, U.S. policy in this area is not particularly coherent.

Shirky criticizes the Clinton plan, explaining that it “is difficult for outsiders to understand the local conditions of dissent.”\(^\text{123}\) Indeed, support from the United States risks “tainting even peaceful opponents as being directed by foreign elements,” particularly given widespread disdain for and suspicion of its agenda in the Arab world.\(^\text{124}\) The co-founder of TuniLeaks and the Tunisian dissident site Nawaat, Sami ben Gharbia, scathingly characterized the Clinton policy as “hypocritical,” designed to use activist bloggers and their causes for the United States’


\(^{120}\) Id.

\(^{121}\) See Morozov, supra note 33, at 208; Shirky, supra note 36, at 31.

\(^{122}\) See Morozov, supra note 33, at 205–206, 211.

\(^{123}\) Shirky, supra note 36, at 32.

\(^{124}\) Id.
own agenda “or simply for domestic consumption.” He does not see its Internet Freedom policy as “independent from the broader and decades old U.S. foreign policy, which has been based on practical rather than ethical or moral considerations such as the support of Human Rights.” After all, the United States clearly is not a consistent supporter of democracy in the Middle East, preferring in many cases the “stability” offered by allies such as Saudi Arabia, Bahrain, and, previously, Mubarak in Egypt. Furthermore, the WikiLeaks cables revealed blatant hypocrisy by the West regarding its tolerance of Ben-Ali and other oppressive and corrupt regimes: many cables exposed U.S. indifference to repression and corruption. In any case, it is not for the United States to guide democratic revolutions abroad. The interests of a remote and self-interested superpower will not often accord with the wishes and best interests of a State’s population.

Morozov believes that Clinton’s 2010 speech backfired. It alarmed rival regimes by suggesting that the Internet was not simply a forum for free speech but a foreign policy tool of the United States. These regimes, such as Russia, reacted accordingly by clamping down harder on Internet freedoms. Iran recently announced its plan to launch its own “Halal Internet” in late 2012, which will be extensively censored in accordance with its government’s views of Islamic morality and its own “security” needs. Iran plans to offer this service to Islamic neighbors.

In early 2011, Clinton updated her Internet Freedom speech and acknowledged an initiative “to connect NGOs and advocates with tech-

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126 Id.
128 See Morozov, supra note 33, at 231–34.
nology and training that will magnify their impact.”131 In fact, at the
time of the speech links already existed between Arab activist groups
and government-funded groups in the United States. For example, State
Department cables leaked by WikiLeaks confirmed that the April 6
Youth Movement and the Bahrain Center for Human Rights received
training from organizations including the pro-democracy NGO Free-
dom House, the International Republican Institute (affiliated with the
Republican Party), and the National Democratic Institute (affiliated
with the Democrats) on how to organize and build coalitions.132 Never-
theless, the resulting revolutions and protests in the Arab world were
not driven by the agendas of these U.S.-based organizations. The United
States was a reluctant or, at best, belated supporter of the protests.

B. Propaganda, Sock Puppets, Good Speech, Bad Speech

Social media can be used to communicate misinformation as read-
ily as it can be used to convey reliable information. For example, “A
Gay Girl in Damascus” (Amina Arrat) was one of the more popular Syr-
ian bloggers in the beginnings of the uprising, blogging about revolu-
tion, sexuality, and repression in Syria. The story fell apart, however,
after “Amina” was revealed to be Tom McMaster, a masters student res-
dent in Scotland. The unmasking of “Amina” as a straight man from
Scotland reminded us all how easy it can be to spread lies and use a
false identity in cyberspace. It also no doubt undermined the real Syr-
ian activist blogosphere and its receptive audience.133

Similarly, while social media can be used to support pro-democracy
forces, it can also be used to push pro-government propaganda.134 In
March 2011, The Guardian reported that the U.S. military was “develop-
ing software that will let it secretly manipulate social media sites by us-
ing fake online personas to influence Internet conversations and
spread pro-American propaganda.”135 While such tactics may be de-
signed to target extremist ideas that might foster terrorism, they could
also thoroughly compromise the key “conversation” potential of social

131 See 2011 Clinton Address, supra note 19.
133 See, e.g., David Kenner, Straight Guy in Scotland, FOREIGN POL’Y LIST (June 13, 2011),
134 See, e.g., Neal Ungerleider, Syria’s Facebook Wars, FAST COMPANY (May 10, 2011),
135 Nick Fielding & Ian Cobain, Revealed: US Spy Operation that Manipulates Social Media,
GUARDIAN (U.K.), March 17, 2011, at 15, available at http://www.guardian.co.uk/technol-
media, especially if the same idea is adopted by other governments, companies, or NGOs. Propaganda is even being outsourced by some States, with U.S.-based public relations consultants providing “reputation management” services to governments such as those in Bahrain, Syria, and, previously, Tunisia. One can only hope that social media will prove resilient to such “sock puppets.” In reality, the tactic could seriously backfire, as the unmasking of a sock puppet thoroughly discredits any ideas from that source.

Social media can also spread bad ideas and content just as it can spread good ideas and content. As Morozov points out, it is wrong to assume that all bloggers in Russia, China, or Iran favor democratic reforms and pluralist tolerance. Many such bloggers are more hardline than their government; the blogosphere in authoritarian States harbors reactionaries just as it does in the West. Such reactionaries can even be cultivated to report on perceived subversive activity, as has occurred in Thailand, Saudi Arabia, and China, or to engage in cyber-attacks on dissident websites.

Morozov quotes James Lewis, a senior fellow at the Center for Strategic and International Studies, for the proposition that “[c]yberspace is increasingly Hobbesian,” with a proliferation of egregiously hateful sites and pages. In April 2011, Sultan Sooud Al Qassemi of the Dubai School reported on the rise of “McCarthyist” trends in social media in the Gulf region, which is particularly vulnerable to an “us vs. them” mentality due to sectarian societal divides. In early October 2011, disturbing reports from Indonesia discussed thousands of tweets referring people to an Islamic extremist website in the aftermath of an Islamist suicide bomb attack on a Christian church.

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138 See Morozov, supra note 33, at 46–47, 103–04, 108–10. A website can be brought down by being overloaded with virtual visitors using viruses and malware. These are known as Distributed Denial of Service attacks.


In the immediate aftermath of the British riots in August 2011, which resulted in widespread looting and property damage, British Prime Minister David Cameron partially blamed social media for the unrest, and raised the possibility of banning criminals from and otherwise censoring social networks. The culpability of social media for the riots is disputed, and it seems likely that Blackberry’s encrypted messenger service, rather than the open social media platforms, played a bigger role in fuelling the unrest. A joint study by The Guardian and the London School of Economics indicates that Twitter, at least, was used more to respond to the riots than to start them, as well as to organize post-riot cleanups (using the hashtag #riotcleanup). Nevertheless, just as social media can coordinate legitimate and profound political mobilization, it can undoubtedly play a role in provoking mayhem.

Social media platforms are neutral tools that can be used to promote both good and bad causes. Of course, the traditional pro-speech argument suggests that in the free market of ideas, “bad” speech can be drowned out by “good” speech. Such a statement may seem trite and its premise cannot be proven, but the opposite cannot be proven, either. At the very least, social media increases participation; but greater participation does not necessarily lead to democracy, pluralism. It depends on “the values people bring to the table.”

At least when it comes to verifiable facts, social media is capable of self-correction. A good example is Andy Carvin’s meticulous investigation and eventual debunking, via Twitter, of a rumor begun on Facebook by a Libyan expat news service that Israeli weapons were being used by the Libyan government to crush the rebels.

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C. Speech Ghettoes

A potential downside of social media is the so-called ghettoization of speech. Many people will follow, view, and become a fan of only those sites that accord with their preconceived world view. This phenomenon may generate greater and more intransigent political divides, and, at worst, “enclave extremism.” Such a problem, however, already exists with regard to mainstream media, with, for example, conservatives reading the Daily Mail or watching the Fox News Channel, and progressives reading The Guardian or watching MSNBC. Certainly, some social media ghettoes, like certain Facebook pages, may be heavily protected and effectively visible only to invitees, so they are less transparent than mainstream media ghettoes. Furthermore, the personalization of searches and Facebook feeds increases the ghettoization problem, because people are artificially shielded, often without their knowledge, from views that they are expected by an algorithm not to agree with. The walls of some social media ghettoes, however, are more porous than those of established media ghettoes; for example, it is very easy for outsiders to penetrate Twitter ghettoes and spread stories that challenge their prevailing narratives. Finally, the existence of speech ghettoes is often a positive thing, as it is indicative of a lively, broad, and diverse political debate.

D. The People’s Broadcasts

Morozov bemoans the greater ability of the powerful, such as state actors and multinational corporations, to dominate the “decentralized space” of the Internet. But social media, which is becoming increasingly accessible to the poor across the world, can give a voice to the previously invisible in a way that other broadcast media, like television or radio, cannot. The nature of social media, which provides a global public space that allows for an unprecedented level of citizen “broadcasting” and choice of sources, should help counter the phenomenon that the speech of the powerful generally overwhelms that of the powerless.

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146 See Morozov, supra note 33, at 240 (quoting U.S. presidential advisor and former academic Cass Sunstein).
148 See Morozov, supra note 33, at 136.
While acknowledging the potential dark side of social media, Zeynep Tufekci postulates that the Internet, including social media, offers the opportunity for a people’s counterweight in the global political arena, which is otherwise dominated by remote entities such as superpower States, multinational corporations, and international organizations like the International Monetary Fund, the World Bank, and the U.N. In her words, “it has become very hard for citizens of any nation-state to confront these powerful global institutions or to start to meaningfully address the multiple global crises facing humanity,” such as climate change, ongoing unpopular wars against terror, and financial collapse. People are also weary of cynical realpolitik.

Truly global communities of citizens, which may be uniquely created and facilitated by social media, offer at least some “hope of reclaiming leverage on institutions of power.” In this respect, signs of Internet-facilitated insurgency are evident in WikiLeaks and its present and future imitators, which pose significant challenges to government control over classified information. Indeed, outside the Arab world, an upsurge in mass global dissent is evident. The protests in Spain are an interesting example, where the crowd’s grievances were so multi-faceted that it was difficult to know exactly what their focus was. What they all had in common, though, was the shared sense that “politics as usual” was no longer acceptable. Furthermore, as I write, the burgeoning #occupywallstreet movement, a loose alliance with general grievances against corporate power and greed in the United States, is gaining traction in large part thanks to social media.

VI. Twitter, Facebook, YouTube: Who Are These Companies Anyway?

Private companies run the key global social media platforms. What social or human rights responsibilities do these entities have to their users? Is it appropriate to place any faith in them as facilitators and guardians of a revolution? What if they oppose a progressive, democratic revolution? After all, the status quo often suits big business. Perhaps the-

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149 Tufecki, supra note 54.
151 See Shirky, supra note 36, at 41.
Social media platforms are not as “neutral” as revolutionaries (or their adversaries) might expect.

Twitter executives are openly proud of the role their tool has played in the Arab Spring. Co-founder Biz Stone stated in an interview: “What I like to think of services like Twitter and other services is that it’s kind of a supporting role. We’re there to facilitate and to foster and to accelerate those folks’ missions.”

As noted, the Mubarak regime shut down the Internet in the initial days of the Egyptian protests. Twitter responded by quickly setting up a “Speak2Tweet” service that allowed people in Egypt to leave messages at a local phone number that were then transcribed and tweeted to the world. Similarly, Google openly expressed its pride in its executive Wael Ghonim’s role in the Egyptian uprising, though there has been no suggestion that the company helped him facilitate the protests. YouTube, which is owned by Google, curated videos from Egypt to make them more easily searchable.

In contrast, Facebook has not publicly embraced the revolutions. It actually removed the “We are all Khaled Said” page in November 2010 after discovering that its administrator, Ghonim, used a pseudonym. The site was restored only after U.S. resident Nadine Wahab agreed to take on the nominal role of administrator. Anonymity will be desirable, even essential, for many activists to avoid identification, subsequent harassment, or worse. Facebook’s strict policy against fake identities and pseudonyms led to the removal of activist webpages, sometimes at sensitive times.

U.S. legislators—notably, Illinois Senator Richard Durbin—lobbied Facebook to change its policy so as to protect pro-

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154 Jenna Wortham, Google Praises Executive’s Role in Egypt Revolt, N.Y. Times, Feb. 15, 2011, at A11. The company expressed this sentiment through an official tweet: “We’re incredibly proud of you, @Ghonim, & of course will welcome you back when you’re ready.”


157 See Giglio, supra note 156.
democracy activists, but Facebook refuses to do so.\footnote{See Dick Durbin, Op-Ed., Tyrants Can Use Facebook, Too, POLITICO (Mar. 7, 2011), http://www.politico.com/news/stories/0311/50739.html.} The company claims the policy is necessary to avoid fraud and to ensure user accountability.\footnote{See Mike Giglio, supra note 156; cf. Hayley Tsukayama, Google Plus Relaxing Real Name Policy, WASH. POST (Oct. 20, 2011), http://www.washingtonpost.com/business/technology/google-plus-relaxing-real-name-policy/2011/10/20/glQA8140L_story.html (stating that the new social networking site Google+ has stepped back from using a similar “real name” policy due in part to backlash about danger to political dissidents).} Regardless, Facebook’s core concern is hardly the promotion of revolutions: its “overriding objective is the much more typical one of expanding its market while avoiding bad PR and staying out of trouble with governments that set the rules.”\footnote{Weisberg, supra note 155.} 

A. Censorship Policies

A key concern regarding the value of social media sites to political change is the extent to which the relevant sites are censored. While the perception of social media is that it facilitates interaction between users sharing content, the fact is that the content is mediated through, and can be suppressed by, a private intermediary. There are two distinct issues here. One issue concerns the extent to which a company assents to local censorship laws in order to conduct business in a particular State. The second issue concerns censorship of content imposed by companies themselves.

The first issue is particularly prominent with regard to Internet companies doing business in China. Internet companies that operate in China must comply with the country’s strict censorship rules, or be banned outside its firewall, which means that content is either inaccessible or slow to upload, and therefore less likely to be accessed.\footnote{See Sarah Joseph, Blame It on the WTO: A Human Rights Critique 138 (2011).} At the time of writing, Facebook is reportedly in negotiations to enter the Chinese market, and has clearly signaled its willingness to comply with China’s censorship demands.\footnote{Tania Branigan, Facebook May ‘Block Content’ Claim as Speculation Grows over Entry into China, GUARDIAN (U.K.), Apr. 20, 2011, available at http://www.guardian.co.uk/technology/2011/apr/20/facebook-considers-censorship-claim-china.} The benefits to Facebook of access to China means that it may itself work out how to separate the cute cats, which will presumably be allowed by China, from anti-government activism, which will almost certainly not be. Of course, local censorship rules stifle the utility of a site as a catalyst for spreading or fomenting dissent.
Although the issue of business acquiescence in State censorship receives more attention, company-imposed censorship is potentially more pernicious in undermining progressive social movements. A government’s censorship rules may be more transparent than those of a company. In States that respect the rule of law, one might be able to successfully challenge a State’s censorship of material in court. By contrast, there are few official remedies available if Facebook chooses to take one’s page down: it is, after all, Facebook’s platform. It is extremely difficult, if not impossible, to reconstruct a site elsewhere on the Internet, particularly if the site had tens of thousands of followers and sophisticated multimedia. In that light, I briefly examine the censorship policies of three key social media sites: Twitter, Facebook, and YouTube.

Twitter claims that it avoids censorship as much as possible. For example, while “specific threats of violence against others” are removed, Twitter’s policy appears to allow offensive language, abusive language, and even generalized threats or hate speech, except where illegal under local law. In late 2010, Twitter encountered controversy when it temporarily halted access to the account for “Anonymous”—a group of cyber-vigilantes who attack governments and companies—after the group apparently tweeted private credit card details. The removal of such private information seems reasonable. In any case, Anonymous has since resurrected its Twitter account.

Facebook’s Statement of Rights and Responsibilities provides that its users cannot “post content that: is hateful, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence,” or that is “unlawful, misleading, malicious, or discriminatory.” These rules sound reasonable, except that Facebook reserves the right to remove content if it “believes that it violates [the] Statement.” There is no provision for appeal or even a hearing prior to the content removal. Facebook may not always exercise its discretion wisely. For ex-

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ample, on April 16, 2011, Facebook removed a photo of two fully clothed men kissing from a user’s profile for alleged breach of its Terms; it turned out that the photo was in fact a still image from the British soap opera *Eastenders*, which screens during family hours in the United Kingdom.\(^{168}\) It is difficult to discern exactly what part of the Terms the photo breached.

On April 29, 2011, Facebook was accused of “purging” activist accounts in the United Kingdom when it suddenly removed dozens of pages that challenged a variety of government policies, such as the tripling of tertiary student fees. As with “We are all Khaled Said,” Facebook claimed that the pages breached its Terms because they used fake profiles.\(^{169}\)

Facebook also found itself mired in controversy over its initial refusal, and then acquiescence to, a request by the Israeli government to remove a page promoting a Third Intifada in the Occupied Territories, on the grounds that the page promoted violence against Jews. From a human rights perspective, there is certainly nothing illegitimate about Facebook being used to promote peaceful protests in the Occupied Territories, just as it has been used to promote protests in other parts of the Middle East and the world.\(^{170}\)

Facebook also came under fire from the Syrian government for taking down pages associated with the Syrian army.\(^{171}\) Syrian protesters likely welcomed this instance of censorship, but it gave rise to concerns that Facebook was “taking sides,” and therefore manipulating the political or revolutionary messages broadcast on its powerful site. Given the importance of Facebook pages in promoting demonstrations against, and even the overthrow of, Arab governments, Facebook must tread a fine line between allowing its platform to be used for the or-


ganization of peaceful protests—which often contain comments that are not peaceful—and pages that promote violence and hate.\textsuperscript{172} One can only speculate how Facebook decides what content crosses the line from political speech into hateful speech, and what the credentials are of the people making these decisions. Furthermore, even violence is sometimes legitimate, as in the case of proportionate self-defense against a government crackdown, as may have occurred in Libya, Yemen, and Syria. In such situations, should Facebook remove pages that advocate fighting back against a violent regime?

YouTube’s Community Guidelines specify that videos should not show “bad stuff” including “animal abuse, drug or substance abuse, or bomb making,” “pornography or sexually explicit content,” “graphic or gratuitous violence,” “gross-out videos,” and “hate speech.”\textsuperscript{173} Google, as the owner of YouTube, amended the policy on violence after it was criticized in 2007 for removing videos showing police abuse in Egypt.\textsuperscript{174} In response to allegations that it was removing videos of post-election violence in Iran in 2009, YouTube addressed the controversy on its blog:

We’ve noticed some claims going around that YouTube has been engaging in acts of censorship and removing some of these videos from the site. Unless a video clearly violates our Community Guidelines, we will not take it down. In general, we do not allow graphic or gratuitous violence on YouTube. However, we make exceptions for videos that have educational, documentary, or scientific value. The limitations being placed on mainstream media reporting from within Iran make it even more important that citizens in Iran be able to use YouTube to capture their experiences for the world to see. Given the critical role these videos are playing in reporting this story to the world, we are doing our best to leave as many of them up as we can. YouTube is, at its core, a global forum for free expression.\textsuperscript{175}


\textsuperscript{173} YouTube Community Guidelines, YouTube http://www.youtube.com/t/community_guidelines (last visited Jan. 6, 2012).

\textsuperscript{174} See Morozov, supra note 33, at 215; Verne G. Kopytoff, Sites Like Twitter Absent From Free Speech Pact, N.Y. Times, Mar. 6, 2011, at B4.

\textsuperscript{175} Olivia Ma, More Footage from Protests in Iran on YouTube, Official YouTube Blog (June 16, 2009), http://youtube-global.blogspot.com/2009/06/more-footage-from-protests-in-iran-on_8218.html.
Nevertheless, YouTube is still criticized on occasion for censorship of content, and likewise for its failure to censor certain content, such as that which is allegedly hateful. As with Facebook, the process by which YouTube decides to remove content is opaque, the credentials of the decision-makers are unknown, and its censorship decisions are not reviewable by a third party.

B. Privacy

Privacy is another important human rights concern that has been affected by the proliferation of social media. Internet companies and social networking sites harvest vast amounts of users’ personal information, which enables the ongoing development of personalized Internet searches. Facebook is constantly criticized for changing its platform in ways that tend to undermine the privacy preferences of its users; its default settings generally favor openness at the expense of personal privacy. While a user can restore his or her privacy settings, he or she does not always know that the rules and privacy settings have changed, and therefore may inadvertently share personal information much more widely than he or she intends. Julian Assange, the founder of WikiLeaks, has bluntly described Facebook as “the most appalling spy machine that has ever been invented,” constituting a giant database of willingly volunteered information.

In addition, the danger exists that a social media company could release a user’s private information to unfriendly governments. In early 2011, the United States subpoenaed Twitter to hand over information on certain users associated with WikiLeaks. Twitter informed those users, who unsuccessfully challenged the subpoena in court. A key

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176 See, e.g., steveberkecomedy, YouTube Censorship of “Should Be Legalized” Prop 19 Video—Join the Fight, YouTube (Oct. 27, 2010), http://www.youtube.com/watch?v=mUHWZz6owA8 (user-uploaded content) (criticizing YouTube’s decision to censor material in favor of Proposition 19, a California proposal to legalize marijuana).

177 At the time of writing, Facebook was facing suit in the United States with respect to its alleged tracking of users’ online activities even after they had logged out of Facebook. See Asher Moses, Facebook Exposed Again on Privacy, Age, Oct. 5, 2011, at 3.


point to note is that Twitter was not required to tell the users of the subpoena; it could have handed over the information without their knowledge. One wonders how many times such information might have been surrendered to governments without users’ knowledge in the past. In a famous instance in 2004, Yahoo turned over information that helped China identify a dissident blogger, Shi Tao, leading to his arrest and imprisonment.\footnote{180} Furthermore, governments place significant pressure on providers who fail to acquiesce in attempts to monitor data. Smartphone manufacturer RIM, maker of BlackBerry, has been involved in a dispute with a number of States, including the United Arab Emirates, Saudi Arabia, Indonesia, Lebanon, and India, over the level of security it provides to users, because it hinders the ability of those States to monitor data.\footnote{181}

While these companies’ policies, particularly on censorship, may not be challengeable via official channels such as the courts or administrative agencies, the companies are susceptible to other pressure through criticism that harms their image and brand. For example, Facebook faced a revolt on its own pages in response to its decision to take down the Eastenders photo. Additionally, videos critical of YouTube are routinely loaded and shared on YouTube. While such protests may generate disdain for the company, the use of their own platforms is hardly a form of protest that hurts them. In this respect, it is worth recalling “Quit Facebook Day” on May 31, 2010, a protest against Facebook’s continued tinkering with its privacy policies. The campaign was not particularly successful; only 32,000 people, or just 0.008\% of all Facebook users, actually quit Facebook that day.\footnote{182} Indeed, just as the “cute cats” theory might work to insulate social media sites from government restrictions, it might also work to insulate social media sites from the wrath of censored activists. That is, people who use these sites to share photos and videos of cute cats might not care if another person’s protest page is removed. This enduring loyalty of the majority means that companies have a wider margin within which to upset the activist minority.


\footnote{182} See Tom Spring, Quit Facebook Day Was a Success Even as It Flopped, \textit{PCWorld} (June 1, 2010), https://www.pcworld.com/article/197686/quit_facebook_day_was_a_success_even_as_it_flopped.html.
C. The Responsibility and Accountability of Social Media Corporations

Sparked in part by the Shi Tao incident, concern over the human rights responsibilities of Internet companies prompted the creation of a voluntary global initiative for such companies to pledge to protect online privacy and free expression. Launched in late 2008, the Global Network Initiative constitutes a “multi-stakeholder group of companies, civil society organizations, investors and academics.”183 The initial corporate members were the then-Big Three of the Internet: Google, Yahoo, and Microsoft. Nearly three years later, they remain the only three corporate members; neither Facebook nor Twitter, nor indeed any other corporation, has joined the Global Network Initiative.184 The Initiative faces great criticism; for instance, in the three years since its launch (which followed a two year gestation period), the Initiative has failed to generate any assessment of the participant companies’ compliance with its principles.185 One of the world’s key human rights NGOs, Amnesty International, was involved in the initial discussions but refused to join the Global Network Initiative, citing its disappointment with the weakness of the final outcome.186

The major social media companies exercise a power over politics and potential social change that is not commensurate with their expertise or responsibility. The problem of the lack of corporate accountability—particularly on the part of major multinationals—under traditional human rights law is well known, and prompted the UN Human Rights Council to adopt the Guiding Principles on Business and Human Rights in July 2011.187 They are not binding, however, and much work must be done if the Principles are to be adopted into corporate practice. The same is also true of the Global Network Initiative.

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184 Kopytoff, supra note 174.
To be fair, the major social media companies have largely been passive facilitators of revolution, not obstacles. Certainly, the iconic Western companies are safer intermediaries for users than smaller but still popular local companies, such as the Chinese or Russian versions of Facebook, which are more susceptible to government pressure.\textsuperscript{188}

However, activists can perhaps only expect social media companies to “do the right thing” to the extent that such activism does not conflict with their commercial goals. The potential for such conflict may rise as relevant companies do more business with oppressive governments in lucrative markets like China. The potential for conflict could also rise if revolutions begin to challenge free market ideals, which suit the goals of Western social media companies as well as those who pay to use their advertising space. Indeed, the potential for conflict could rise as social media platforms continue to search for ways to improve profitability and raise revenue. Thus far, their extraordinary growth and social influence has not translated into major profits, though the companies themselves are valuable commodities. Facebook, despite being used by 10% of the population of the planet, is projected to record a $1 billion profit in 2011—a relatively small figure in the world of multinational business.\textsuperscript{189} Likewise, Twitter’s wholehearted embrace of revolutionary speech might slacken once it starts to make money. After all, revolutions necessarily lead to some instability that is not a favored marketplace condition for profitable business.

**Conclusion**

Despite the apparent contributions of social media to the seismic events of the Arab Spring, Malcolm Gladwell remains an unrepentant skeptic. He has stated that twitter revolution enthusiasts like Shirky must show “that in the absence of social media, [the] uprisings would not have been possible.”\textsuperscript{190} Gladwell, however, asks for the impossible; after all, one cannot prove the counterfactual.

Perhaps Gladwell’s skepticism over the revolutionary potential of social media is correct with regard to the developed world. There, social media may be merely adding a cherry atop existing deep layers of

\textsuperscript{188} See Morozov, supra note 33, at 238.


\textsuperscript{190} See Gladwell & Shirky, supra note 109 at 153.
information and conversation, and in doing so it may dull rather than contribute to progressive social activism. On the other hand, the increase of unfiltered connections between people of different cultural, political, and economic outlooks is likely to have some unprecedented and beneficial consequences for the development of local, national, regional, and global activism.

In any case, Gladwell too readily ignores the value of social media in States that efficiently suppress information and conversation, and in developing States, where long-voiceless people are suddenly connected to each other and to the outside world. It is in the developing world—Moldova, Iran, and now the Arab States—that it has had the most revolutionary impact, though watchful eyes must be kept on Greece, Spain and the #occupy movement. Certainly, many of the Arab revolutionaries themselves believe that social media played a significant role in the uprisings. Its importance for this young, tech savvy Arab generation reflects and perhaps surpasses the role of music in the counterculture protests of the 1960s. Both mediums played the role of providing information—albeit obliquely in the case of music—and facilitating conversation, galvanization, and organization.

Of course, it must be conceded that the revolutions are unfinished. At the time of writing, the revolutions had deposed autocratic leaders in Tunisia, Egypt, and Libya, but the governments that replaced them are yet to prove that they will adopt the liberal democratic values called for by the demonstrators. Moreover, the likelihood of civil war in Yemen and the continued deadly crackdowns in Syria cannot be ignored. In Tunisia, Egypt and Libya, the political and social situation may deteriorate. Certainly, there is much fear among some Western commentators that Islamist groups, such as the Muslim Brotherhood in Egypt, could ascend to power, perhaps signaling a step backwards for women’s rights and the rights of religious minorities, and encouraging the promulgation of extremist ideologies.

It is possible too that pro-democracy movements in the Arab world moved too quickly. The conversations arising from newly available in-

formation might not have been sufficiently mature or sophisticated to establish a properly functioning public sphere or civil society. Perhaps the resultant loose networks moved prematurely towards galvanization and organization. As Morozov put it, “[j]ust because you can mobilize a hundred million people on Twitter . . . does not mean that you should; it may only make it harder to accomplish more strategic objectives at some point in the future.”193 Perhaps there is a danger that the authoritarian regimes in Tunisia and Egypt will be replaced by failed States. This may be even more likely in Libya, Syria, and Yemen.

It is patronizing to assume, however, that the Arab world is not ready for democracy, or that it is better for them to remain perpetually under the thumb of stagnant, autocratic, brutal, and corrupt regimes whose promises of reform are illusory. It is axiomatic that their destinies should be determined by the citizens themselves—something that was impossible for Tunisians under Ben Ali, for Egyptians under Mubarak, and for Libyans under Gaddafi. Furthermore, the success of the revolutions should be judged by the conduct of the new governments that eventually emerge, not by their palatability to Western interests. Finally, there are some signs that the revolutions will lead to excellent human rights outcomes. For example, the interim Tunisian government has ruled that political parties in its upcoming elections must present equal numbers of male and female candidates.194 This development is remarkably progressive, particularly by regional standards.

The need for caution in promoting social media as an instrument of progressive political change must be acknowledged. There is the potential for governments to subvert the utility of social media through the extensive use of “sock puppets,” which would poison people’s trust in the platforms. There is no doubt that Internet-based technology can be used to track and profile dissidents, just as it can be used to promote the views of those dissidents. Good and bad ideas can be spread, and one cannot guarantee that the former will prevail.

The commercial, for-profit nature of the most popular social media platforms also poses a threat to their long-term utility as progressive political tools. The integration of the U.N.’s Guiding Principles on Business and Human Rights and the Global Network Initiative into company policies must proceed apace to ensure, at the very least, that company personnel are aware of their very important influence on po-

193 Morozov, supra note 33, at 196.
itical and social change and on human rights, and of the need to exercise that power responsibly. A preferable long-term solution might be for key social media tools to be developed on a non-commercial basis in the public domain. Such tools already exist for blogs and collaborative projects—Wikipedia is a prime example. However, the development of a serious “public domain” rival to Facebook or Twitter that can capture enough users to make it influential, without utilizing expensive proprietary technology, seems unlikely in the near term. For the time being, through no particular fault of those companies, they must wield political power that far outweighs their official responsibility and levels of accountability, and that is beyond their area of expertise.

Presently, social media in its various forms has created an unprecedented global public space that vastly increases and amplifies the number of accessible voices and connections in all parts of the world. In the future, governments or other powerbrokers might seize control or compromise these platforms, and social media corporations might change their largely benign or even supportive attitude toward activism. For now, however, this digital communications Hydra provides a unique platform for millions of people to proclaim, in voices and actions heard around the world, that they are “as mad as hell and they aren’t going to take it anymore.”

There are “open source” social networks, such as Diaspora*. Diaspora, https://joindiaspora.com/ (last visited Jan. 13, 2012).

These words are taken from Peter Finch’s immortal role in the 1976 film Network. Network (Metro-Goldwyn-Mayer 1976).
SHIELDING THE PUBLIC INTEREST: WHAT CANADA CAN LEARN FROM THE UNITED STATES IN THE WAKE OF NATIONAL POST AND GLOBE & MAIL

JASON D. BURKE*

Abstract: In Canada and the United States, freedom of the press is among the most fundamental rights of citizens; yet, the exact contours of this freedom are still hotly debated. One contested question concerns the right of a journalist to protect the identity of his or her confidential sources. In Canada, two recent Supreme Court decisions established that a journalist may have a privilege to protect the identity of his or her confidential sources. This Note argues that the case-by-case determination with a presumption in favor of disclosure that these two cases establish is insufficient to protect the strong interest in a free press, which is bolstered by the ability to use confidential sources. Rather, Canada should legislatively enact a shield law based on those of many U.S. states in which the privilege is extended broadly and is nearly absolute, with only limited circumstances in which the state can compel disclosure.

INTRODUCTION

For years, Canada has been one of the countries leading the world in freedom of the press.¹ In 2010, Reporters Without Borders ranked Canada twenty-first out of 178 nations in its annual survey, the Press Freedom Index.² Indeed, in the years between 2002 and 2010, Canada never fell below the twenty-first position on this survey.³

Despite its highly developed freedom of the press, Canadian journalists have experienced certain setbacks in their quest for full freedom

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3 See id. To view Canada’s rank in any year from 2002 to 2009, choose the appropriate year from the drop-down menu titled “Look up other years,” available at http://en.rsf.org/press-freedom-index-2010,1034.html.
of the press. For example, in 2010, the Supreme Court of Canada upheld a broad ban against the publication of information arising out of bail hearings. In 2009, a federal court in Canada limited public access to information when it denied a professor-journalist’s request to review government information about human rights in Afghanistan. Further, after a 2004 provision of the Criminal Code allowed journalists to be a source of evidence in certain criminal investigations, several journalists had to fight to keep their notes and photographs private.

Part I of this Note lays out the facts of several key cases from the highest courts in Canada and the United States regarding the journalist-source privilege. Part II discusses the importance of confidential sources and the current state of the law with regard to a privilege for journalists to protect the identity of their confidential sources under Canadian and U.S. law. Part III shows how the National Post standard is insufficient to protect the journalist-source relationship and then proposes that the Parliament of Canada (Parliament) legislatively enact a shield law to address these issues. It goes on to use the large body of work about the journalist-source privilege in the United States to discuss how Parliament should address two of the biggest issues regarding shield laws: the extent of the privilege and to whom the privilege is extended.

I. Background

A. The Tenuousness of Confidential Sources in Canada

One particular aspect of freedom of the press has recently seen a great deal of legal flux: the privilege of journalists to maintain the confidentiality of their sources. Over the past several years, various Canadian journalists have been compelled to turn over their confidential sources.

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4 See infra text accompanying notes 5–7.
5 CJFE Disappointed in Outcome of Publication Bans Case at Supreme Court, CANADIAN JOURNALISTS FOR FREE EXPRESSION (June 10, 2010), http://www.cjfe.org/resources/media_releases/cjfe-disappointed-outcome-publication-bans-case-supreme-court.
7 CJFE Distressed by Court Approval of Seizure of Photographs, CANADIAN JOURNALISTS FOR FREE EXPRESSION (June 29, 2008), http://www.cjfe.org/node/246.
8 Compare R. v. Nat’l Post, 2010 SCC 16, [2010] 1 S.C.R. 477, ¶ 77 (Can.) (holding that a defendant journalist must turn over a piece of physical evidence that may have revealed the identity of his confidential source), with Globe & Mail v. Canada (Attorney Gen.), 2010 SCC 41, [2010] 2 S.C.R. 592, ¶ 102 (Can.) (holding that a defendant journalist may be able to keep the identity of his source confidential, pending review by a lower court).
sources. Two recent cases on this issue that found their way to the Canadian Supreme Court are *R. v. National Post* and *Globe & Mail v. Canada*.

In the first case, the Canadian Supreme Court decided that the privilege of journalists to keep their sources confidential is not an essential part of the right to freedom of the press guaranteed by the Canadian Charter of Rights and Freedoms (Charter). Instead, the Canadian Supreme Court held that there must be a case-by-case inquiry that balances the interest of a free press with the state’s interest in the disclosure of information at trial. The second case on this issue handed down in 2010 followed *National Post* and found that the correct procedure for analyzing whether a source should remain confidential is a case-by-case balancing test. Nevertheless, in that case, the Canadian Supreme Court used the same balancing test to come out to a starkly different result; namely, that the source may be able to remain confidential, pending further analysis by a lower court.

1. The Facts of *R. v. National Post*

The facts of this case arise out of the possession of an envelope and document purported to be from the Business Development Bank of Canada (BDBC) showing that Prime Minister of Canada Jean Chrétien was engaged in a serious financial conflict of interest. The appellant in this case, Andrew McIntosh, was a reporter with the Canadian newspaper, the *National Post*, for over six years between August 1998 and February 2005. During his time with the *National Post*, McIntosh deeply investigated Chrétien’s involvement with the Grand-Mère Golf Club, located in Chrétien’s home riding in Quebec. During the course of this investigation, McIntosh came to suspect that Chrétien had been involved in questionable activities with the Auberge Grand-Mère, a hotel located next to the golf club. Over the course of his investigation, McIntosh contacted a person, known as Confidential Source X (X), but

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13 See id. ¶ 55.
17 Id.
18 Id.
19 Id.
X was not willing to communicate with him.20 Thereafter, Confidential Source Y (Y) contacted McIntosh with important information that he or she would disclose in return for a blanket, unconditional promise of confidentiality.21 Y indicated that he or she was acting on behalf of X, who had important information about the Auberge Grand-Mère loan.22 McIntosh, as part of his job, was authorized to give such promises of confidentiality, and this particular promise was made with the approval of his editor-in-chief.23 With these materials, which appeared to be legitimate, McIntosh wrote that Chrétien had contacted the BDBC and lobbied for the approval of a loan to the Auberge Grand-Mère, an allegation that Chrétien confirmed.24

Months later, McIntosh received a document that purported to be the internal authorization for a BDBC loan to the Auberge Grand-Mère.25 This document also allegedly showed that the Auberge Grand-Mère owed a debt to JAC Consultants, a company owned by the Chrétien family.26 If true, these allegations would be a major scandal implicating the Prime Minister.27 A week after McIntosh received the document, X requested a meeting with him.28 X requested that McIntosh dispose of the document for fear that the police may obtain it in order to try to ascertain its source.29 McIntosh stated that he would not dispose of the document, but would keep his promise of absolute confidentiality, so long as he believed X had not intentionally misled him.30 McIntosh testified that he believed X to be a reliable source, and that if the document were forged, he did not think that X knew it.31 Thereafter, the Royal Canadian Mounted Police (RCMP) met with McIntosh and several National Post editors; National Post counsel refused to comply with the RCMP’s request to produce the document and envelope, and McIntosh refused to identify the source.32

In 2002, the RCMP applied for an order to produce the document and envelope, because it could not get the necessary information else-

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20 Id.
21 Id. ¶ 9.
23 Id. ¶ 9.
24 Id. ¶ 11.
25 Id. ¶ 12.
26 Id.
27 Id.
29 Id.
30 Id. ¶ 17.
31 Id. ¶ 18.
32 Id. ¶ 19.
The judge ordered that McIntosh produce the letter and envelope because they were the substance of the crime and may have contained physical evidence such as DNA. The appellants applied to quash the orders and the reviewing judge set them aside, stating that the damage to freedom of expression did not outweigh the remote possibility that the production of the requested evidence would lead to a conviction. This decision was later reversed by the Ontario Court of Appeal. It is with this factual and procedural background that the case proceeded to the Canadian Supreme Court.

2. The Facts of *Globe & Mail v. Canada* (Attorney General)

The *Globe & Mail* case followed just months after *National Post* and addressed the same general question of what privilege journalists have to keep their sources confidential. This case arose out of the litigation surrounding the so-called Sponsorship Scandal. After the failed attempt by Quebec to secede from Canada in 1995, the federal government came up with the Sponsorship Program to increase the federal government’s visibility in Quebec. At this time, Daniel Leblanc was a journalist with the *Globe & Mail*, and wrote a series of articles about the Sponsorship Program. Notably, he leveled the serious allegation that public funds had been misused throughout the Sponsorship Program. Leblanc obtained his information from a confidential source known only as MaChouette. Through their correspondence, he pledged to protect her confidentiality.

The articles written by Leblanc generated significant media attention and a Royal Commission known as the Gomery Inquiry (Inquiry) was struck to investigate this scandal. As a result of the Inquiry, in 2005, the Attorney General of Canada filed a motion in a Quebec court in an attempt to recoup the losses that the federal government had suf-

33 Id. ¶ 21.
35 Id. ¶ 24.
36 Id.
37 See id.
40 Id. ¶ 4.
41 Id.
42 Id.
43 Id.
44 Id.
ferred as a result of corruption in the Sponsorship Scandal. Based on its contention that the government knew about the Sponsorship Scandal at an early date, Groupe Polygone, one defendant, raised a defense allowed by Quebec law. In order to support its defense, Groupe Polygone requested an order forcing several people to give testimony in the hopes that it would help to out Leblanc’s confidential source, MaChouette. The Globe & Mail brought a motion attempting to revoke these orders, arguing that their effect was to breach the privilege of a journalist to keep his sources confidential. Leblanc testified in support of the Globe & Mail’s motion and was cross-examined by counsel for Groupe Polygone. At several points during the cross-examination, counsel for the Globe & Mail objected, stating that if Leblanc were to answer the questions, the effect would be to force him to disclose the true identity of MaChouette, in violation of the oath of confidentiality given by Leblanc to his informant. The judge at the trial refused to grant these objections as he did not recognize a journalist-source privilege. After a Court of Appeal refused to hear the appeal on this issue, the Globe & Mail sought to discontinue hearings on its motion to revoke the earlier orders to protect Leblanc from disclosing his source. The trial judge did not grant this discontinuance and the Quebec Court of Appeals proceeded to dismiss the appeal. It is in this context that the issue of journalist-source privilege came to the Canadian Supreme Court in this case.

**B. The U.S. Experience with Journalists and Confidential Sources**

1. From Branzburg to Judith Miller: A Troubling Pattern of Forced Disclosure of Confidential Sources in the United States

*Branzburg v. Hayes* was the consolidation of three different cases all concerning whether compelling journalists to appear before grand juries violates the First Amendment’s guarantees of free speech and free

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46 Id. ¶ 7.
47 Id. ¶ 8. The defendant “sought to advance a defense of prescription under the Civil Code of Québec.” Id.
48 Id.
49 Id. ¶ 9.
50 Id.
52 Id.
53 Id.
54 Id.
55 See id. ¶¶ 9, 14.
The first of the component cases came before the Supreme Court of the United States (U.S. Supreme Court) from two different judgments by the Kentucky Court of Appeals. Branzburg was a journalist for the Courier-Journal in Louisville, Kentucky, who wrote a piece about creating hashish from marijuana. He was subpoenaed to appear before a grand jury and reveal his sources, but he refused. The trial court judge ordered him to answer, stating, inter alia, that the First Amendment of the U.S. Constitution (Constitution) did not afford him immunity from answering. The second case involving Branzburg arose from an article that he had written about drug use in Frankfort, Kentucky, in which he had interviewed several drug users. He once again protested being brought before a grand jury and once again, the Kentucky Court of Appeals rejected his arguments, which included a First Amendment argument. The U.S. Supreme Court granted Branzburg’s writ of certiorari to adjudicate the First Amendment issue.

The second component case involved a judgment from the Supreme Judicial Court of Massachusetts. Pappas, a journalist and photographer, gained entrance to the inside of a restricted-entry Black Panther meeting. The condition of his entrance was that he would neither photograph nor discuss anything seen inside of the building, except as related to a possible police raid. Such a raid never happened and Pappas never published any story; however, he was summoned before a grand jury but refused to answer questions about the meeting, claiming First Amendment immunity from answering such questions. The trial judge and later the Supreme Judicial Court of Massachusetts rejected this contention, and the U.S. Supreme Court granted certiorari.

The third component case involved Caldwell, a New York Times reporter in California who was also covering the Black Panther Party. He

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57 Id. at 667.
58 Id.
59 Id. at 668.
60 Id.
61 Id. at 669.
62 Branzburg, 407 U.S. at 670.
63 Id. at 671.
64 Id. at 673.
65 Id. at 672.
66 Id.
67 Id. at 672–73.
68 Branzburg, 407 U.S. at 673–75.
69 Id. at 675.
was summoned before a grand jury to testify and filed a motion to quash on First Amendment grounds. The District Court denied this motion but nevertheless held that Caldwell had a qualified privilege, which included the right not to reveal confidential sources, associations, and information. The Court of Appeals reversed and held that, in this case, requiring the reporter to testify at all would deter his confidential sources from associating with him, thus abridging his First Amendment rights. As in the other two cases, the U.S. Supreme Court granted certiorari to consider this issue. Eventually, the U.S. Supreme Court ruled that the First Amendment included no protection for confidential sources, effectively mandating that these three journalists comply with the orders to reveal the identities of their confidential sources.

Decades later, the issue of protecting journalists’ confidential sources is still a pressing topic that generates much scholarly debate in the United States. In the first decade of the twenty-first century, U.S. courts attempted to force journalists to disclose their sources in numerous high-profile cases. One of the most high-profile of all of these cases, however, was that of Judith Miller of the New York Times. The action against Miller arose out of journalist Robert Novak’s disclosure of the identity of Valerie Plame, a Central Intelligence Agency operative. Such unauthorized disclosure to unauthorized sources is a federal crime, and thus an investigation ensued. As part of this investigation, numerous journalists who had received this information from a number of confidential sources were subpoenaed to testify; among these reporters was Judith Miller. On August 12, 2004, Miller was subpoenaed to

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70 Id. at 675–76.
71 Id. at 677–78 (citing Application of Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970)).
72 Id. at 670.
73 Id. at 671, 673–75, 679.
74 See Branzburg, 407 U.S. at 708.
76 See Alexander, supra note 75, at 1094–102 (discussing several recent press subpoena cases).
78 See id. at 559–60.
79 Id. at 560.
80 See id. at 560–61.
testify in front of a grand jury to identify the identity of her source.\textsuperscript{81} She refused and was held in contempt of court; however, she was spared from jail pending an appeal.\textsuperscript{82} The U.S. Supreme Court denied certiorari on Miller’s case on June 27, 2005, and on July 6, Miller was jailed for her continued refusal to disclose the identity of her source.\textsuperscript{83} She was held until September 29, when she received a waiver from her source and subsequently agreed to testify.\textsuperscript{84}

2. Protecting Journalists Through State Shield Laws

Many states have granted protection to the relationship between journalists and their confidential sources by passing shield laws.\textsuperscript{85} In fact, in March 2011, West Virginia’s legislature passed a shield law.\textsuperscript{86} After being signed in April 2011, West Virginia became the fortieth state to pass a shield law; the District of Columbia also has a shield law.\textsuperscript{87}

A shield law is a legislative enactment that lays out the rights of journalists and protects them from being forced to disclose, among other things, the identity of their confidential sources.\textsuperscript{88} The protections offered by these statutes vary greatly in nature, with some being incredibly protective of journalists and forbidding compelled disclosure of confidential sources in any circumstances, while others grant far narrower protections.\textsuperscript{89} The journalist-source privilege codified by these shield laws incentivizes sources that would otherwise stay silent for fear of reprisals to come forward with information of great import to the public.\textsuperscript{90}

\textsuperscript{81} Id.
\textsuperscript{82} Id. at 561.
\textsuperscript{83} Joyce, supra note 77, at 561.
\textsuperscript{84} See id.
\textsuperscript{86} Id.
II. Discussion

A. The Benefits and Costs of a Privilege Protecting Confidential Sources

The importance of using confidential sources has been well-documented in numerous studies. At the most basic level, the goal of any privilege is “to promote open communication in circumstances in which society wants to encourage such communication.” In the context of journalists and confidential sources, there are often people with valuable information—information about political corruption, for example—who may nevertheless withhold this information for fear of retaliation or simply for fear of getting involved in an explosive situation. Although the press is often a reliable disseminator of information of value to the public, such trepidation in a source may dissuade him from going public with important information if he has legitimate fears that his correspondence with a journalist may not be kept private.

The number of journalists who have used confidential sources in their work is quite high; indeed, scholars have noted that the use of confidential sources provides a wide variety of benefits to journalists. First, the use of confidential sources allows journalists to get their hands on information that they might not otherwise be able to obtain. Second, it better allows journalists to develop relationships with sources. Third, the promise of confidentiality facilitates the building of trust between confidential sources and journalists. Fourth, confidentiality aids journalists by “giving comfort, confidence, and protection to fearful sources.”

A 1971 empirical study on the use of confidential sources by journalists documented the potential detrimental effects of subpoenaing journalists. According to this study, one negative effect of forcing

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92 Stone, supra note 90, at 39.
93 Id. at 41.
94 See id. at 42.
96 Id. at 102.
97 Id.
98 Id.
99 Id.
100 Blasi, supra note 91, at 265–68.
journalists to disclose confidential sources rests with the journalist.\textsuperscript{101} This effect is the “professionally incapacitating worry and hassle to which the reporter is subjected.”\textsuperscript{102} This translates into both a lack of time to do his job and cover his stories because the reporter is spending time dealing with myriad legal issues.\textsuperscript{103} The journalist must spend a great amount of time dealing with ethical worries, and may ultimately face jail time for refusing to comply with a subpoena.\textsuperscript{104} Another negative, yet intangible, effect is the drying up of sources that fear the subpoena threat.\textsuperscript{105} Although it is unclear whether sources that refuse to give information are uncooperative because of the fear that their confidentiality may be violated, the study identified two tangible effects—based on the experience of reporters—of the subpoena threat.\textsuperscript{106} Some sources stopped allowing reporters to record conversations that could later be used as evidence.\textsuperscript{107} Further, the “cajoling and elaborate promises” necessary to ease the fears of some confidential sources could significantly delay a key story.\textsuperscript{108} Finally, and perhaps most importantly, the ultimate negative effect of under-protecting source confidentiality is a complete refusal of a prospective source to give crucial information.\textsuperscript{109}

Another empirical study published fourteen years later confirmed the previous study’s claims about the deleterious effects of subpoenaing journalists to force them to reveal their confidential sources.\textsuperscript{110} Importantly, this study found that every reporter interviewed had used a confidential source at some point within the preceding ten years.\textsuperscript{111} Moreover, over half of the respondents indicated that they used such sources often.\textsuperscript{112} By a two-to-one margin, respondents stated that confidential sources were particularly important to their biggest stories—those nominated for a Pulitzer Prize.\textsuperscript{113} This appears to be because the biggest stories are often those about corrupt public officials and confiden-
tiality in this kind of investigative journalism is almost a necessity.\textsuperscript{114} Many reporters said that the lack of protection provided by U.S. law to promises of confidentiality did not affect them because they were willing to go to jail rather than disclose source identities.\textsuperscript{115} However, the author concluded that “[t]he confidential relationship, so crucial a tool in gathering the news, cannot flourish indefinitely if supported solely by reporters’ willingness to go to jail.”\textsuperscript{116} Unsurprisingly, another even more recent empirical study generated extremely similar results.\textsuperscript{117}

In contrast, allowing reporters not to disclose the identities of their confidential sources imposes various costs on society.\textsuperscript{118} Paramount among these is the violation of the legal maxim that in a fair system of justice, the public has the right to “every man’s evidence.”\textsuperscript{119} Allowing a journalist to abstain from testimony about the identity of a confidential source could deprive the public of valuable information that would allow justice to be done.\textsuperscript{120}

However, there are strong counterpoints to the argument against recognizing a legal protection for confidential sources.\textsuperscript{121} First, if a would-be confidential source chooses not to come forward with his valuable information because of the threat of forced disclosure, the public will not have this valuable evidence.\textsuperscript{122} This means that the public ends up with the same amount of evidence with or without the privilege.\textsuperscript{123} Second, it is likely that the most important confidential disclosures concern the kind of information that would place the source in serious

\textsuperscript{114} See id.
\textsuperscript{115} Id. at 74–75.
\textsuperscript{116} Osborn, supra note 91, at 77.
\textsuperscript{117} RonNell Andersen Jones, Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 Wash. L. Rev. 317, 353–74 (2008). In this study, the author found that subpoenas attempting to force journalists to reveal confidential sources both negatively affected newsroom time and cost media outlets money. Id. at 354, 361. Further, many newspapers have changed their material retention policies to avoid subpoenas, which forces journalists to give up invaluable sources; many reporters have also had to abandon cases due to a subpoena threat. Id. at 364, 366. Journalists also believed that subpoena cases that received great amounts of publicity made their confidential sources uneasy, negatively affecting the number of potential informants willing to step forward with information. Id. at 368–69. Finally, and more intangibly, journalists reported concern about the media’s neutral role, and fear that media outlets would be used as tools for discovery. Id. at 373.
\textsuperscript{118} See Stone, supra note 90, at 48.
\textsuperscript{119} See 8 John Henry Wigmore, Evidence § 2285 (McNaughton rev. 1961).
\textsuperscript{120} See David Abramowicz, Note, Calculating the Public Interest in Protecting Journalists’ Confidential Sources, 108 Colum. L. Rev. 1949, 1952 (2008).
\textsuperscript{121} See Stone, supra note 90, at 49–50.
\textsuperscript{122} Id. at 49.
\textsuperscript{123} See id.
jeopardy were the leak to be traced back to him.\textsuperscript{124} This would seem to indicate that the absence of a privilege is most likely to chill the very communications in which the public has the greatest interest.\textsuperscript{125} Third, there is little noticeable difference between law enforcement in states with an absolute privilege where a journalist can never be compelled to disclose his confidential source’s identity and in states with only a qualified privilege where a journalist can be forced to disclose a source’s identity under certain circumstances.\textsuperscript{126} In this light, “it seems clear that the benefits we derive from the privilege significantly outweigh its negative effects on law enforcement.”\textsuperscript{127}

B. Three Legal Bases for a Reporter’s Privilege in Canada and the Adoption of a Case-by-Case Approach in National Post

\textit{National Post} stands as a major case addressing the ability of journalists to keep their sources confidential.\textsuperscript{128} In beginning its analysis, the Canadian Supreme Court emphasized the competing interests that are at stake when deciding whether a journalist should be compelled to disclose the identity of a confidential source.\textsuperscript{129} Specifically, the Canadian Supreme Court stated that “[t]he investigation and punishment of crime is vital in a society based on the rule of law but so is the freedom of the press and other media of communication.”\textsuperscript{130} The general rule referenced by the Court is that the public has the right to every person’s evidence.\textsuperscript{131} Nevertheless, the Canadian Supreme Court pointedly noted that this right is not absolute and proceeded to list myriad instances in which “narrow exceptions have been recognized as necessary to further precisely defined and overriding public interests.”\textsuperscript{132} The Canadian Supreme Court noted, without information from confidential sources, “[i]mportant stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.”\textsuperscript{133} Therefore, the Canadian Supreme Court ulti-

\begin{itemize}
\item \textsuperscript{124} See id.
\item \textsuperscript{125} See id.
\item \textsuperscript{126} See id. at 40–50.
\item \textsuperscript{127} Stone, \textit{supra} note 90, at 50. But see Alexander, \textit{supra} note 75, at 102 (“[N]ewspapers in states with journalist-protecting shield laws do more investigative reporting and win more awards for their reporting than their counterparts in non-shield-law states.”).
\item \textsuperscript{129} See id. ¶ 26.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id. ¶ 33.
\end{itemize}
imately determined that the law accepts that in some instances, the public’s interest in being informed by journalistic work will outweigh the state’s interest in effectively prosecuting crime.\textsuperscript{134} It is in these instances, the Canadian Supreme Court reasoned, that a court should grant immunity to a journalist against the compelled disclosure of his or her confidential sources.\textsuperscript{135}

Although the Canadian Supreme Court recognized that some sort of privilege did exist for journalists to maintain the confidentiality of sources, the question as to the source from which that immunity sprang still needed to be answered.\textsuperscript{136} Ultimately, after weighing the competing interests involved in granting journalists a privilege against compelled disclosure of confidential sources’ identities, the Canadian Supreme Court held that a journalist’s privilege to protect the confidentiality of secret sources should be analyzed on a case-by-case basis.\textsuperscript{137} However, in coming to this holding, the Canadian Supreme Court also analyzed and rejected two other possible sources for the journalist-source privilege under the laws of Canada based on a variety of policy considerations.\textsuperscript{138}

1. The Constitutional Approach

The broadest source of the journalist’s privilege considered by the Court was the Charter.\textsuperscript{139} The relevant starting point for such a legal proposition is found in Section 2(b) of the Charter, which reads “[e]veryone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”\textsuperscript{140} The interveners Canadian Civil Liberties Association (CCLA) and British Columbia Civil Liberties Association claimed that the use of confidential sources was so pivotal to newsgathering that it should be treated as if it were a right expressly included in the Charter.\textsuperscript{141}

CCLA put forth a test for determining when a journalist could invoke the protections of the Charter against a compelled disclosure of

\textsuperscript{134} Nat’l Post, [2010] 1 S.C.R. ¶ 34.
\textsuperscript{135} See id.
\textsuperscript{136} Id. ¶ 35.
\textsuperscript{137} Id. ¶¶ 51–52.
\textsuperscript{138} Id. ¶¶ 41–42.
\textsuperscript{139} Id. ¶ 37.
confidential sources. 142 Namely, they proposed that “immunity is established by a claimant showing (i) that he or she is a journalist; (ii) engaged in news gathering activity; (iii) who has acquired information under a promise of confidentiality.” 143 The interveners pushing this position did not claim that this immunity was absolute. 144 Section 1 of the Charter states that it “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” 145 Therefore, the government could override the protections of Section 2 of the Charter by offering an acceptable justification under Section 1 of the Charter; however, the government, according to CCLA, would have to prove a “countervailing and fact-specific overriding public interest.” 146 Overall, this scheme would include a presumption of immunity that can be overridden only in extreme cases. 147

The Canadian Supreme Court, however, rejected the Charter as the legal source of a journalist’s privilege against compelled disclosure of confidential sources. 148 Its first objection to such a basis for the journalist’s privilege was that it viewed the claim that because the use of confidential sources was an important newsgathering technique, it was protected under the Charter as too farfetched. 149 The Canadian Supreme Court took note of several different methods utilized by journalists to gather news—some of them ethically questionable—and stated that it does not follow that each and every newsgathering technique considered important by journalists received protection from the Charter. 150 Secondly, the Canadian Supreme Court stated that Canadian courts have generally opposed grounding testimonial immunities in the constitution. 151 Indeed, even the solicitor-client privilege that is “one of the most ancient and powerful privileges” is generally not given constitutional status. 152 Finally, the Canadian Supreme Court noted the difficulty in defining to whom such a constitutional immunity would be ex-

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142 Id. ¶ 37.
143 Id.
144 See id.
145 Canadian Charter, supra note 140, § 1.
147 See id.
148 See id. ¶ 41.
149 Id. ¶ 38.
150 See id.
151 Id. ¶ 39.
tended. Recent jurisprudence made it clear that Section 2(b) protections belong to “everyone” and not merely to the traditional media. The implication of the Charter’s words and the Canadian Supreme Court’s recent precedent is that a constitutional immunity would have to be extended to all citizens, not merely members of traditional media, like the appellant in National Post. The Court fully elucidates its fear, stating that allowing anybody to promise confidentiality to any source on any terms would be a huge impediment to effective law enforcement. Ultimately, the Canadian Supreme Court concluded that history has proven that Section 2(b)’s aims could be accomplished without constitutionalizing the journalist’s privilege and thus rejected using the Charter as the basis for this privilege.

2. The Class Privilege Model

After rejecting the Charter as the basis of the journalist’s privilege, the Canadian Supreme Court began to examine the common law as a source. At common law, there are two different kinds of privileges: class-based or case-by-case. The Court notes that the distinguishing factor of a class privilege is that the particular relationship being protected—the seminal example being the solicitor-client privilege—is so important that communications therein must be protected, even at the risk of interference with the judicial process. The Canadian Supreme Court, referencing R. v. Gruenke, noted that very few class privileges exist in Canada. Thus, the Court in National Post observed “[i]t is

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153 See id. ¶ 40.
156 Id. (“To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever ‘sources’ they deem worthy of a promise of confidentiality . . . would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.”).
157 See id. ¶ 41.
158 Id. ¶ 42.
159 Id.
160 Id. (“Once the relevant relationship is established between the confiding party and the party in whom confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case.”).
likely that in future (sic) such ‘class’ privileges will be created, if at all, only by legislative action.\(^\text{163}\)

The Canadian Supreme Court also offered several compelling reasons not to adopt a class-based privilege for journalists and their confidential sources.\(^\text{164}\) First, unlike the case of the solicitor, in which the profession is highly regulated to maintain professional standards, the journalism profession is unregulated and professionalism is often subpar, if not completely lacking.\(^\text{165}\) Furthermore, the decision in Grant broadly defined the scope of journalism, thus further complicating the idea of extending a broad class-based privilege to “journalists.”\(^\text{166}\) Second, the Canadian Supreme Court pointed out the extreme difficulty in determining to whom the privilege belongs and thus the rights of the journalist and the confidential source if a class privilege were created.\(^\text{167}\) Third, the Canadian Supreme Court noted that no set of criteria had been proposed to determine when the privilege was created or lost.\(^\text{168}\) Among newspapers, practices concerning when a journalist could even promise confidentiality—a necessary precondition for the privilege to attach—varied considerably.\(^\text{169}\) Various media codes of ethics also diverged on this question and thus offered no help or guidance.\(^\text{170}\) Finally, the search for truth is of the utmost importance and that search is seriously limited by the granting of a class privilege.\(^\text{171}\) A case-by-case privilege is far more suited to adaptation when the circumstances warrant it than a class privilege.\(^\text{172}\)

3. The Case-by-Case Model of Privilege

The final option that the Canadian Supreme Court considered was to approach the question of a journalist’s privilege on a case-by-case basis.\(^\text{173}\) Numerous cases handed down by the Canadian Supreme Court before National Post had laid out an ad hoc inquiry involving the

\(^{163}\) Id.
\(^{164}\) See id. ¶¶ 43–46.
\(^{165}\) Id. ¶ 43.
\(^{166}\) Id.; see Grant, [2009] 3 S.C.R. ¶ 96.
\(^{167}\) Nat’l Post, [2010] 1 S.C.R. ¶ 44.
\(^{168}\) Id. ¶ 45.
\(^{169}\) Id.
\(^{170}\) See id.
\(^{171}\) Id. ¶ 46.
\(^{172}\) See id.
balancing of interests through a multi-part test. This inquiry could be guided by the values enshrined in the Charter. The Canadian Supreme Court had previously established that it was appropriate that common law principles such as the case-by-case model of privilege could be adapted to take into account these Charter values. For example, in Gruenke, the original claim was that Section 2(a) of the Charter that protects freedom of religion also conferred a constitutional immunity for priests and penitents. While the Canadian Supreme Court in that case found religious liberty is an important value to be fostered, it ultimately rejected this broad claim. Instead, all of the interests at stake could be more adequately protected by the weighing of these factors against one another in a case-by-case analysis that frees courts to consider the totality of the circumstances and the strengths of the various rights implicated in any case.

The four factors that should be considered in any case-by-case analysis of privilege are taken from John Henry Wigmore’s seminal text on common law evidence, and are thus referred to by the Canadian Supreme Court as the “Wigmore criteria.” Reiterating its earlier conclusions about the indispensability of investigative journalism in keeping public institutions accountable to the public, the Canadian Supreme Court stated that this balancing test was a good way to allow courts the necessary flexibility to balance “the sometimes-competing interest of free expression and the administration of justice and other values that promote the public interest.” Ultimately, this is the approach adopted by the Canadian Supreme Court.

The first criterion that must be established in a Wigmore analysis is that the communication originated “in a confidence that the identity of the informant will not be disclosed.” Second, “the confidence must be essential to the relationship in which the communication arises.” Combined, these two factors mean that the privilege can only be in-

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175 Id. ¶ 50.
176 Id. (citing RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 603 (Can.).
178 Id.
179 Id.
180 Id. ¶ 53; see Wigmore, supra note 119, § 2285.
182 Id.
183 Id. ¶ 53.
voked where the information given by the secret source was unambiguously conditioned upon the promise of confidentiality regarding the identity of the source.185 Third, “the relationship must be one which should be ‘sedulously fostered’ in the public good.”186 This requirement allows a court to consider different types of sources and journalists.187 Fourth, if all of the first three criteria have been met, “the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.”188 Stating that this criterion “does most of the work,” the Canadian Supreme Court noted that after the first three factors have been met, thereby establishing the public’s interest in the particular journalist-source relationship, a court must weigh that value against countervailing interests.189 Critically, the Canadian Supreme Court held that, throughout the entire process, the burden of proof rests with the journalists seeking to establish a privilege.190 Until all four Wigmore criteria are satisfactorily established, “[t]he evidence is presumptively compellable and admissible.”191

C. The Legal Situation in the United States

1. Branzburg and a Lack of a Federal Guidance

   In Branzburg, the U.S. Supreme Court held that journalists could not refuse to testify before a grand jury based on the First Amendment.192 The Court emphasized its respect for the importance of a free press and explicitly protected newsgathering under the First Amendment because “without some protection for seeking out the news, free-

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185 Id. ¶ 56.
186 Id. ¶ 55 (citing Wigmore, supra note 119, § 2285).
187 Nat’l Post, [2010] 1 S.C.R. ¶ 57. The Court gave important guidance on this point, noting that “[t]he relationship between the source and a blogger might be weighed differently than in the case of a professional journalist . . . who is subject to much greater institutional accountability within his or her own news organization.” Id.
188 Id. ¶ 60.
189 Id.
190 Id.
191 Id. at 689–90.
dom of the press could be eviscerated.” However, it found no direct incursions upon the freedom of the press in requiring a journalist to testify before a grand jury. Instead, the Court noted that every burden placed upon the press does not violate the First Amendment, and proceeded to catalog numerous other instances in which governmental restrictions burdened the newsgathering function of the press but nevertheless passed constitutional muster. After reviewing such evidence, it noted that it was unsurprising that “the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.” Ultimately, the U.S. Supreme Court dismissed the notion that its refusal to create First Amendment immunity for journalists would undermine the freedom of the press; indeed, it noted that this issue has not even been raised until 1958 and prior to that date, the press flourished.

Interestingly, the majority addressed the contention that an infringement upon First Amendment rights must be “no broader than necessary to achieve a permissible government purpose.” The U.S. Supreme Court found that the government had not abused its function and impacted protected First Amendment rights. Despite this holding, however, the majority stated that even tests that mandate the government provide a “‘compelling’ or ‘paramount’” state interest were satisfied in this case. It stated that “[i]f the test is that the government ‘convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,’” such a test was met. However, the majority did not state that this was indeed the test. Further, it noted that grand jury investigations without a legitimate purpose, instituted solely or primarily to harass the press, would raise different First Amendment issues and thus be unacceptable.
as they “would have no justification.”

Although the majority seemed to repudiate the need for a balancing test, such a statement raises the possibility that the justifications of the government should be balanced against the alleged violations of the First Amendment.

Further complicating this analysis is the short, but poignant, concurrence by Justice Powell. Justice Powell wrote separately to emphasize that he viewed the U.S. Supreme Court’s holding as limited in nature. Indeed, he emphasizes the majority’s respect for First Amendment freedoms and reiterates that the majority’s opinion assures that “no harassment of newsmen will be tolerated.” Most importantly, however, he emphasizes that

the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Apparently, therefore, Justice Powell viewed the majority’s holding as affirmatively leaving open the possibility of a case-by-case model of privilege, similar to the holding of the Canadian Supreme Court in National Post. The lack of clarity about the journalist’s privilege in this ruling has created a great deal of uncertainty among federal courts trying to apply it to other cases about the journalist’s privilege.

2. State Laws: A National Trend Toward Shield Laws

Despite the lack of consensus in the federal courts about the existence of a reporter’s privilege, many states have established such a privi-
As of the time of this writing, forty states and the District of Columbia have enacted some form of shield law that establishes the privilege of a journalist against being compelled to reveal the identity of confidential sources.

States have written their shield laws in a variety of ways. The extent of the protections offered by these shield laws varies among the states, with some states offering complete immunity to journalists against the disclosure of confidential sources and others creating a qualified privilege. Further affecting the protection of journalists is how the acts define who qualifies for the privilege. Therefore, people who would be protected by a shield law in one state would not be afforded protection in some other states merely because of a more restrictive definition of who is a journalist.

a. Definition of Journalist

One major issue that arises in the construction of shield laws is how to define who can invoke the privilege guaranteed by the statute. There is a wide variety of ways in which the states with shield laws have sought to define who is a journalist or reporter for the purposes of the statute’s protection. Such a variance reflects the ongoing debate

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212 Rasmussen, supra note 87 (“West Virginia . . . became the 40th state, along with the District of Columbia, to provide statutory protection for subpoenaed reporters.”).
213 Compare Okla. Stat. tit. 12, § 2506 (2009) (“Journalist’ means any person who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual regularly engaged in obtaining, writing, reviewing, editing, or otherwise preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service. Any individual employed by any such news service in the performance of any of the above-mentioned activities shall be deemed to be regularly engaged in such activities. However, journalist shall not include any governmental entity or individual employed thereby engaged in official governmental information activities.”), with Ariz. Rev. Stat. Ann. § 12-2237 (2003) (“[The privilege applies to a] person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station . . . .”).
214 Compare Ala. Code § 12-21-142 (2006) (“No person engaged in, connected with or employed on any newspaper, . . . while engaged in a news-gathering capacity, shall be compelled to disclose . . . the sources of any information procured or obtained by him and published in the newspaper . . . .”) (emphasis added), with Colo. Rev. Stat. Ann. § 13-90-119(3)(a) to (c) (West 2011) (establishing a three-part test to overcome the presumptive reporter’s privilege).
215 See supra text accompanying note 213.
216 See supra text accompanying note 213.
217 See Stone, supra note 90, at 50–51.
218 See supra text accompanying note 213.
in scholarly circles regarding exactly who should qualify to invoke the privilege.\textsuperscript{219}

On one end of the spectrum are the extremely specific definitions of “journalist” that limit the extent of the privilege to traditional media.\textsuperscript{220} For example, the Alabama state shield law specifically limits its protections to a “person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity.”\textsuperscript{221} Thus, a person working outside the confines of these three traditional media outlets is not protected under Alabama’s shield law.\textsuperscript{222}

On the other end of the spectrum are very broad definitions of who is a journalist.\textsuperscript{223} Such a definition is found in New York’s shield law, which provides protection to a “professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public.”\textsuperscript{224} Further, New York’s shield law gives specific guidance in defining such terms as newspaper, magazine, and news agency.\textsuperscript{225} Some states impose specific employment requirements in order for a person to qualify as a journalist.\textsuperscript{226} In other states, the shield law grants protection to a “journalist” but provides no definition of who qualifies as a journalist for the purposes of the statute.\textsuperscript{227}

\textsuperscript{219} See discussion infra Part III.B.1.
\textsuperscript{220} See, e.g., \textsc{Ala. Code} § 12-21-142 (2006).
\textsuperscript{221} Id. (emphasis added).
\textsuperscript{223} See, e.g., \textsc{Okla. Stat. tit. 12, § 2506 (2009).}
\textsuperscript{224} \textsc{N.Y. Civ. Rights Law} § 79-h(b) (McKinney 2009).
\textsuperscript{225} See id. § 79-h(a).
\textsuperscript{226} See, e.g., \textsc{Del. Code Ann. tit. 10, § 4320 (1999) (“Reporter’ means any journalist, scholar, educator, polemicist, or other individual who either: a. At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or b. Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.”).}
\textsuperscript{227} See, e.g., \textsc{Me. Rev. Stat. Ann. tit. 16, § 61 (2010).}
b. Absolute or Qualified Privilege

Another of the central issues in the construction of shield laws is whether the privilege granted to reporters can be overcome. An absolute privilege provides firm protection against compelled disclosure of source identities, whereas a qualified privilege allows the state to overcome the presumptive privilege and force disclosure of source identities in certain situations. This divergence reflects a great deal of debate over the balancing of the public’s right to all relevant evidence with the importance of confidential sources.

Several jurisdictions that have some form of shield law protection grant a reporter an absolute privilege against mandatory disclosure of the identity of confidential sources. It should be noted that in Alabama and Kentucky, in order for a journalist to invoke this privilege, the statutes mandate that the information obtained from the confidential source must be published, broadcast, or televised. In many other statutes, however, there is a marked absence of language mandating that the information obtained from a confidential source is published in order to invoke the protections of the statute. In still others, the statute states specifically that a reporter can invoke the privilege against mandatory disclosure of confidential sources regardless of whether the information obtained from such a source is ever published. Finally, it is notable that the District of Columbia, which grants absolute protection against the disclosure of the identity of a confidential source actually permits the government to compel the disclosure of other information from the journalist, such as notes and outtakes. This seems to

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228 See Stone, supra note 90, at 51–54.
229 See id. at 51–53. In states with a qualified privilege, “[t]he government can require the journalist to reveal the confidential information if the government can show that it has exhausted alternative ways of obtaining the information and that the information is necessary to serve a substantial government interest. There are many different variations of this formulation, but this is the essence of it.” Id. at 51–52.
230 See discussion infra Part III.B.2.
233 See, e.g., Cal. Evid. Code § 1070(a) (West 2009) (“[A protected person] cannot be adjudged in contempt . . . for refusing to disclose any unpublished information obtained or prepared in the gathering, receiving, or processing of information for communication to the public.”) (emphasis added).
reflect a judgment that the protection of source confidentiality is of the utmost importance.\textsuperscript{236}

In the other jurisdictions with some form of shield law, the privilege against mandatory disclosure of the identity of confidential sources is qualified.\textsuperscript{237} It is notable that, in contrast to all of the other shield laws, those in Georgia, North Carolina, and South Carolina do not specifically mention a privilege to protect the “source” of confidential information.\textsuperscript{238} Nevertheless, these three statutes include a qualified privilege protecting against compelled disclosure of “information” obtained while acting as a journalist; the identity of a source would presumably be information.\textsuperscript{239} In the other jurisdictions with a qualified privilege, the statutes explicitly indicate that the identity of a confidential source is within the scope of the statutory protections.\textsuperscript{240} The statutes vary widely in the way they express the criteria that must be established by the party seeking disclosure of the source’s identity in order to override the statutory privilege.\textsuperscript{241}

III. Analysis

A. The Impetus for a National Shield Law in Canada: The National Post Standard Does Not Adequately Protect Confidential Sources

The use of confidential sources in the process of investigative journalism is extremely important.\textsuperscript{242} The scholarship examined earlier in this Note demonstrates theoretically and empirically that people with important information of public concern may not come forward with-

\textsuperscript{236} See id.


\textsuperscript{239} See sources cited supra note 238.


\textsuperscript{241} Compare Alaska Stat. § 09-25-310 (2010) (“The court may deny the privilege . . . if it finds the withholding of the testimony would (1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or (2) be contrary to the public interest.”), with Colo. Rev. Stat. Ann. § 13-90-119(3) (West 2011) (“Notwithstanding the privilege of nondisclosure granted in subsection (2) of this section, any party [may overcome the privilege] by establishing . . . (a) That the news information is directly relevant to a substantial issue involved in the proceeding; (b) That the news information cannot be obtained by other reasonable means; and (c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.”).

out a guarantee of confidentiality.\textsuperscript{243} What is sought from a shield law, therefore, is a level of certainty at the time that a journalist makes a promise of confidentiality that this promise will ultimately be kept.\textsuperscript{244} Thus, the effectiveness of the protection afforded by the standard elucidated in \textit{National Post} should be judged based upon whether it creates the necessary certainty at the time the promise is made.\textsuperscript{245}

1. Extent of the Privilege: The Burden of Proof

The most glaring flaw in the \textit{National Post} decision is that it essentially creates a rebuttable presumption in favor of disclosure.\textsuperscript{246} The Canadian Supreme Court in that decision stated that analysis of whether a privilege is afforded to a journalist to protect the confidentiality of sources will proceed on a case-by-case basis.\textsuperscript{247} Further, in order for the privilege to attach, the onus is on the journalist to establish that all four Wigmore criteria are met.\textsuperscript{248}

In several of the U.S. states that have shield laws, the privilege is absolute and cannot be overcome in any circumstances.\textsuperscript{249} Many other U.S. states, however, grant to journalists a qualified privilege that can be overcome when certain statutorily specified factors are met.\textsuperscript{250} However, even in these jurisdictions, the presumption is in favor of nondisclosure of the identity of the confidential source and the burden of proof remains with the party seeking disclosure.\textsuperscript{251}

In criticizing U.S. state shield laws that provide only a qualified privilege to reporters, one scholar stated that a major flaw with such a construction of the privilege is that “[a]t the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege.”\textsuperscript{252} This criticism has even more force when the \textit{National Post} standard is examined against it.\textsuperscript{253} In the U.S. states that use a qualified privilege model, at least the burden of showing that the

\textsuperscript{243} See supra text accompanying note 91.
\textsuperscript{244} See Stone, supra note 90, at 53.
\textsuperscript{245} See id.
\textsuperscript{246} \textit{Nat’l Post}, [2010] 1 S.C.R. ¶ 60; see Stone, supra note 90, at 53.
\textsuperscript{248} Id. ¶ 60.
\textsuperscript{249} See supra text accompanying note 231.
\textsuperscript{250} See supra text accompanying note 237.
\textsuperscript{252} See Stone, supra note 90, at 52.
\textsuperscript{253} See \textit{Nat’l Post}, [2010] 1 S.C.R. ¶ 60; Stone, supra note 90, at 52.
privilege should be overcome rests with the prosecutor.\textsuperscript{254} Under the Canadian Supreme Court’s standard, a source should assume that his communication is not privileged.\textsuperscript{255} Such a prosecution-friendly standard creates the very type of uncertainty that discourages confidential sources from disclosing important information of public concern.\textsuperscript{256}

2. Definition of “Journalist”

Another major flaw in the \textit{National Post} standard is it fails to define who is a journalist for the purposes of establishing the privilege.\textsuperscript{257} Indeed, one of the difficulties that the Canadian Supreme Court had in this case was determining who was a journalist.\textsuperscript{258} The potential breadth of the term “journalist” is a key reason cited by the Canadian Supreme Court for refusing to establish either a constitutional or a class-based immunity.\textsuperscript{259}

In contrast, in states with shield laws the vast majority of statutes define the term journalist.\textsuperscript{260} Of course, Maine’s statute makes no effort to narrow the scope of the term journalist, presumably leaving such a determination up to the reviewing court; however, this complete lack of a definition is an outlier.\textsuperscript{261}

The third of the four Wigmore criteria allows courts applying \textit{National Post} to distinguish between different types of journalists.\textsuperscript{262} The Canadian Supreme Court itself noted that “[t]he relationship between the source and a blogger might be weighed differently than in the case of a professional journalist.”\textsuperscript{263} While this statement has intuitive appeal, it provides relatively little guidance on exactly which types of journalists might be more protected under the \textit{National Post} standard.\textsuperscript{264}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{255} See \textsc{Nat’l Post}, [2010] 1 S.C.R. ¶ 60.
\item\textsuperscript{256} See \textsc{id.}; \textsc{Stone}, supra note 90, at 53.
\item\textsuperscript{257} \textsc{Nat’l Post}, [2010] 1 S.C.R. ¶¶ 53, 57.
\item\textsuperscript{258} See supra text accompanying notes 153–156.
\item\textsuperscript{259} See supra text accompanying notes 153–156, 166.
\item\textsuperscript{261} Compare \textsc{Me. Rev. Stat. Ann.} tit. 16, § 61 (2010) (stating that a “journalist” cannot be compelled to disclose certain information but not defining the term “journalist”), with \textsc{Cal. Evid. Code} § 1070(a) (West 2009) (“[T]he privilege extends to a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed . . . .”).
\item\textsuperscript{262} \textsc{Nat’l Post}, [2010] 1 S.C.R. ¶ 57.
\item\textsuperscript{263} \textsc{id.}
\item\textsuperscript{264} See \textsc{id.} ¶¶ 53, 57.
\end{itemize}
\end{footnotesize}
his relationship with a particular journalist is one that ought to be “sedulously fostered” in the public good creates the very type of uncertainty that discourages important disclosures. 265 While some state shield laws have arguably been written or interpreted too narrowly, 266 these shield laws at least have the virtue of creating some level of certainty as to the types of journalists to whom the privilege will apply. 267

3. Overall Arbitrariness

A third, less specific—but no less major—flaw with the National Post standard is the arbitrariness that it creates in deciding exactly which reporters in which circumstances are deserving of a privilege. 268 This is highlighted by the divergent outcomes that the Canadian Supreme Court arrived at in National Post and Globe & Mail. 269 In National Post, the Canadian Supreme Court allowed compelled disclosure of evidence that may serve to identify a journalist’s confidential source. 270 In contrast, in Globe and Mail, the Canadian Supreme Court temporarily allowed a journalist to keep the identity of his source confidential, pending review by a lower court. 271 The major difference leading to these two divergent outcomes was that the Canadian Supreme Court in Globe and Mail wanted the lower court to conduct a more thorough analysis under the fourth Wigmore criterion, whereas the National Post court was confident that the interests balanced in favor of disclosure. 272 Despite evidence that the lower court judge had found in favor of disclosure on the first three Wigmore criteria, the Canadian Supreme Court reasoned that the public interest in dissemination of the information might be so strong that it could outweigh the other three criteria. 273 Yet the fourth Wigmore criterion is incredibly subjective. 274 Si-

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265 See id. ¶ 57; Stone, supra note 90, at 53.
266 See infra text accompanying note 296.
267 See Stone, supra note 90, at 53.
268 See id.
269 Compare Nat’l Post, [2010] 1 S.C.R. ¶ 77 (“[T]he identity of the individual who shipped Mr. McIntosh the forged document has no continuing claim to the protection of the law.”), with Globe & Mail v. Canada (Attorney Gen.), 2010 SCC 41, [2010] 2 S.C.R. 592, ¶ 70 (Can.) (holding that a lower court must review the evidence and pay particular attention to the fourth Wigmore criterion).
274 See Nat’l Post, [2010] 1 S.C.R. ¶ 61 (“The weighing up will include (but of course is not restricted to) the nature and seriousness of the offence under investigation, and the
multaneously, however, it is the most powerful factor in the analysis.\(^\text{275}\) Leaving a court with such wide discretion makes the potential application of the privilege questionable and discourages confidential sources from coming forward with important information.\(^\text{276}\)

B. The Need for Legislative Action: Moving Toward a Shield Law

To adequately protect the relationship between journalists and their confidential sources, many questions must be specifically addressed to avoid creating uncertainty about the protection that will be afforded to confidential communications.\(^\text{277}\) Many scholars writing about this topic examine specific concepts like the definition of a journalist and the extent of the protection afforded to confidential sources.\(^\text{278}\) However, as it considered whether to create a class privilege, the Canadian Supreme Court in *National Post* noted a number of problems.\(^\text{279}\) Among the issues cited were the varying degrees of professionalism and the Canadian Supreme Court’s own broad definition of journalism, determinations of whether the privilege would belong to the source or the journalist, a lack of workable criteria regarding the creation or loss of the privilege, and the inflexibility of a class privilege.\(^\text{280}\) As important questions remained unanswered, the Canadian Supreme Court thus decided that a judicially created class privilege for journalists and their sources would be inappropriate.\(^\text{281}\)

Importantly, the Canadian Supreme Court stated that “[i]t is likely that in future (sic) such ‘class’ privileges will be created, if at all, only by legislative action.”\(^\text{282}\) To address the myriad questions that prevented the Canadian Supreme Court from finding a class privilege for journalists and their confidential sources and thus address the underprotective nature of the *National Post* standard, this Note proposes that

probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist’s promise of confidentiality.”).  

\(^{275}\) See id. ¶ 58 (“The fourth Wigmore criterion does most of the work.”).

\(^{276}\) See Stone, supra note 90, at 53 (“[T]he very purpose of the privilege is to encourage sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce.”).


\(^{278}\) See id. at 71–74.

\(^{279}\) See supra text accompanying notes 164–172.


\(^{281}\) See id. ¶ 42.

\(^{282}\) Id.
the Parliament should do just what the Canadian Supreme Court has stated: create a class privilege that more adequately details and protects the important journalist-source relationship.283

In crafting a shield law that better protects the interests of confidential sources, many issues must be addressed.284 This section will investigate two major topics that arise frequently in scholarship examining shield laws.285 First, the Parliament should adopt a relatively broad definition of when the privilege applies.286 Second, the Parliament should create a nearly absolute privilege for journalists to protect their confidential sources, as this type of privilege most fully protects confidential sources and therefore most fully incentivizes the types of disclosure that any privilege seeks to encourage.287

1. Defining Who Is a Journalist

One scholar notes that defining who can invoke the privilege might prove to be the toughest part of drafting a shield law.288 Coming up with a consistent definition of who qualifies as a journalist for the purposes of invoking the privilege may be the most important task facing a legislature.289 The importance of this definitional section is illustrated by a 2005 case from the U.S. Court of Appeals for the Eleventh Circuit interpreting Alabama’s shield law.290 That case concerned a Sports Illustrated magazine article about the coach of the University of Alabama’s football team.291 The coach sued the magazine for libel, slander, and outrageous conduct.292 A major issue in the case was whether Alabama’s shield law statute, worded in absolute terms, provided protection to magazine reporters.293 The statute states that the privilege is extended to a “person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-

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283 See Stone, supra note 90, at 53.
284 See Fargo, supra note 277, at 71–74.
285 See Stone, supra note 90, at 50–56 (examining the definition of the term journalist and whether the privilege granted should be absolute or qualified).
286 See infra text accompanying notes 288–315.
287 See infra text accompanying notes 316–328.
288 Fargo, supra note 277, at 71.
291 See id. at 1330.
292 Id. at 1332.
293 See id. at 1335.
gathering capacity.” The court in this case decided, based on the literal language of the statute, that magazine reporters were not covered by Alabama’s law. Due to this antiquated definition of the news media, it appears that many people who in modern parlance would be considered journalists are not protected by this statute.

However, exactly who should receive the benefit of this privilege is still an open question, and the subject of much debate. At the outset, it must be clear exactly to whom the privilege belongs. Relying on the law of privilege, it is clear that the privilege against compelled disclosure of a source’s identity belongs to the source. Thus, one scholar properly rephrases the question as “to whom may a source properly disclose information in reasonable reliance on the belief that the disclosure will be protected by the journalist-source privilege?”

Although it is necessary to have the correct question in mind, it does not help in defining to whom a source might reasonably disclose confidential information. This lack of clarity is most notable in the ongoing debate about whether to extend the privilege to include bloggers and other non-traditional media. Many state shield laws err on the side of caution in their definition of who is a journalist and subsequently extend the privilege only to mostly traditional media. However, the exclusion of non-traditional media such as blogs overlooks the fact that such non-traditional media can often be media through which information of substantial public value is disclosed. For example, in the United States, bloggers contributed substantially to public discourse when they noted inaccuracies in a CBS News story about President

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295 Price, 416 F.3d at 1342–43. “It is not plausible to interpret the term ‘newspaper’ in the Alabama shield statute to include Sports Illustrated magazine. The term is not ambiguous.” Id. at 1342.
296 See Higgins, supra note 222, at 275.
297 Compare Alexander, supra note 75, at 129–30 (proposing that the protections of a shield law be limited to those people engaged with traditional news media), with Durity, supra note 289, ¶ 39 (arguing that bloggers and other journalists engaged in non-traditional media must be protected).
298 See Stone, supra note 90, at 50–51.
299 See id.
300 Id. at 51.
301 See id.
302 See supra text accompanying note 297.
304 See Fargo, supra note 277, at 71.
Bush’s stint in the military.\textsuperscript{305} The network eventually rescinded its story.\textsuperscript{306}

Therefore, the question of to whom a source can properly disclose confidential information while being assured that the shield law will apply should be answered by returning to the very purpose of crafting a privilege.\textsuperscript{307} The impetus for a shield law establishing a journalist-source privilege is to encourage a source to come forward with information important to the public.\textsuperscript{308} Looking at it in this light, it is clear that in some cases, bloggers may be conduits to the public who can disclose important information.\textsuperscript{309} Therefore, excluding non-traditional media fully from statutory protections may create an underinclusive shield law.\textsuperscript{310}

Thus, in defining the scope of the privilege, the answer must rest in functional considerations, while keeping in mind the very purpose of the journalist-source privilege.\textsuperscript{311} In line with this method of thinking, one scholar proposes that the source must make a disclosure to a “journalist” reasonably believing that this “journalist” regularly distributes information to the public and with the intention that the information divulged to the “journalist” will be distributed to the public.\textsuperscript{312} Although this definition has intuitive appeal as it is in line with the interests that a privilege seeks to protect, it may be too broad.\textsuperscript{313} As the goal of a privilege is to encourage disclosure of the information in which the public has an interest, it makes sense to limit this definition further by imposing a condition that the “journalist” to whom the source makes a disclosure must report “on issues of public concern.”\textsuperscript{314} The shield laws of several states are already tailored to protect only confidential disclosures on issues of public concern.\textsuperscript{315}

\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} See Stone, supra note 90, at 41–42.
\textsuperscript{308} See Fargo, supra note 277, at 71.
\textsuperscript{309} See id.
\textsuperscript{310} See id.; Stone, supra note 90, at 41–42.
\textsuperscript{311} See Stone, supra note 90, at 51.
\textsuperscript{312} Id.
\textsuperscript{313} See Fargo, supra note 277, at 72.
\textsuperscript{314} See id.
2. The Need for a Nearly Absolute Privilege

Another central question any legislature must address when creating a shield law is whether the privilege is to be absolute or qualified.\textsuperscript{316} Absolute privileges have been less popular politically and with the courts in the United States than qualified privileges.\textsuperscript{317} However, an absolute privilege has the virtue of bringing “greater consistency to the law.”\textsuperscript{318} One scholar notes that the purpose of a privilege is to incentivize the disclosure of important information in which the public has an interest; however, “the uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce.”\textsuperscript{319}

Exceptions should be crafted only to account for very narrow circumstances in which the public’s interest in evidence substantially outweighs the journalist’s interest in keeping his source’s identity confidential.\textsuperscript{320} One such exception is when the source has information about a “grave crime or serious breach of national security that is likely to be committed imminently.”\textsuperscript{321} This parallels the U.S. jurisprudence around the psychotherapist-patient privilege when the psychotherapist learns that the patient intends to commit harm to himself or another.\textsuperscript{322} In these narrow circumstances, the public’s interest in evidence so clearly outweighs the journalist-source privilege that it would be “irresponsible” to privilege the disclosure.\textsuperscript{323} However, it is necessary for the Parliament, in crafting a shield law, to define exact and narrow circumstances in which these exceptions would apply; any less would create the type of uncertainty that discourages the disclosure of information of value to the public.\textsuperscript{324}

The other necessary exception involves the case when a source’s disclosure is unlawful in and of itself.\textsuperscript{325} Keeping in mind that the purpose of a shield law is to foster the disclosure of information in which the public has a substantial interest, the fact that a disclosure has already been declared unlawful means that such a disclosure has already
been found not to be in the public interest.\footnote{Id. at 54.} Therefore, most illegal
disclosures should not be privileged.\footnote{See id.} Such a disclosure should only be
privileged when it involves a leak of governmental information which has “substantial public value.”\footnote{Id. at 56 (offering the Pentagon Papers and the leak of the Abu Ghraib scandal as two examples of unlawful leaks with "substantial public value").}

**Conclusion**

Canada and the United States are consistently two of the world’s leading nations when it comes to overall freedom of the press. These two nations, however, share a troubling history of subpoenaing journalists in order to ascertain the identities of their confidential sources when such information will aid in criminal prosecutions or civil litigation. The Canadian Supreme Court recently handed down two decisions that affirmatively established a reporter’s privilege under common law. This privilege is decided on a case-by-case basis and only attaches after the journalist has proven several specified factors. The United States has a longer history with the journalist-source privilege. In 1972, the U.S. Supreme Court decided a case which did not establish a reporter’s privilege but left the door open for one. Seizing on this opportunity, different circuits have developed different iterations of this privilege. Individual states, however, have created the strongest protections for the journalist-confidential source relationship: forty states have enacted a statutory reporter’s privilege. These statutes, called shield laws, firmly establish the rights granted to journalists and their confidential sources. Upon close inspection, it becomes clear that the Canadian Supreme Court’s case-by-case model of privilege is simply insufficient. The uncertainty created by this ad hoc analysis discourages the very types of confidential disclosures that a privilege seeks to incentivize. Canada’s Parliament should craft a shield law that clearly establishes a reporter’s privilege and avoids the type of uncertainty created by the current standard. In doing so, the Parliament could learn much from U.S. states, which already have a great deal of experience in this area. Ultimately, a better shield law will include a fairly broad and functional definition of who is a journalist and thus who qualifies for the privilege and will be nearly absolute, with very few exceptions for only the most pressing circumstances.
WANTED: A PRACTICAL APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT TO FOREIGN REWARD OFFERS

Timothy E. Donahue*

Abstract: In 1976, Congress sought to codify the application of sovereign immunity with the passing of the Foreign Sovereign Immunities Act (FSIA). As foreign governments began to routinely act as participants in international commerce, Congress intended that the FSIA waive sovereign immunity when a foreign government engages in commercial activity that has a “direct effect” in the United States. This exception permits suits against foreign governments in U.S. courts when there is a breach a commercial contract that directly affects economic interests in the United States. Under U.S. contract law, a binding unilateral contract may form when one party performs the acts requested in an open offer, such as providing the whereabouts of a wanted fugitive in return for a reward. A recent Eleventh Circuit case, Guevara v. Republic of Peru, displayed the court’s inconsistent application of the FSIA’s commercial activity exception to fugitive reward offers, and prohibits the judicial enforcement of these contracts, even when offered by a foreign government and entered into on U.S. soil. The Guevara decision illustrates the unsettled interpretation and application of the FSIA by U.S. courts, and may have very damaging effects on U.S. participation in the pursuit of international fugitives.

INTRODUCTION

Perhaps best epitomized by the “wanted” posters of nineteenth Century America, large cash rewards have commonly been used to solicit public assistance in the capture of dangerous fugitives. The legal concept of a fugitive reward as a contract is a relatively simple one, replete with the notions of offer, acceptance, and performance that are well rooted in contract law. Nevertheless, when the pursuit of a fugitive

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1 See Shuey v. United States, 92 U.S. 73, 73 (1875) (describing the widely proclaimed $25,000 reward offer for the arrest of John Wilkes Booth and his accomplices in the assassination of Abraham Lincoln).

2 See Restatement (Second) of Contracts § 29 (1981).
crosses international boundaries, such reward offers become subject to a more complicated legal framework.³

In a recent Eleventh Circuit case, *Guevara v. Republic of Peru*, the plaintiff sought to enforce a $5 million reward offer from the government of Peru after he assisted in the capture of Vladimiro Lenin Montesinos Torres (Montesinos).⁴ After a lengthy journey through the federal courts, the circuit court dismissed the suit for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA).⁵ The FSIA provides immunity to foreign governments from lawsuits in U.S. courts while codifying certain enumerated exceptions to immunity.⁶ One such exception allows for suits against a foreign government that has engaged in “act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”⁷ Although the court concluded in an earlier decision that Peru’s reward offer qualified as a “commercial activity” under the FSIA, it held that the offer did not have a sufficiently “direct effect” in the United States to merit the immunity exception.⁸ The correct interpretation of this direct effect requirement, however, has puzzled district courts since the FSIA was signed into law in 1976.⁹ The context of the *Guevara* case illustrates the inconsistent applications and interpretations of the “commercial activity” exception by federal courts.¹⁰ In November 2010, the Supreme Court declined an opportunity to resolve this split amongst the circuits and denied the plaintiff’s petition for certiorari.¹¹

The application of the FSIA has extended beyond simple international business disputes and now includes criminal acts, as well as the pursuit of criminals.¹² The Eleventh Circuit’s apparent reversal of its

³ See *Guevara v. Republic of Peru (Guevara II)*, 608 F.3d 1297, 1307–08 (11th Cir. 2010) (applying the Foreign Sovereign Immunities Act (FSIA) to a reward offered by a foreign state), *cert. denied*, 131 S. Ct. 651 (2010) (mem.).
⁴ *Id.* at 1300.
⁵ *Id.* at 1302, 1310.
⁷ *Id.* at § 1605(a)(2).
⁸ *Guevara II*, 608 F.3d at 1306, 1310.
¹² Compare *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 620 (1992) (holding that the commercial activity of government-issued bonds had a direct effect in the United States that waives FSIA immunity), *with Guevara II*, 608 F.3d at 1302, 1310 (holding that a reward offered for the capture of a fugitive was a commercial activity, but did not have the required direct effect to waive FSIA immunity), *and Adler v. Fed. Republic of Nigeria*, 219
previous decision in *Guevara* illustrates the unpredictability of FSIA application and shows that a unilateral reward contract, performed in the United States, will not always be enforceable in U.S. courts.\textsuperscript{13} The conflicting decisions in *Guevara* have made apparent the need for courts to interpret the direct effect requirement as Congress intended and waive immunity when foreign governments act as marketplace participants in international commerce.\textsuperscript{14} By allowing the FSIA to prevent judicial guarantee of such unilateral contracts, a valuable tool of law enforcement may be significantly weakened and global security placed at risk.\textsuperscript{15}

Part I of this Note examines the factual and procedural background of the *Guevara* case. Part II discusses the legal framework of the FSIA and the law of contract that governs reward offers. It also examines current international fugitive rewards and security partnerships between the United States and foreign states. Part III applies the facts of *Guevara* to other FSIA interpretations and argues that foreign reward offers, accepted through performance in the United States, should be enforceable in U.S. courts.

### I. Background

During the 1990s, Montesinos served as Peru’s intelligence chief, as well as an advisor to former Peruvian President Alberto Fujimori.\textsuperscript{16} Dubbed “Peru’s Rasputin” because of his substantial influence over the President, Montesinos allegedly used his powerful post to commit a myriad of crimes including arms and drug trafficking, extortion and “more than a few murders.”\textsuperscript{17} Although critics accused Montesinos of corruption for years, in September 2000, hundreds of videotapes surfaced that depicted him engaging in various criminal acts.\textsuperscript{18} During the public outcry that followed, President Fujimori disbanded the National

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\textsuperscript{13} *See Guevara II*, 608 F.3d at 1311 (Cox, J. dissenting) (“Most importantly, the *Guevara I* court explicitly decided that there was no immunity available to Peru under the FSIA.”).

\textsuperscript{14} *See* Morrisey, supra note 9, at 703.

\textsuperscript{15} *See* Guevara v. Republic of Peru (*Guevara I*), 468 F.3d 1289, 1304 (11th Cir. 2006) (“The holding Peru asks us to reach would jeopardize not only its vital interests but those of every country that offers rewards for information, including this country.”); Guevara v. Republica Del Peru, No. 04-23223-CIV, 2008 WL 4194839 (S.D. Fla. Sept. 9, 2008), rev’d, 608 F.3d 1297 (11th Cir. 2010), cert. denied, 131 S. Ct. 651 (2010) (mem.).

\textsuperscript{16} *Guevara II*, 608 F.3d at 1304.

\textsuperscript{17} Id.; Opinion, *Peru’s Spy Chief in Exile*, N.Y. Times, Sept. 27, 2000, at A22.

\textsuperscript{18} *Guevara I*, 468 F.3d at 1292.
Intelligence Service and effectively resigned the presidency.\textsuperscript{19} Before Montesinos could be brought to justice, however, he managed to escape Peru aboard his yacht, the \textit{Karisma}, embarking to points unknown.\textsuperscript{20} The hunt for the former spy chief garnered worldwide attention, with claims that he underwent facial reconstructive surgery and placed nearly $800 million of illegally obtained funds in various offshore accounts.\textsuperscript{21} In an effort to generate new leads, Peru’s Interim President, Valentin Coraza, issued an Emergency Decree in April 2001, offering $5 million to anyone providing “accurate information that will directly enable locating and capturing . . . Montesinos.”\textsuperscript{22}

After fleeing Peru, Montesinos eventually reached Venezuela, where he placed himself under the protection of José Guevara, a former Venezuelan intelligence officer.\textsuperscript{23} Guevara provided a safe house for Montesinos and also served as his personal representative.\textsuperscript{24} While seeking access to one of Montesinos’ U.S. bank accounts, Guevara threatened to physically harm a Miami banker via email.\textsuperscript{25} In June 2001, when Guevara traveled to Miami to meet the banker in person, the Federal Bureau of Investigation (FBI) arrested Guevara on federal charges stemming from those threats.\textsuperscript{26} Aware of Guevara’s connection to Montesinos, the FBI offered to drop the charges if Guevara would provide information on his whereabouts.\textsuperscript{27} Additionally, the agents notified Guevara of Peru’s $5 million reward offer, which had been widely publicized.\textsuperscript{28} Agreeing to the offer, Guevara then informed the FBI of Montesinos’ location, and offered to have his associates deliver the fugitive to Venezuelan authorities.\textsuperscript{29} The FBI relayed this information to Peruvian and Venezuelan officials, who successfully apprehended Montesinos after he spent nearly eight months on the run.\textsuperscript{30}

\textsuperscript{20} Larry Rother, \textit{For Peru Ex-Spy Chief, on the Lam, a Trail of Intrigue}, N.Y. Times, Dec. 31, 2000, at A18.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} Guevara v. Republic of Peru (\textit{Guevara II}), 608 F.3d 1297, 1301 n.4 (11th Cir. 2010) (applying the FSIA to a reward offered by a foreign state), \textit{cert. denied}, 131 S. Ct. 651 (2010) (mem.).
\textsuperscript{23} \textit{Id.} at 1302–03.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 1301.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Guevara II}, 608 F.3d at 1301.
\textsuperscript{29} \textit{Id.}
Subsequent to this highly publicized arrest, both Peruvian and Venezuelan intelligence services claimed credit for its success; however, Peru also openly acknowledged the FBI’s role in facilitating Montesinos’ capture.31 Following his release, Guevara submitted his claim for the reward to Peru’s Special High Level Committee (SLHC), the governmental committee authorized to dispense it.32 The SLHC, however, refused to pay him.33

After Peru refused payment, Guevara filed suit in Florida state court seeking enforcement of the reward offer.34 After removing the suit to federal district court, Peru moved for dismissal under the FSIA.35 The district court agreed, dismissing the case on the grounds that the reward offer did not qualify under any of the FSIA’s exceptions.36 On appeal, however, the Eleventh Circuit reversed, holding that Peru had “ventured into the market place to buy the information needed to get its man.”37 On remand from the Eleventh Circuit, the district court granted summary judgment in favor of Guevara, and entered a final judgment in the amount of $5 million plus interest.38 In Peru’s appeal, the Eleventh Circuit revisited Peru’s FSIA claim, although this time on different grounds.39

Although the circuit court originally decided that Peru’s reward offer constituted a commercial activity, its first decision remained silent on the applicability of the remaining language of the FSIA.40 In the second appeal, the circuit court took up this inquiry and applied the three jurisdictional nexuses listed in § 1605(a)(2) to determine whether such commercial activity waived immunity.41 For waiver to occur, § 1605(a)(2) requires that the case be based upon (1) a commercial activity carried on within the United States, (2) acts performed in the United States in connection with commercial activity elsewhere, or (3)

33 Guevara II, 608 F.3d at 1301.
34 Id.
35 Id. at 1302.
36 Id.
37 Guevara I, 468 F.3d at 1299 (quoting Hond. Aircraft Registry, Ltd. v. Gov’t of Hond., 129 F.3d 543, 547 (11th Cir. 1997)).
38 See Guevara II, 608 F.3d at 1305.
39 Id. at 1307.
40 Id.
41 Id.
acts performed in the United States in connection with commercial activity elsewhere that causes a direct effect in the United States.\textsuperscript{42} Although the district court assumed that the circuit court performed this analysis in its original opinion, the Eleventh Circuit found that the issue had been implicitly left open and performed the inquiry in its second decision.\textsuperscript{43}

Applying the nexus analysis to Guevara, the circuit court concluded that under the first prong, the commercial activity of the reward offer did not take place within the United States.\textsuperscript{44} It reasoned that because the reward offer was created and administered by the SHLC in Peru, the commercial activity itself had not occurred in the United States.\textsuperscript{45} Analyzing the second prong of the nexus, the court held that Peru’s telephone call to the FBI agents in Miami, in which Peru restated the availability of the reward, was not sufficiently “in connection with” the commercial activity of the reward offer.\textsuperscript{46} It held that if such a phone call could meet the “in connection with” requirement of the second nexus, then almost any statement made in the United States regarding the commercial transaction would waive immunity.\textsuperscript{47} Because such an interpretation would run counter to the principle that a foreign state may only waive immunity either explicitly or by implication, the circuit court declined to find that such a minor action met the requirements of the second prong.\textsuperscript{48}

In its analysis of the third and final prong, that acts performed in connection with the commercial activity have a direct effect in the United States, the court applied the holding of \textit{Harris Corp. v. National Iranian Radio & Television}, which required that the effect be “sufficiently ‘direct’ and sufficiently ‘in the United States’ that Congress would have wanted an American court to hear the case.”\textsuperscript{49} The court also employed a minimum contacts analysis analogous to that used to determine personal jurisdiction.\textsuperscript{50} Under this analysis, the Eleventh Circuit rejected Guevara’s claim that his acceptance of the reward offer

\textsuperscript{42} 28 U.S.C. § 1605(a)(2).
\textsuperscript{43} \textit{Guevara II}, 608 F.3d at 1307.
\textsuperscript{44} \textit{Id}.
\textsuperscript{45} \textit{Id.} at 1307–08.
\textsuperscript{46} \textit{Id.} at 1308.
\textsuperscript{47} \textit{Id}.
\textsuperscript{48} \textit{Id}.
\textsuperscript{49} \textit{See Guevara II}, 608 F.3d at 1309 (quoting \textit{Harris Corp. v. Nat’l Iranian Radio & Television}, 691 F.2d 1344, 1351 (11th Cir. 1982)).
\textsuperscript{50} \textit{See id.} at 1310.
while in FBI custody satisfied the direct effect requirement.\textsuperscript{51} Moreover, the court rejected Guevara’s contention that Peru’s non-payment of the reward caused a direct effect in the United States, declining to allow a “negative activity” to establish a direct effect waiver of the FSIA.\textsuperscript{52} Finally, the court also held that Guevara’s arrest in the United States was not a direct effect of Peru’s reward offer, as the arrest was instead a consequence of his criminal behavior.\textsuperscript{53} The majority reversed the district court’s summary judgment decision and remanded the case with the instruction that it be dismissed.\textsuperscript{54}

In a dissenting opinion, however, Judge Cox criticized the court’s holding that the issue of sovereign immunity was not addressed in the Eleventh Circuit’s first decision.\textsuperscript{55} Judge Cox stated that when the Eleventh Circuit originally decided that Peru had engaged in a commercial activity, it also decided that the requisite “direct effect” nexus also existed.\textsuperscript{56} Additionally, he cited the court’s previous holding that the individual defendants named in the suits were not entitled to sovereign immunity, “because the sovereign itself is not.”\textsuperscript{57} Although critical of the Eleventh Circuit’s apparent reversal of its own decision, Judge Cox also stated that rather than apply the FSIA, the court should have dismissed the suit under principles of international comity.\textsuperscript{58} Under that doctrine, he felt that the court should have recognized and respected the decision of the SHLC to not pay the reward as the final determination of the matter.\textsuperscript{59}

Following the Eleventh Circuit’s dismissal of the claim, Guevara petitioned the Supreme Court for certiorari.\textsuperscript{60} The petition asserted that the circuits are evenly split as to the correct application of the FSIA direct effect analysis.\textsuperscript{61} Because of the various tests and interpretations, Guevara claimed that there is considerable uncertainty as to when courts should waive FSIA immunity.\textsuperscript{62} Additionally, Guevara stated the need for judicial enforcement of a reward on policy grounds.\textsuperscript{63} On No-
November 26, 2010, the Supreme Court denied the petition for certiorari.64

II. DISCUSSION

A. The Foreign Sovereign Immunities Act

The doctrine of foreign sovereign immunity is an ancient legal concept originally intended to protect foreign officials who conduct business abroad.65 The Supreme Court first established the doctrine of sovereign immunity in landmark case of Schooner Exchange v. McFadd-on.66 In that case, Chief Justice Marshall held that no U.S. jurisdiction exists over a foreign sovereign absent the sovereign’s express consent.67 The dicta of that opinion, however, suggested that immunity may be waived if the foreign sovereign acts as a private party.68 Many later courts applied the holding broadly and interpreted the decision “as extending virtually absolute immunity to foreign sovereigns as ‘a matter of grace and comity.’”69

Following Schooner Exchange, the courts developed a two-step system for making sovereign immunity determinations.70 Under this system, a diplomatic representative from the foreign state could petition for a “suggestion of immunity” from the State Department, and upon such a suggestion the court would surrender jurisdiction.71 In the absence of a State Department request, the district courts could also make such an immunity determination themselves.72 As foreign states began to engage increasingly with private parties in international business, however, it became clear that the absolute application of immunity was no longer desirable.73

64 Guevara v. Republic of Peru, 131 S. Ct. 651 (2010) (mem.).
66 See 11 U.S. (7 Cranch) 116, 137 (1812).
67 Id. at 136.
68 Morrissey, supra note 9, at 680.
70 Id.
71 Id.
72 Id.
73 Froestad, supra note 65, at 522–23.
In 1952, the State Department halted its general practice of requesting sovereign immunity for all friendly sovereigns. That year, Jack Tate, the acting legal advisor to the State Department, announced that the department would adopt a “restrictive” theory of sovereign immunity. The restrictive theory of immunity, which many other countries had already adopted by the 1950s, recognized the role of the foreign state in international commerce and stripped immunity from suits where a foreign government acted in a commercial capacity. In recognizing the importance of the restrictive theory, Tate found that individuals engaged in business with foreign states needed the protection of a judicial remedy and therefore sovereign immunity must be waived in such instances. In 1976, Congress sought to codify the restrictive theory of sovereign immunity by enacting the FSIA.

The FSIA has been described as a “statutory labyrinth” with numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions. Although the FSIA operates under the traditional premise that foreign governments are immune from U.S. jurisdiction, it codifies specific exceptions, most significantly the commercial activity exception inherent in the restrictive theory of sovereign immunity. The FSIA defines commercial activity as “either a regular course of commercial activity or a particular commercial transaction or act.” In Republic of Argentina v. Weltover, Inc., the Supreme Court held that “when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.” This interpretation has been extended to include acts seemingly sovereign in nature, such as the national registration of aircraft, if a foreign state contracts with a private company for assistance in such governmental functions. The federal courts have even extended the definition of commercial activity to include illegal conduct. This

74 Samantar, 130 S. Ct. at 2285.
75 Morrissey, supra note 9, at 681–82.
76 Frotestad, supra note 65, at 522–23.
77 Morrissey, supra note 9, at 681–82.
78 See Frotestad, supra note 65, at 524.
80 Morrissey, supra note 9, at 675, 676; see James A. Beckman, Citizens Without a Forum: The Lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity Above the Territorial Air Space, 22 B.C. Int’l & Comp. L. Rev. 249, 265 (1999).
83 Hond. Aircraft Registry, Ltd. v. Gov’t of Hond., 129 F.3d 543, 548 (11th Cir. 1997).
interpretation stemmed from Justice White’s concurrence in *Saudi Arabia v. Nelson*, in which he posited that torture of a plaintiff by government hired thugs, rather than police, could be considered a commercial activity. Not all circuits have been willing to follow such a broad interpretation of commercial activity, however, leaving the precise definition of the term uncertain.

Section 1605(a)(2) of the FSIA establishes the commercial activity exception and provides three nexuses for waiver of immunity due to commercial activity. First, immunity is waived when “the action is based upon a commercial activity carried on in the United States by the foreign state.” Second, waiver applies when the suit is based “upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere.” Finally, waiver occurs when a suit is based “upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” Although the first and second nexuses do not explicitly define the commercial activity or “in connection with” requirements, it is the interpretation of the third nexus’s direct effect requirement that poses significant difficulty for the circuit courts.

Almost immediately after the enactment of the FSIA, the circuit courts developed different interpretations of the direct effect clause. Although most circuits required that a direct effect in the United States be “substantial and foreseeable,” others expressly rejected such a requirement. The Supreme Court sought to address this split when it decided *Weltover v. Argentina* in 1992. In that case, bondholders sued the central bank of Argentina for altering a bond payment schedule outside of their preexisting contract. The Court examined whether

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86 Compare *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1993) (rejecting a claim that Hezbollah kidnappers hired by Iran to kidnap Americans in Lebanon constituted a commercial activity under the FSIA), with *Adler*, 219 F.3d at 875 (holding that a contract to illegally obtain government funds and bribe officials constituted a commercial activity).
88 Id.
89 Id.
90 Id.
91 Id.
92 Id., supra note 9, at 676, 677.
93 Id. at 683.
95 *Morrissey*, supra note 9, at 684.
96 *Weltover, Inc.*, 504 U.S. at 607.
the contractual breach that occurred in Argentina had a direct effect in the United States, thereby waiving Argentina’s FSIA immunity.96 The Court did not require any substantiality or foreseeability requirement and instead accepted the Second Circuit’s holding that “an effect is ‘direct’ if it follows ‘as an immediate consequence of the defendant’s activity.’”97 In applying this test, the Court held that because New York was the place of performance for Argentina’s payment obligations, the rescheduling of those obligations had the necessary direct effect in the United States.98 Finally, the Court also used the “minimum contacts” test99 for personal jurisdiction as an aid in interpreting the direct effect requirement.100 In that analysis, the Court found that because the bonds were payable in New York, Argentina had availed itself of the privilege of engaging in business in the United States and met the test’s requirements.101

Although Weltover established the “immediate consequence” test for the direct effect inquiry, some circuit courts continued to apply additional means of analysis.102 One such test requires that a direct effect must be a “legally significant act” in the United States.103 Even after Weltover failed to include such a requirement in its holding, some circuit courts continued to apply it, as the Second Circuit did in Antares Aircraft v. Federal Republic of Nigeria.104 The Fifth Circuit rejected such a test in Voest-Alpine Trading USA Corp. v. Bank of China, when it held that the Supreme Court’s holding in Weltover represented an explicit rejection of any legally significant act requirement.105 The Fifth Circuit also held that while a legally significant act could cause a direct effect in the United States, it was not the only means of doing so.106 Although the Second Circuit eventually abandoned the test as well,107 the Eighth and

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96 Id. at 609.
97 Id. at 618; see Adler, 219 F.3d at 876 (applying Weltover and holding that reliance on fraudulent statements made outside the United States was an immediate consequence of defendant’s activity).
101 See id. at 620.
102 See Froststad, supra note 65, at 529–30.
104 See Antares Aircraft Inc. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993).
105 142 F.3d 887, 894 (5th Cir. 1998).
106 Id.
107 See Guirlando v. T.C. Ziraat Bankasi, 602 F.3d 69, 76 (2d Cir. 2010).
Tenth Circuits still employ the legally significant act requirement in their direct effect inquiry.108

B. Unilateral Reward Contracts

When some aspect of a contract for the purchase of goods or services occurs in the United States, and a foreign state is a party, it will likely meet the requirements for the waiver of immunity.109 Under modern contract law, a party can be legally bound by an offer, even absent any formal bargaining with another party.110 Such open offers are called unilateral contracts, and they represent an enforceable promise of consideration upon the performance of a requested act.111 Open reward and prize offers, whether for information leading to the arrest of a fugitive or for a successful hole in one in a golf tournament, are considered unilateral contracts.112 Unilateral contracts, and fugitive rewards in particular, can only be accepted through complete performance of the offer’s specific terms, and the offeror may also revoke the offer any time before performance is complete.113

The law governing rewards for assistance in the capture or arrest of wanted fugitives has developed over the centuries in U.S. courts.114 Shuey v. United States involved a $25,000 reward offer for the arrest of John H. Suratt, an alleged conspirator in the assassination of Abraham Lincoln.115 Although President Andrew Johnson publicly revoked the reward offer, that revocation was unbeknownst to Henri Beaumont de Sainte Marie, an associate of Suratt’s.116 When Sainte Marie discovered Suratt hiding in Vatican City, he alerted the authorities and even ac-

108 Compare id., with United World Trade, Inc. v. Mangyshlaakneft Oil Prod. Assoc., 33 F.3d 1232, 1239 (10th Cir. 1994), and GE Capital Corp. v. Grossman, 991 F.2d 1376, 1385 (8th Cir. 1993).
109 See Weltover, Inc., 504 U.S. at 620 (finding that a bond agreement with payment scheduled to a U.S. bank waived FSIA immunity); Hond. Aircraft Registry, Ltd., 129 F.3d at 548, 549 (holding that a contract for assistance in aircraft registration, with parties based in the United States, met the requirements for the waiver of FSIA immunity).
111 Id.
115 Shuey, 92 U.S. at 73.
accompanied the U.S. Navy as it finally apprehended Suratt following his escape to Egypt.\footnote{\textit{Id.}} When Sainte Marie petitioned Ulysses S. Grant, the interim Secretary of War, for the $25,000 reward, he was denied on the grounds that the reward offer had been previously revoked.\footnote{\textit{Id. at 955.}} In the litigation that followed, Sainte Marie’s claim for the reward reached the Supreme Court.\footnote{\textit{Shuey}, 92 U.S. at 73.} The Court held that regardless of a party’s reliance on such a reward offer, the offeror could validly revoke it any time before performance, even without the offeree’s knowledge of such revocation.\footnote{\textit{Id. at 76.}}

Some courts have come to understand the Supreme Court’s opinion in \textit{Shuey} as requiring the strict interpretation of the terms of a reward offer.\footnote{See Perillo, supra note 116, at 964.} Under this view, if a reward is offered for the “arrest” of a fugitive, simply providing information leading to the arrest of that fugitive does not satisfy the requested performance of the offer.\footnote{See \textit{id.}} Other courts have been more willing to interpret reward offers liberally, holding that providing information leading to an arrest is essentially the same as performing the act of arrest itself.\footnote{\textit{Id.}}

Another unsettled area of the law governing reward offers is whether knowledge of the offer, prior to performance, is essential to recovery.\footnote{Compare \textit{Glover v. D.C.}, 77 A.2d 788, 791 (D.C. 1951) (requiring prior knowledge of a reward before performance to create a binding obligation), with \textit{Smith v. State}, 151 P. 512, 513 (Nev. 1915) (holding that prior knowledge of a reward is not necessary for entitlement).} Although some courts have ruled that knowledge of a reward is essential to the formation of a unilateral contract, not every court has adhered to this principle.\footnote{See \textit{Glover}, 77 A.2d at 791; \textit{Smith}, 151 P. at 513.} In \textit{Drummond v. United States}, a private detective who successfully facilitated the arrest of an escaped fugitive sought payment of a reward from both the U.S. Marshals and the Department of Justice (DOJ).\footnote{Drummond v. United States, 35 Ct. Cl. 356, 370, 371 (Ct. Cl. 1900).} By examining both the purpose of a fugitive reward and other case law governing such offers, the Court of Federal Claims found that knowledge of a government reward offer is not necessary for recovery.\footnote{\textit{Id. at 372–73.}} The Municipal Court of Appeals found differently in \textit{Glover v. District of Columbia}, when it held that a plaintiff...
must prove knowledge of a reward offered by a government to prove the existence of a binding contract. Some courts have also acknowledged a possible distinction between governmental and private reward offers, with knowledge of such a reward only being required in the latter instance.

The law governing fugitive reward offers also draws a distinction between rewards offered through a proclamation and those offered pursuant to a government official’s statutory authorization. When a government offers a reward pursuant to a statute, the offer is subject to the terms of the statute rather than contract law. When a government official has the authority to make reward offers independently, however, that authority equates to the power to enter the government into a binding contract. In Cornejo-Ortega v. United States, the Court of Federal Claims dismissed the claim of an individual who provided the whereabouts of a fugitive in Mexico who was wanted for kidnapping, robbery and the murder of a DEA agent. Although federal agents showed the plaintiff a reward poster with the fugitive’s name and picture, offering a “reward up to $2,200,000,” the court held that no valid unilateral contract existed because the agents did not have the authority to enter the federal government into such a contract. Furthermore, the court found that the language used in the poster, which included the words “up to,” provided no guarantee of any payment, since such phrasing may be interpreted “to include zero as its lower limit.”

Rewards offered by private individuals are subject to the same concepts of contract law that apply to rewards offered by governments or their agencies. In Norman v. Loomis Fargo & Co., the Western District of North Carolina held that when an armored car company publicized a $500,000 reward for information “that result[ed] in the capture of the perpetrators” of the theft of several million dollars, it created a uni-

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128 See Glover, 77 A.2d at 791.
129 See Broadnax v. Ledbetter, 99 S.W. 1111, 1112 (Tex. 1907).
130 See State v. Malm, 123 A.2d 276, 277 (Conn. 1956) (recognizing a difference between rewards offered pursuant to statute and those offered independently).
131 See In re Kelly, 39 Conn. 159, 162 (1872).
132 See Cornejo-Ortega, 61 Fed. Cl. at 372.
133 Id.
134 Id. at 372, 374.
135 Id. at 375.
136 See Glover v. Jewish War Veterans of U.S., Post No. 58, 68 A.2d 233, 234 (D.C. 1949) (“So far as rewards offered by private individuals and organizations are concerned, there is little conflict on the rule that questions regarding such rewards are to be based upon the law of contracts.”).
lateral contract. The court further found that the plaintiff met the requirement of acceptance of the reward offer when she phoned in her information to the America’s Most Wanted tip line. In Guevara, the Eleventh Circuit also acknowledged the prevalence of private reward offers, such as an offer made by Oprah Winfrey’s television show for information relating to child predators or O.J. Simpson’s personal reward offer for information on the whereabouts of the “real killers.” In examining such private reward offers, the court found that such activity equated to the purchase of information on the open market by a private party.

Law enforcement agencies all over the world commonly employ the use of rewards to encourage public assistance in locating fugitives. In 1984, Congress approved the use of cash rewards under the Act to Combat International Terrorism. This legislation led to the formation of the Rewards for Justice Program, which allows the Secretary of State to offer rewards in excess of $25 million for information that prevents terrorist acts against U.S. persons or property worldwide.

Other countries offer similar rewards for fugitives accused of various criminal acts, such as war crimes, drug offenses and murder. Before his unassisted capture in May of 2011, the government of Serbia had offered a cash reward of €10 million for information leading to the arrest of accused war criminal Ratko Mladic, wanted for orchestrating the Srebrenica massacre in 1995. As the Government of Mexico continues to battle with the drug cartels that operate in the country, it has

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138 Id. at 989.
139 Guevara v. Republic of Peru (Guevara I), 468 F.3d 1289, 1301 (11th Cir. 2006).
140 Id.
143 See Program Overview, supra note 141.
offered rewards of $2 million dollars for information leading to the arrest of various high level drug lords.\textsuperscript{146} In February of 2011, the Government of Greece offered a €1 million reward for assistance in the capture of kidnapper and suspected terrorist Vassilis Paleokostas, who recently escaped the same maximum security prison via helicopter for the second time.\textsuperscript{147} While these lucrative reward offers are used to assist in the capture of the most notorious and dangerous fugitives, foreign governments also offer smaller rewards to solicit information on less notable criminals.\textsuperscript{148} The Royal Canadian Mounted Police offers smaller rewards for information about its most wanted fugitives, such as the $17,500 offered for assistance in the arrest of a triple murder suspect in British Columbia.\textsuperscript{149}

C. Current Joint Law Enforcement and Security Operations Between the United States and Foreign States

Increased global security concerns following the September 11th terrorist attacks have ushered in an era of formal partnerships between the United States and foreign governments.\textsuperscript{150} In order to provide greater border security between the United States and Canada, both governments have established Integrated Border Enforcement Teams (IBETs).\textsuperscript{151} These units, located at various border points of entry, are intended to combat national security threats and thwart organized crime through a partnership between various agencies such as the Royal Canadian Mounted Police and U.S. Bureau of Immigration and Customs Enforcement (ICE).\textsuperscript{152}

A similar program, the Mérida Initiative, exists between the United States and Mexico.\textsuperscript{153} Established by Congress in 2007, the Mérida Initiative has provided more than $1 billion to assist the Mexican govern-

\textsuperscript{146} Olson, supra note 144.
\textsuperscript{147} Greece Puts €1m Bounty on Bank Robber Accused of Terrorism, supra note 141.
\textsuperscript{149} Id.
\textsuperscript{151} Background Note: Canada, supra note 150.
ment in combating the drug violence plaguing the border areas. The stated purpose of the Mérida Initiative is to disrupt organized crime syndicates that operate between both countries, as well as strengthen the communities and institutions needed to improve security. In addition to funding the Partnership, the United States also currently offers multi-million dollar rewards for information leading to the arrest of top cartel leaders.

The United States also assists in security and anti-terrorist partnerships well beyond its North American borders. In order to combat the various security threats operating in the Philippines, such as the Al Qaeda-linked Abu Sayyaf Group (ASG), the United States has provided non-combat military support to the region. American advisors have also assisted in the training and development of the Philippine National Police. After the kidnapping of two American missionaries by ASG operatives, the U.S. Department of Justice offered rewards of up to $5 million for information leading to arrest or conviction of the members of the organization. The reward offers proved effective, and in 2007 the U.S. government paid $10 million to a group of Filipino citizens who provided information that resulted in the capture of two high-ranking ASG members. The successes of the U.S. Rewards for Justice program have inspired the Philippine Congress to propose a bill establishing a similar rewards program under the Philippine Department of Justice. Under this proposed legislation, the Secretary of Justice could offer rewards of up to 5 million pesos, roughly $115,000, for information leading to the capture or arrest of wanted terror suspects.

154 Id.
155 Id.
157 See Lum, supra note 150, at 16.
158 See id. at 16, 17.
163 Id.
III. Analysis

A. FSIA Immunity Should Not Allow the Contractual Obligations of Foreign States to Be Avoided

While the Eleventh Circuit dismissed Guevara on the grounds of FSIA immunity, according to the facts of the case the plaintiff still met all of the requirements for a binding unilateral contract under U.S. contract law. Unlike the federal agents in Cornejo-Ortega, the President of Peru was acting within the scope of his authority when he issued the decree establishing the reward. Guevara, having learned of the reward while in F.B.I. custody, provided this information as a direct result of Peru’s promise of compensation. Finally, as the district court acknowledged in its summary judgment, Guevara’s information directly resulted in Montesinos’ capture, thereby fulfilling the requested performance of the Emergency Decree. Because Guevara had met all of the requirements for formation of a binding unilateral contract, in the absence of FSIA immunity the reward offer would have been enforceable under American law.

The willingness of U.S. courts to liberally interpret reward offers and enforce obligations to pay such rewards illustrates the need for judicial protection of such agreements. The important policy considerations behind maintaining the integrity of a unilateral contract make it precisely the type of claim the commercial activity exception is supposed to make available against foreign states. The FSIA was intended to maintain the enforceability of contracts between private parties and foreign states by providing a remedy in U.S. courts in the event of a breach. Because of the personal risks assumed by an informant in

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164 See Guevara v. Republica Del Peru, No. 04-23223-CIV, 2008 WL 4194839, at *4 (S.D. Fla. Sept. 9, 2008), rev'd, 608 F.3d 1297 (11th Cir. 2010), cert. denied, 131 S. Ct. 651 (2010) (mem.) (finding that Guevara provided the information requested by the reward offer that resulted in Montesinos' capture).
165 Compare Cornejo-Ortega v. United States, 61 Fed. Cl. 371, 374 (Fed. Cl. 2004), with Guevara v. Republic of Peru (Guevara I), 468 F.3d 1289, 1293 (11th Cir. 2006).
166 Guevara v. Republic of Peru (Guevara II), 608 F.3d 1297, 1304 (11th Cir. 2010).
168 See id.
169 See Norman v. Loomis Fargo & Co., 123 F. Supp. 2d 985, 989 (W.D.N.C. 2000) (interpreting the terms of the reward offer to include an accessory after the fact as a "perpetrator"); Elkins v. Bd. of Commrs of Wyandotte Cnty., 120 P. 542, 544 (Kan. 1912) (allowing for substantial compliance of the terms of a reward offer to satisfy the requested performance).
170 See Guevara I, 468 F.3d at 1303 (stating that enforcing a reward offer coincides with "good policy").
171 See Frostestad, supra note 65, at 523.
providing information to law enforcement, the legally binding promise of compensation must be vigorously protected by courts, even against foreign states.\textsuperscript{172} When a foreign state enters the market as a private party, it must be made subject to the same obligations of private individuals after the formation of a contract.\textsuperscript{173} In \textit{Guevara}, the Emergency Decree was silent on jurisdiction and did not specify any forum for disputes arising from the offer.\textsuperscript{174} Because of its role as the offeror, Peru was free to include an arbitration or forum selection clause if it wished to be free from the possibility of adjudication or enforcement of the offer in the U.S. courts.\textsuperscript{175} Allowing a state to claim FSIA immunity, after it has failed to address jurisdictional concerns in its contract, goes beyond the defenses afforded to a private party and therefore runs counter to the purpose of the commercial activity exception.\textsuperscript{176}

B. Application of the FSIA Commercial Activity Exception to Reward Offers

While the Eleventh Circuit found that the first two nexuses of the commercial activity exception did not apply to the reward offer in \textit{Guevara}, that may not be true for every reward offered by a foreign state.\textsuperscript{177} The first nexus, which waives immunity when a foreign state partakes in a commercial activity in the United States, could potentially be satisfied in the context of a fugitive reward offer.\textsuperscript{178} In \textit{Guevara}, the Eleventh Circuit held that because the Special High Level Committee which oversaw the offer was based in Peru, and the $5 million of reward money lay in a Peruvian escrow account, no part of the commercial activity was carried on in the United States.\textsuperscript{179} Under this holding, if Peru had sent its own law enforcement agents to Miami to evaluate Guevara’s information or had arranged for payment of the reward through a U.S.

\begin{footnotesize}
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  \item \textsuperscript{172} See \textit{Guevara I}, 468 F.3d at 1304; \textit{Elkins}, 120 P. at 554 (“If, for instance, great danger is from the known facts to be anticipated in making the arrest, the reward should be construed as intended for those who should brave the danger and effect the arrest.”).
  \item \textsuperscript{173} See Frostestad, supra note 65, at 523.
  \item \textsuperscript{174} See \textit{Guevara II}, 648 F.3d at 1300–01 nn.3–4.
  \item \textsuperscript{175} See UNC Lear Services, Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 219 (5th Cir. 2009) (recognizing the use of forum selection clauses to overcome waiver of FSIA immunity); \textit{Kroeze v. Chloride Grp. Ltd.}, 572 F.2d 1099, 1105 (5th Cir. 1978) (“The offeror is the master of his offer. An offeror may prescribe as many conditions, terms or the like as he may wish . . . .”).
  \item \textsuperscript{176} See Morrissey, supra note 9, at 682 (“[The] theory [of the FSIA] is based on the premise that . . . when a foreign state acts like a private party . . . it should be accountable for its actions the way a private party would be . . . .”).
  \item \textsuperscript{177} See \textit{Guevara II}, 608 F.3d at 1307, 1308.
  \item \textsuperscript{178} See \textit{id.} at 1308.
  \item \textsuperscript{179} \textit{Id.}
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bank account, such commercial activity might be considered as having occurred in the United States, satisfying the first jurisdictional nexus.\textsuperscript{180} Also, while the court found that publishing the reward through an official Peruvian website maintained the sovereign nature of the offer outside the United States, active promotion of a reward in a U.S. based publication or media outlet may also meet the requirements for waiver of immunity under the first nexus.\textsuperscript{181}

While the offer in \textit{Guevara} failed to meet the requirements of the second nexus, which waives immunity in suits based upon an act in the United States “in connection with a commercial activity elsewhere,” under different circumstances a foreign state’s actions might meet this requirement.\textsuperscript{182} Reluctant to expand the scope of the second nexus, the Eleventh Circuit was unwilling to find that the single phone call by a Peruvian official to the FBI in Miami was sufficiently “in connection with” the commercial activity of the reward offer.\textsuperscript{183} In doing so, the court noted that to allow for such a discrete act to constitute waiver of sovereign immunity would violate the principle that immunity may only be waived either by explicit or implicit waiver.\textsuperscript{184} Although the court failed to articulate what types of acts would establish a proper waiver, it appears that greater communication between Peruvian and U.S. authorities, or greater direct contact with an informant in the United States, might be adequately “in connection with” the commercial activity.\textsuperscript{185}

In a situation like \textit{Guevara}, where most of the reward-related activity occurs within the offering country, the third nexus’s direct effect inquiry represents the most appropriate test for a FSIA determination.\textsuperscript{186} Just as the Peruvian government independently administered and managed the Montesinos reward offer within their borders, so do other countries seeking information on a wanted fugitive.\textsuperscript{187} For instance, the proposed “Rewards for Information Concerning Terrorism Program” in the Philippines would grant the Philippine Depart-

\textsuperscript{180} See \textit{id.}.
\textsuperscript{181} See \textit{id.}.
\textsuperscript{182} 28 U.S.C. § 1605(a) (2) (2006); see \textit{Guevara II}, 608 F.3d at 1308.
\textsuperscript{183} \textit{Guevara II}, 608 F.3d at 1308.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} See \textit{id.}.
\textsuperscript{186} See \textit{id.} at 1308, 1309.
\textsuperscript{187} Compare \textit{Guevara II}, 608 F.3d at 1300 (stating that Peru’s reward offer was administered by the subcommittee of Ministry of the Interior), with Phil. Pending Act Establishing a Rewards Program, \textit{supra} note 162 (proposing the establishment of a reward program under the supervision of the Philippine Department of Justice), and Vasovic, \textit{supra} note 144 (stating that Serbia’s reward offer for an accused war criminal is funded through specially allocated government funds).
ment of Justice the discretion to authorize and administer rewards in a fashion similar to Peru’s SHLC.\textsuperscript{188} Similarly, the Serbian government allocated the €10 million reward for accused war criminal Ratko Mladic in much the same way Peru placed its reward funds in escrow.\textsuperscript{189} Because the locus of the commercial activity, and any acts in connection with it, remain within the offering country in these instances, the direct effect nexus is the most applicable FSIA analysis for such reward offers.\textsuperscript{190}

When a reward offer is subject to the direct effect analysis, it should also be subject to the various tests the courts use when applying the third nexus to other forms of contracts.\textsuperscript{191} In \textit{Weltover}, the Supreme Court interpreted a direct effect as one that follows “as an immediate consequence of the defendant’s . . . activity.”\textsuperscript{192} The Court held that waiver of FSIA immunity occurred when the Argentinean government’s failure to pay out its bonds in New York City had a direct effect in the United States.\textsuperscript{193} While a reward offer is unlike the bond agreement at issue in \textit{Weltover}, it still becomes a binding contract once the informant provides the information and the requested performance is completed.\textsuperscript{194} Although a reward logically occurs as a direct result of the offer’s existence, an informant provides information to the authorities as an immediate consequence of the offer.\textsuperscript{195} Although the Eleventh Circuit failed to directly apply this test in \textit{Guevara}, because a person provides the requested information as an immediate consequence of the promised compensation, acceptance of a reward offer should meet the requirements of a direct effect under \textit{Weltover}.

Rather than solely applying the language of the \textit{Weltover} holding to \textit{Guevara}, the Eleventh Circuit instead relied on the Second Circuit’s

\textsuperscript{188} Phil. Pending Act Establishing a Rewards Program, supra note 162; see \textit{Guevara II}, 608 F.3d at 1300.
\textsuperscript{189} Vasovic, supra note 144; see \textit{Guevara II}, 608 F.3d at 1508.
\textsuperscript{190} See \textit{Guevara II}, 608 F.3d at 1308–09.
\textsuperscript{191} See id. at 1309 (applying the \textit{Harris Corp.} interpretation of \textit{Weltover} to the direct effect analysis); United World Trade, Inc. v. Mangyshlakneft Oil Prod. Assoc., 33 F.3d 1232, 1239 (10th Cir. 1994) (applying the legally significant act requirement to the direct effect analysis); Am. W. Airlines, Inc. v. GPA Grp., Ltd., 877 F.2d 793, 799 (9th Cir. 1989) (applying the “substantial and foreseeable” test to the direct effect analysis).
\textsuperscript{193} See id. at 620.
\textsuperscript{194} See Broadnax v. Ledbetter, 99 S.W. 1111, 1112 (Tex. 1907) (“The [reward] offer is made to anyone who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it.”).
\textsuperscript{195} See \textit{Weltover, Inc.}, 504 U.S. at 618.
\textsuperscript{196} See id.; \textit{Guevara II}, 608 F.3d at 1309 (applying the \textit{Harris Corp.} interpretation of the \textit{Weltover} test instead of the \textit{Weltover} test directly).
interpretation of the test.\textsuperscript{197} In \textit{Harris Co. v. National Iranian Radio \& Television}, the Second Circuit interpreted \textit{Weltover} as requiring that that a direct effect be “sufficiently” in the United States, as well as have “significant, foreseeable financial consequences [in the United States].”\textsuperscript{198}

In applying this interpretation to \textit{Guevara}, the Eleventh Circuit found the plaintiff’s only “acceptance-related activity” was a single phone call between U.S. and Peruvian authorities to which Guevara was not a party.\textsuperscript{199} This analysis of Guevara’s acceptance, however, does not consider the basic nature of a unilateral contract.\textsuperscript{200} The Eleventh Circuit failed to recognize that under the law of unilateral contract, when Guevara provided the information to the FBI and completed performance of the requested task, he accepted the offer.\textsuperscript{201} When the circuit court applied \textit{Harris}'s financial consequence requirement, it also failed to consider the use of FBI resources for the capture of Montesinos as a “significant, foreseeable financial consequence” of the reward offer.\textsuperscript{202} Because Peru’s reward offer resulted in the coordinated actions of several FBI agents over multiple days, the use of those agents likely represented a significant financial burden to the U.S. government.\textsuperscript{203}

Although the Supreme Court in \textit{Weltover} expressly renounced the addition of “unexpressed requirements” to the direct effect clause, some circuits apply additional tests, such as the legally significant act and the substantial and foreseeable tests.\textsuperscript{204} Although these tests are intended to clarify and narrow the scope of the commercial activity exception, the Eleventh Circuit failed to apply them in \textit{Guevara}, ignoring many of the other circuits’ means of FSIA analysis.\textsuperscript{205}

The Ninth Circuit reaffirmed its use of a “substantial and foreseeable” requirement in \textit{America West Airlines v. GPA Group}, where a U.S. based purchaser of aircraft sued the national airline of Ireland for

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\item Guevara II, 608 F.3d at 1309.
\item Harris Corp. v. Nat’l Iranian Radio \& Television, 691 F.2d 1344, 1351 (11th Cir. 1982).
\item Guevara II, 608 F.3d at 1309–10.
\item See Restatement (Second) of Contracts § 50, cmt. b (1981) (“Where the offer requires acceptance by performance and does not invite a return promise, as in the ordinary case of an offer of a reward, a contract can be created only by the offeree’s performance.”).
\item See Guevara II, 608 F.3d at 1309–10.
\item Harris Corp., 691 F.2d at 1344; see Guevara II, 608 F.3d at 1309.
\item See Guevara II, 608 F.3d at 1304 & n.17 (describing the use of FBI agents in Miami and Latin America to assist with the apprehension of Montesinos).
\item Weltover, Inc., 504 U.S. at 618; United World Trade, Inc., 33 F.3d at 1239 (employing the legally significant act test); Am. W. Airlines, Inc., 877 F.2d at 799 (employing the “substantial and foreseeable” test).
\item See Guevara I, 608 F.3d at 1309; Froestad, supra note 66, at 527, 528–29.
\end{enumerate}
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damages sustained from the faulty service of a jet engine. Because the repairs only occurred in Ireland at the direction of one of the contracting parties, the court found that U.S. contacts to the Irish government were “purely fortuitous” and were not substantial or foreseeable enough to create a direct effect. That decision relied heavily on the fact that the Irish entity servicing the engine was unaware that the aircraft would be used in the United States. In Guevara, however, the Peruvian government was in contact with the FBI during its pursuit of Montesinos and knew it was dealing with an informant in FBI custody in Miami. Any time a foreign state knowingly forms a contract for information with a party located in the United States, and also coordinates apprehension efforts with U.S. authorities, there can be no claim that the U.S. connection was purely fortuitous.

The application of the legally significant act test arose as a result of the apparent vagueness of Weltover’s immediate consequence test. The Supreme Court seemingly affirmed its use when it followed the Second Circuit’s decision in Weltover to “look to the place where legally significant acts giving rise to the claim occurred.” Because some circuits feared that a liberal interpretation of the direct effect requirement might turn U.S. courts into “international court[s] of claims”, the legally significant act test provides a much narrower standard for waiver of immunity. Under this standard, U.S. courts are able to enforce the contractual obligations of foreign states, while still requiring more than a tenuous connection to the United States to establish waiver of immunity.

Pursuant to its holding in United World Trade v. Mangyshlakneft Oil Production Ass’n., the Tenth Circuit still employs the legally significant act requirement in its direct effect analysis. In that case, the circuit court found that a breach of contract had no direct effect in the United States because “no part of the contract . . . was to be performed in the

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207 Id. at 800.
208 Id.
209 See Guevara II, 608 F.3d at 1304.
210 See Am. W. Airlines, Inc., 877 F.2d at 795.
211 See Frostestad, supra note 66, at 548.
212 See United World Trade, Inc., 33 F.3d at 1239 (quoting Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991)).
213 See Frostestad, supra note 66, at 547–48, 549.
214 See id.
215 United World Trade, Inc., 33 F.3d at 1239.
United States." In Guevara, however, the plaintiff established performance of the unilateral contract in the United States when he provided the requested information to the FBI in Miami. When acceptance of a reward offer in the United States creates a binding contract, it meets the requirements of the test because performance of a contract in the United States is a legally significant act. Despite the fears of some courts, application of the legally significant act test to reward claims would do little to expand the scope of the direct effect exception, because it would be limited to instances like Guevara, where performance in the United States has created a binding contract between an informant and a foreign state.

Some courts also employ a personal jurisdiction, minimum contacts analysis as an aid in determining the sufficiency of a direct effect. In Weltover, the Supreme Court found the Government of Argentina “purposefully avail[ed] itself of the privilege of conducting activities within the [United States].” When the court in Guevara performed a similar analysis, it found that a single telephone call was not sufficient to establish minimum contacts. What the Guevara court failed to recognize, however, was that the Government of Peru purposefully availed itself of assistance from the FBI in the United States and abroad when it solicited the information from Guevara. Although the record reflects that only one phone call occurred between Peruvian and U.S. agents in Miami, in that call Peru willingly accepted the assistance of federal law enforcement in obtaining and relaying the information regarding Montesinos’ whereabouts.

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216 Id. at 1237.
218 See United World Trade, Inc., 33 F.3d at 1237; Guevara, 2008 WL 4194839, at *4 (order granting partial summary judgment).
219 See Frostestad, supra note 66, at 549 (“The specific language of the ‘legally significant act’ analysis to determine direct effect also preserves notions of comity because it is narrowly tailored and foreign defendants should be responsible for commercial activity which directly affects the United States through legally significant acts.”).
220 Weltover, Inc., 504 U.S. at 619 & n.2 (employing a “minimum contacts” test as an aid in determining FSIA waiver); Guevara II, 608 F.3d at 1310 (holding that one phone call cannot create minimum contacts under the “direct effect” analysis).
221 See Weltover, Inc., 504 U.S. at 620 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).
222 Guevara II, 608 F.3d at 1310.
223 See id. at 1304.
224 See id.
Such purposeful availment of U.S. resources goes far beyond any “‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts” with the United States.

While courts have applied various tests and interpretations to the commercial activity exception of the FSIA, the core purpose of the provision remains the same: if a foreign sovereign participates in private commercial activity, it should not be granted foreign sovereign immunity. The purchase of information, whether it is the location of a dangerous fugitive or a consumer’s credit report, remains a commercial exchange that occurs among private parties on a daily basis. Just as the private company in Loomis Fargo Co. entered a contract with a private party for information regarding a robbery, so too did Peru engage with a private individual to locate the country’s most notorious fugitive. Although courts apply numerous interpretations and tests to the direct effect clause of the FSIA, all are intended to ensure that waiver of immunity occurs only when a foreign sovereign performs a commercial activity that affects the United States. Rather than simplify the already confusing doctrine, the final Guevara decision only further complicates the FSIA analysis by recognizing that Peru engaged in a commercial activity with a party in the United States, yet still failed to meet the requirements for waiver of immunity.

C. The Inapplicability of the International Comity Doctrine to Reward Offers

In his dissenting opinion in Guevara, Judge Cox recognized that the requirements of the commercial activity exception should have

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225 See supra text accompanying note 31 (noting Peru’s acknowledgement of the FBI’s role in Montesinos’ capture and quoting Peru’s Minister of the Interior as stating that the $5 million reward had not been paid “for the moment”).
226 See Burger King Corp. v. Rudzewics, 471 U.S. 462, 475 (1985).
227 See Morrissey, supra note 9, at 703.
228 See Guevara I, 468 F.3d at 1302.
229 See Guevara II, 608 F.3d at 1302; Norman, 123 F. Supp. 2d at 988–89 (W.D.N.C. 2000).
230 See Weltower, Inc., 504 U.S. at 618 (“Of course the generally applicable principle [is] that jurisdiction may not be predicated on purely trivial effects in the United States.”). In United World Trade, Inc., the court employed the legally significant act test and refused to interpret the FSIA in a way that would “give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state.” 33 F.3d at 1239. In America West Airlines, Inc., the court employed the “substantial and foreseeable” test and held that “[m]ere financial loss, incurred by a U.S. corporation does not . . . constitute a ‘direct effect’ . . . .” 877 F.2d at 799.
231 See Guevara II, 608 F.3d at 1312 (Cox, J. dissenting) (“Guevara I’s holding . . . is a holding that subject matter jurisdiction exists over this case pursuant to the FSIA.”).
waived FSIA immunity, but also suggested that the claim should be dismissed based on the “doctrine of international comity.”

In *Hilton v. Guyot*, the Supreme Court defined international comity as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”

Judge Cox stated that the Peruvian Government’s decision to withhold the reward from Guevara should be respected on the grounds of international comity and not be questioned through litigation in the United States. The use of the comity doctrine to abstain from hearing a case is based on the principle that a judgment issued by a foreign nation should be recognized in U.S. courts.

In *Guevara*, however, Peru’s decision to withhold the reward came only through the Department of the Interior’s SHLC, without any adjudication by a Peruvian court. The abstention doctrine generally is applied only when a judgment has been rendered by a competent foreign court employing principles of civilized jurisprudence. Invocation of the international comity doctrine is improper in cases such as *Guevara*, where a plaintiff seeks to enforce a contract with a foreign state and there has not been a parallel judicial proceeding in that state.

Courts also invoke the international comity doctrine out of concern that litigation would strain the “amicable working relationships” between the United States and a foreign sovereign. In the case of *Guevara*, concern over damaging relations with Peru is unwarranted given the amount of support the United States already provides in pursuing Peru’s most dangerous fugitives. The State Department currently offers rewards of up to $5 million, an amount identical to Peru’s offer for Montesinos, for information leading to the arrest of two

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232 *Id.* at 1313.
233 159 U.S. 113, 143 (1895).
234 See *Guevara II*, 608 F.3d at 1313 (Cox, J., dissenting).
235 See *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994).
237 See *Turner Entm’t Co.*, 25 F.3d at 1519.
238 *See id.*
members of the “Shining Path,” a Peruvian terrorist group. Because the United States remains a leading provider of large cash rewards for information regarding the world’s most dangerous criminals, enforcement of another state’s reward offer would not strain the strong working relationships already in place between the United States and its partners in global security.

D. The Harm Resulting from Failing to Enforce Foreign Reward Offers

At the most basic level, failure to find waiver of FSIA immunity in a reward offer would permit a foreign state to bargain for information but not pay for it, allowing for unjust enrichment. In Guevara, Peru entered the market like any private party and sought to purchase information on Montesinos’ whereabouts through a unilateral contract. Failure to enforce a foreign state’s obligation to pay such a reward allows that state to “shift to the [plaintiff] its ordinary marketplace obligations for the . . . services that plaintiff . . . furnish[ed].” Just as the Supreme Court found that the FSIA direct effect clause protected the contractual interests of Swiss and Panamanian bondholders, so too should individuals, who undertake tremendous personal risk and assist in the capture of dangerous fugitives, have their contractual interests protected. Failure to do so would simply allow a foreign government to contract for and receive a valuable service like any private party but leave it with no legal obligation to pay for it.

The United States adopted the restrictive theory of sovereign immunity in part because it was no longer claiming immunity in contract or tort claims in foreign courts, and it was therefore unfair to allow other foreign states to do so. This concept of reciprocity should also apply to the commercial activity of fugitive reward offers. Since its inception, the Rewards for Justice Program has paid over $100 million to sixty informants for information they provided to assist in the cap

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241 Guevara II, 608 F.3d at 1301 n.4; see Narcotics Rewards Program: Florindo Eleuterio Flores-Hala, supra note 240.
242 See Childress, supra note 239, at 14; Program Overview, supra note 141; United States-Mexico Security Partnership: Progress and Impact, supra note 153.
243 See Hond. Aircraft Registry, Ltd. v. Gov’t of Hond., 129 F.3d 543, 549 (11th Cir. 1997).
244 See Guevara I, 468 F.3d at 1301–02.
245 See Hond. Aircraft Registry, Ltd., 129 F.3d at 549.
246 See Welther, Inc., 504 U.S at 610, 619; Guevara I, 468 F.3d at 1304.
247 See Hond. Aircraft Registry, Ltd., 129 F.3d at 549.
248 Morrissey, supra note 9, at 682.
249 See id.
ture the world’s most wanted criminals. The intelligence procured by these substantial reward offers has resulted in the capture of actors posing serious threats to both U.S. and international security, such as Ramzi Yousef, mastermind of the 1993 World Trade Center bombing, and Edgar Navarro, the commander of the FARC rebels in Columbia. In most of these cases the informants were located outside the United States and the Department of Justice readily delivered on its promise to provide millions of dollars to foreign nationals for their service. To allow a foreign state to avoid payment of its obligations, while the United States honors its own, violates the FSIA’s underlying principles of reciprocity. While reward offers may be a unique form of contract, allowing a state to renege on a reward payment obligation “would jeopardize not only its vital interests but those of every country that offers rewards for information, including [the United States].”

In addition to the fundamental unfairness of allowing an offering state to violate contract law while the United States meets the same obligations abroad, failure to provide legal protection to informants could have adverse effects on U.S. law enforcement. Paid informants are a crucial tool used to infiltrate major criminal operations, and such reward offers provide the motivation for key witnesses to come forward. In a situation like Guevara’s, where a federal law enforcement agency deals directly with an informant, it is of paramount importance that the informant retain a level of trust in the government agency to ensure that further information will be provided.

The existing partnerships between the United States and Mexico, Canada, and the Philippines create an opportunity for informants to come forward to U.S. authorities with information on serious criminal activity, in a situation similar to that in Guevara. Because informants are quite often involved in illegal activity themselves, it seems quite

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252 See id.; U.S. Pays Big Terror Reward in Philippines, supra note 161.
253 See Morrissey, supra note 9, at 682.
254 Guevara I, 468 F.3d at 1304.
255 See id.
256 United States v. Ihnatenko 482 F.3d 1097, 1100 (9th Cir. 2007); Guevara I, 468 F.3d at 1304 (referencing the risks undertaken by informants in the case against Russian spy Robert Hanssen).
257 See Guevara I, 468 F.3d at 1304.
258 See Lum, supra note 150, at 16; Background Note: Canada, supra note 150; United States-Mexico Security Partnership: Progress and Impact, supra note 153.
likely that a suspect in U.S. custody could have valuable information regarding criminal activity abroad.\textsuperscript{259} Under the collaborative police efforts currently in place, U.S law enforcement is also likely to rely on foreign reward offers as a tool in soliciting information, just as the FBI did in \textit{Guevara}.\textsuperscript{260} If an informant in the United States was motivated to come forward to federal authorities because of a foreign state’s lucrative reward offer and the offering state refused payment, the credibility of federal law enforcement among informants would be severely compromised.\textsuperscript{261} Because “the promise of a reward means little or nothing to an informant if the country offering the reward cannot be made to pay it,” continued participation of informants in our collaborative law enforcement operations requires that such rewards must be made enforceable in U.S. courts.\textsuperscript{262} Given the vital role that informants play in the criminal justice system, especially those who provide information crucial to both U.S. and international security—the FSIA must be interpreted in a way that protects their interests.\textsuperscript{263}

\textbf{Conclusion}

The Eleventh Circuit’s recent decision in \textit{Guevara} both muddied the waters of FSIA jurisprudence and undermined a valuable tool employed by law enforcement all over the world. Congress intended the FSIA to provide U.S. jurisdiction when a foreign state breaches its obligations in a commercial contract. Reward offers are a recognized form of contract that simply equates to the purchase of information through the promise of compensation. When a foreign state offers rewards for information regarding a wanted fugitive, an informant in the United States creates a binding contract when he or she provides that information. The creation of such a contract, especially when it is formed through the assistance of U.S. authorities, undoubtedly has the requisite direct effect on the United States to waive sovereign immunity. It is imperative that these contracts, when performed in the United States, receive the protection of U.S. courts as the FSIA intended. As a partner in global security, the United States must be able to rely on reward offers from other countries when it solicits information regarding dangerous international fugitives. Because rewards are only as effective as

\textsuperscript{259} See Ihnatenko, 482 F.3d at 1100.
\textsuperscript{260} See \textit{Guevara I}, 468 F.3d at 1293; \textit{Mexico Offers $2 Million for Top Drug Lords}, supra note 141; \textit{United States-Mexico Security Partnership: Progress and Impact}, supra note 153.
\textsuperscript{261} See \textit{Guevara I}, 468 F.3d at 1304; \textit{Hond. Aircraft Registry, Ltd.}, 129 F.3d at 549.
\textsuperscript{262} See \textit{Guevara I}, 468 F.3d at 1304.
\textsuperscript{263} See \textit{id}.
they are enforceable, allowing a foreign state to avoid its contractual obligations weakens this important law enforcement tool.
DELAYED FIGHT: THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT MECHANISM, NEGOTIATION, AND THE TRANSATLANTIC CONFLICT OVER COMMERCIAL AIRCRAFT

Ron Kendler*

Abstract: For over thirty years, the United States and the European Union have waged a bitter and seemingly eternal political battle over the manufacture and trade of large commercial aircraft. In 2005, they brought this dispute to the World Trade Organization by litigating through its Dispute Settlement Mechanism. With the arrival of decisions from the WTO Dispute Settlement Body, this long-running conflict enters a new phase. This Note proposes that DSM litigation will result in a negotiated settlement between the two parties. Starting with the histories of both the DSM and the LCA industry, it delineates how the WTO has created a system that continually encourages states to settle through the DSM’s textual provisions and extrinsic effects. The Note analyzes why and how a negotiated settlement will come about, building upon the settlement-oriented nature of the DSM and the industry’s history.

Introduction

Halfway through its second decade, the World Trade Organization (WTO) is experiencing growing pains.1 Its current trade liberalization negotiations, the Doha Round, continue to stagnate2 as its goal of encouraging free trade has suffered in the wake of the global recession and protectionism by some states.3 Also, one of its key accomplishments, the quasi-judicial Dispute Settlement Mechanism (DSM), has come un-

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1 See Daniel Pruzin, WTO Members Give Up on Deliverables Pact, to Push for Work Program to Advance Doha, 28 INT’L TRADE REP. (BNA) 1228 (July 28, 2011).
2 Id.
der increasing criticism. Even those who praise its efficacy concede that the DSM needs reform and has fallen short of resolving large, complex, and contentious international trade disputes.

The transatlantic dispute over commercial aircraft is a prime example of such a complex and contentious case. Over the last three decades, firms in the United States and the European Union (EU) (and its predecessor, the European Economic Community (EEC)) have engaged in a high-stakes commercial competition to manufacture and sell commercial planes with over 100 seats, known as large commercial aircraft (LCA). This industry is especially lucrative: the combination of high-technology characteristics generating beneficial “spillover” effects and annual sales averaging over $100 billion lead governments to take an active interest in the success of their domestic aircraft firms. Additionally, the market dynamics of commercial aircraft production have created a duopoly: the world’s sole two producers of LCA are the United States’ Boeing and the EU’s Airbus.

This competition is fierce, and the two sides do not perceive it as fair. Both firms receive financial support from their governments—Boeing through indirect subsidization in the form of U.S. military contracts and tax incentives, and Airbus through direct EU subsidies. Such behavior has led to allegations by both sides that the other is gain-

5 See, e.g., id.
ing an unfair advantage, and each has attempted to alter the other’s policy. These attempts have at times resulted in interstate agreements, both bilateral and through the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT). Yet the dispute has also resulted in public condemnation and confrontation through litigation and trade restrictions.

In June 2005, the United States filed a DSM claim, alleging illegal EU subsidization of Airbus; the EU immediately launched a countersuit against the United States and Boeing. The case is the largest and one of the most complex ever submitted to the DSM, taking five years for the Dispute Settlement Body (DSB) panel to issue its decision in the U.S. case. An average DSM case takes approximately twelve months from filing to decision adoption.

Per WTO procedure, the decision in the U.S. case remained confidential until the final public report was issued in June 2010. The report contains the Panel’s ruling that some of the EU’s “launch aid” of loans and other financial support constitutes a violation of WTO agreements, as well as enforcement mechanisms to terminate such subsidization. A separate panel released its decision in the EU suit in March 2011, labeling various U.S. policies as illegal.

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14 See id. at 6.
15 Request for the Establishment of a Panel by the United States, European Communities—Measures Affecting Trade in Large Civil Aircraft, WT/DS316/2 (June 3, 2005) [hereinafter U.S. DSM Filing].
16 Request for the Establishment of a Panel by the European Communities, United States—Measures Affecting Trade in Large Civil Aircraft, WT/DS317/2 (June 3, 2005) [hereinafter EU DSM Filing].
17 See Meier-Kaienburg, supra note 6, at 242–43 (2006); see also Daniel Pruzin, WTO Signals Long Delay in Issuing Ruling on EU’s Appeal Against Airbus Decision, 27 Int’l Trade Rep. (BNA) 1482 (Sept. 30, 2010).
19 See John H. Jackson, The Role and Effectiveness of the WTO Dispute Settlement Mechanism, 1 Brookings Trade F. 179, 210 (2000).
With these decisions, this long-running dispute enters a new phase. Both parties have appealed both decisions, making it likely that the conflict will continue to play out for some time. Nevertheless, this Note argues that the United States and the EU will likely renew negotiations in an effort to resolve their differences rather than pursue DSB-mandated measures. Under the right circumstances, as found in the history of this case, the DSM pushes states to negotiate and settle their disputes, even in the midst of litigation. This settlement effect should be considered one of the DSM’s successes.

Part I of this Note reviews the histories of the DSM and the LCA industry, examining the nature and mechanisms of dispute settlement under the GATT and the WTO, as well as the economic and political aspects of LCA production. Part II discusses how the DSM, both through intrinsic structural provisions and extrinsic effects on state behavior, serves as a mechanism to bring states to the bargaining table. Part III puts forth this Note’s main argument—that the DSB generates settlement, and that it will do so in this case—through a comparison and analysis of two eras in the history of the dispute. In the mid-1980s, a similar process of public discord and utilization of GATT dispute settlement ultimately led to a negotiated outcome, found in the 1992 U.S.-EEC Bilateral Treaty on Civil Aircraft. This section thus highlights similarities and common trends between the pre-1992 era and the contemporary era to predict that the most recent cases will result in a negotiated settlement. The Note concludes by considering the DSM’s practical effects and the future of the LCA dispute in light of its main argument.

I. BACKGROUND

A. The Evolution of Dispute Settlement Under the GATT and WTO

As the Allies pushed through the final year of World War II, they sought to ensure that the economic and political failures that had cata-

23 See Daniel Pruzin, U.S. Says EU Case Against WTO Ruling on Illegal Subsidies to Airbus Falls Short, 27 Int’l Trade Rep. (BNA) 1806 (Nov. 25, 2010).
24 See id.
25 See discussion infra Part III.
26 See infra text accompanying notes 160–165, 256–274.
27 See, e.g., Alexandra R. Harrington, They Fought for Trade but Did Trade Win? An Analysis of the Trends Among Trade Disputes Brought by WTO Member States Before the WTO Dispute Resolution Body, 16 Mich. St. J. Int’l L. 315, 339, 341 (2007) ("[The DSM] acts as a deterrent in many cases... It also creat[es] a legal forum through which trade fights can be waged civilly and without major incursions into [state sovereignty].").
alyzed the Great Depression, and in turn, the War, would not reoccur.\textsuperscript{28} At a series of meetings in Bretton Woods, New Hampshire, delegates from forty-four countries created three institutions to accomplish this goal: the International Monetary Fund; the International Bank for Reconstruction and Development; and the General Agreement on Tariffs and Trade (GATT).\textsuperscript{29}

Although the parties built the first two to their final form, the GATT was a placeholder, to be succeeded by a more comprehensive International Trade Organization.\textsuperscript{30} Negotiations to create the International Trade Organization took place in Havana in 1948, but the U.S. Congress refused to ratify the resulting Havana Charter.\textsuperscript{31} As such, the GATT’s formative treaty, known as “GATT 1947,” became a \textit{de facto} international institution, smaller and less developed than its contemporaries.\textsuperscript{32}

Over the next five decades, the GATT developed through a series of negotiation “rounds” through which its contracting parties sought mutual reductions in trade barriers through international bargaining.\textsuperscript{33} The eighth such round, the Uruguay Round (1986–1994), replaced the GATT with the WTO and sought to strengthen the former’s mandate and institutional presence through additional, more extensive treaties and a larger bureaucratic apparatus.\textsuperscript{34}

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  \item \textsuperscript{28} See John W. Pehle, \textit{The Bretton Woods Institutions}, 55 \textit{Yale L.J.} 1127, 1128 (1946).
  \item \textsuperscript{30} See id. at 36, 55; Steven Nathaniel Zane, Note, \textit{Leveling the Playing Field: The International Legality of Carbon Tariffs in the EU}, 34 \textit{B.C. Int’l & Comp. L. Rev.} 199, 206 (2011).
  \item \textsuperscript{34} See Pauwelyn, supra note 33, at 24–25.
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From the outset, key GATT provisions addressed dispute settlement, but entailed weak enforcement and great deference to state autonomy. As a result, one of the Uruguay Round’s notable contributions reformed GATT dispute settlement through a new treaty, the Dispute Settlement Understanding (DSU). GATT and WTO dispute settlement has played a central role in the LCA dispute.

1. GATT Dispute Settlement, 1947–1995

GATT dispute settlement emphasized negotiation and amicable resolution of trade disputes, rather than rules or quasi-judicial institutions. This approach sought the withdrawal of measures considered illicit under the GATT without imposing too legalistic a framework that would offend sovereignty and thus reduce state participation.

Two Articles, XXII and XXIII, are the central elements of GATT 1947 that address the settlement of trade disputes, though they later led to additional clarifying policy statements and were eventually supplemented by the DSU. Article XXII requires parties to “accord sympathetic consideration to [one another] with respect to . . . all matters affecting the operation of this Agreement.” In the case that two or more contracting parties fail to find a “satisfactory adjustment,” they may consult in order to do so. In other words, if a GATT signatory believed that another signatory pursued trade practices that violated the treaty, the other signatory would have to consider the allegations in good faith, and the two could negotiate an opportunity to bring the policy into accordance with the GATT.

35 See id. at 10. In light of pre-GATT protectionism, states sought to monitor each other’s commitment to free trade and challenge digressions from this commitment. See id.

36 See id. at 13. Such deference relates to states’ desire to maintain control over their economies and the anarchic nature of international relations. See id. This concern led states and policymakers to see GATT as an institution where political flexibility and sovereignty trumped adherence to developing legal standards. See id.

37 Chow & Schoenbaum, supra note 31, at 52.

38 See infra text accompanying notes 102–159.


40 See Gardner, supra note 29, at 55–56.


42 GATT 1947, supra note 41, art. XXII.

43 Id. art. XXIII.

44 See id. This provision is a “broad general authorization for consultation among parties,” which thus encourages a possible mutually agreed-upon solution as the first step in
The second key provision, Article XXIII, highlights three potential interstate disagreements concerning trade policy: violation, whereby a GATT state fails to “carry out its obligations;” non-violation, whereby a GATT state can contest another’s policy, even if the policy does not violate treaty obligations; and “any other situation.”\(^45\) The disputing parties would refer the issue to the GATT Council, a general body open to all members which would meet once a month.\(^46\) The Council would appoint a panel, which would review the parties’ arguments.\(^47\) The panel would determine whether the measure in question “nullified or impaired” any “benefit” that a contracting party expected under the GATT, or if it impeded any other treaty objectives.\(^48\)

Once the panel reached a conclusion, it issued a report; if it found nullification or impairment, it could recommend (but not mandate) “in order of preference:” removal of the measure, compensation of the injured party, or retaliation.\(^49\) To take effect, the report must have been adopted unanimously by the GATT Council.\(^50\) This led member states to contend that the institution was unable to enforce panel decisions.\(^51\) Additional GATT treaties, such as the Subsidies Code and the Agreement on Trade in Civil Aircraft, contained similar mechanisms and references to Articles XXII and XXIII.\(^52\)

\(^{45}\) GATT 1947, supra note 41, art. XXIII.

\(^{46}\) See Petersmann, supra note 39, at 34–35. While the treaty itself defined basic guidelines and violations, it left the finer points of dispute settlement process and remedies open to interpretation and clarification, which later occurred through procedures, policy statements, and customary developments by and within the institution itself. See GATT 1947, supra note 41, arts. XXII–XXIII; Petersmann, supra note 39, at 35–36.

\(^{47}\) See Petersmann, supra note 39, at 34–35.

\(^{48}\) GATT 1947, supra note 41, art. XXIII.


\(^{50}\) Id. at 94 (“[f] the losing party prevents formation of a consensus, the report is not adopted and has no effect.”). Though GATT 1947 did not prescribe unanimous adoption, weak enforcement and customary development led to “consensus [as] the traditional method of resolving disputes.” General Agreement on Tariffs and Trade, Ministerial Declaration of 29 November 1982, L/5424, GATT B.I.S.D. (29th Supp.) at 16 (1983).

\(^{51}\) See Davey, supra note 49, at 85–88. Given unanimous adoption and panels’ limited recommendation abilities, a losing party could effectively block unfavorable findings. See id. at 85.

\(^{52}\) See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade art. 18, Apr. 12, 1979, GATT B.I.S.D (26th Supp.) at 77 [hereinafter Subsidies Code]; Agreement on Trade in Civil Aircraft art. 8.8, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 167–68 [hereinafter Civil Aircraft Agreement].
Member states thus criticized GATT dispute settlement as weak and ineffective. Even after developments in the 1970s and 1980s that commentators deemed the “legalization” of the process, dispute settlement was still hampered by noncompliance, politicization, and “forum-shopping” among the various GATT corollary agreements. Thus, when policymakers set out to transform the GATT into the WTO, they sought to further the growing sense of “legalization” in dispute settlement.

2. The WTO Dispute Settlement Mechanism, 1995–Present

Dispute settlement under the WTO is much more rigorous, time-sensitive, and rules oriented. In response to decades of criticism, GATT member states set out to address the system’s flaws through a new treaty exclusively committed to dispute settlement. Known as the DSU, this part of the Uruguay Round codified the DSM.

Under the DSU, dispute initiation is similar to GATT: Article 4 requires the contesting party to seek consultations with the offending party to discuss the measure in question. These consultations can last

54 Petersmann, supra note 39, at 48. States began to view panels as a “right” under the GATT, and panels themselves (increasingly comprised of legal professionals) began to utilize (1) previous decisions as non-binding precedent, and (2) customary methods of treaty interpretation, among other institutional developments initiated by the GATT Council. Id.
55 Id. at 53–54.
56 See Pauwelyn, supra note 33, at 18–20. As the GATT developed between 1947 and the Uruguay Round’s conclusion in 1994, member states gained comfort with conceding autonomy in order to promote trade liberalization. See id. at 18–24 (describing the GATT’s “quiet mutation” toward “harder law” and highlighting “a mounting belief in the rule of law amongst GATT parties . . . .”). The focus of GATT’s development thus shifted from avoiding the creation of legal standards to encouraging and adhering to them. See id. at 18.
57 See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Despite adherence to “the principles” of Articles XXII and XXIII, WTO members emphasize “prompt settlement . . . in accordance with [states’ DSU] rights and obligations,” implying that the DSM is more time sensitive and stricter than GATT dispute settlement. Id. arts. 3.1, 3.3, 3.4.
58 See id. art. 1.
59 Taunya McLarty, GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System?, 9 Fla. J. Int’l L. 241, 264 (1994). At the time, the DSU was seen as a landmark step; analysts noted that the DSM “reflect[s] a legal system more so than ever in the history of GATT.” Id. at 268.
60 DSU, supra note 57, art. 4.3.
up to sixty days, during which the complaining party can ask the WTO Council, acting as the DSB, to form a panel.\textsuperscript{61} 

Article 8 outlines the creation of panels, noting that they shall contain three panelists who are “well-qualified governmental and/or non-governmental individuals.”\textsuperscript{62} If there are multiple related complaints, Article 9 enables the formation of a single panel to address all of them.\textsuperscript{63} Per Article 12, the panel has six months (three if the matter is deemed urgent) from the date of composition to hear arguments and evaluate the case.\textsuperscript{64} If this is not possible, Article 12 sets a strict deadline of nine months.\textsuperscript{65} All panel proceedings are confidential.\textsuperscript{66} 

Following the above steps, the panel issues its findings to the contesting parties through an interim report and provides them an opportunity to review the report before it is fully circulated to the DSB;\textsuperscript{67} the panel sets the time period during which parties may raise concerns or objections.\textsuperscript{68} After interim review, the panel submits the report to the DSB, which adopts it after a maximum of sixty days unless it refuses, by consensus, to do so.\textsuperscript{69} 

Unlike GATT, the WTO DSM process need not end with the panel. Instead, Article 17 allows a party to appeal a panel decision; three members of the Appellate Body (AB), a rotating group comprised of seven individuals serving four-year terms, hear the appeal.\textsuperscript{70} The AB’s jurisdiction is limited to issues of law raised and concluded by the panel, and it cannot remand cases to panels.\textsuperscript{71} It has sixty, and never more than ninety, days to execute its proceedings, after which the DSB adopts its findings within thirty days of the decision.\textsuperscript{72} The entire process is designed to take nine to twelve months, depending on whether or not a party appeals the panel decision.\textsuperscript{73}

\begin{flushright}
\textsuperscript{61} Id. art. 4.7.
\textsuperscript{62} Id. arts. 8.1, 8.5.
\textsuperscript{63} Id. art. 9.1.
\textsuperscript{64} Id. art. 12.8.
\textsuperscript{65} Id. art. 12.9.
\textsuperscript{66} DSU, \textit{supra} note 57, art. 14.1.
\textsuperscript{67} Id. art. 15.2.
\textsuperscript{68} Id.
\textsuperscript{69} Id. art. 16.4.
\textsuperscript{70} Id. arts. 17.1, 17.2.
\textsuperscript{71} Id. art. 17.6; John Lockhart & Tania Voon, \textit{Reviewing Appellate Review in the WTO Dispute Settlement System}, \textit{6} \textit{Melb. J. Int’l L.} 474, 483 (2005).
\textsuperscript{72} DSU, \textit{supra} note 57, arts. 17.5, 17.14.
\textsuperscript{73} Id. art. 20. This provision responds to states’ criticism of the GATT’s delays in panel processes and decisions. See Davey, \textit{supra} note 49, at 83–85.
\end{flushright}
After the final report, the DSB meets, requiring the “losing” party to implement the panel or AB’s recommendations. The party can propose, and the DSB must approve, a “reasonable period of time” for implementation. If the party does not implement the recommendations, the parties must then negotiate compensation. If they fail to do so within twenty days, the DSB allows the “winning” party to enact retaliatory measures aimed at countering the policy in question, starting with the relevant sector and potentially expanding into others.

The development of the DSM was a direct reaction to states’ disappointment with and concerns over circumvention under the weak enforcement and lax standards of GATT dispute settlement. The DSM, in addition to addressing this disappointment, demonstrates the amount of sovereignty that states are willing to concede in the area of international trade to ensure cooperation. In order to comprehend current prospects for settlement, however, an understanding of the economic dynamics and political history of LCA is also necessary.

B. An Economic and Political History of the Transatlantic LCA Dispute

In order to understand why the DSM will generate a negotiated resolution in this case, it is important to comprehend the history of the LCA dispute. Specifically, an explanation of the economic and business foundations of aircraft production and the surrounding international political developments is crucial.

1. The Commercial Aircraft Industry: An Economic and Business Background

a. Economic Dynamics and Their Political Effects

According to economists, commercial aircraft manufacturing entails factors that make market entry and success uniquely difficult.  

74 DSU, supra note 57, art. 21.3.
75 Id.
76 Id. art. 22.1.
77 Id. arts. 22.2–3.
79 See Pauwelyn, supra note 33, at 3.
80 See Newhouse, supra note 7, at 67–68 (noting that long life cycles of aircraft and erratic demand by airlines forces producers to invest in both current and future products); Keith Hartley, Aerospace: The Political Economy of an Industry, in The Structure of European Industry 307, 316, 325 (H.W. de Jong ed., 1993) (explaining how high research and development (R&D) costs require firms to spend billions of dollars before they can manu-
Many conclude that, because of these factors, the market naturally consolidates over time—resulting in the Boeing-Airbus duopoly—and requiring subsidization in order to exist and flourish.

In the United States, subsidization occurs through the military-industrial complex. Private aerospace firms amass funds and technical knowledge through military contracts, which effectively subsidize their commercial programs. This generates further ties between the civilian government and these firms, which are already strong because policymakers believe that the industry is economically important.

In Europe, governments subsidize commercial aircraft manufacturing through more direct means. Since its founding in the mid-1960s, Airbus has received various forms of direct subsidies from multiple European governments, including France, Germany, the United Kingdom, and Spain. As with the United States, commentators note...
the overlap between European leaders’ policy goals and Airbus executives’ business aims. Beyond subsidization itself, the development of the industry provides additional insight into this dispute.

b. The Transatlantic Duopoly and Specter of Future Competitors

In the late 1940s, U.S. aircraft firms, buoyed by World War II, transitioned to commercial aerospace as a way to ensure future success, but continued to rely primarily on existing propeller technology. French and British competitors, possessing less market share and industrial capacity, sought to generate demand through a new, faster product: the jet airliner. Due to a combination of circumstances, they failed in this venture, enabling American firms to continue their domination of the industry. Boeing capitalized on these circumstances and its military connections to develop the 707 jetliner. Thereafter, from the mid-1950s through the late 1970s, Boeing led a small number of American firms that dominated the global market for commercial aircraft.
Across the Atlantic, industrial and political leaders continued their effort to challenge U.S. dominance by utilizing the trend of European integration to promote collaboration in aerospace. By the late 1960s, France, Great Britain, and West Germany had established the Airbus consortium, pooling national firms' resources and capabilities to produce the groundbreaking A300, followed by a series of other planes that would challenge U.S. products. At the dawn of the twenty-first century, Airbus eclipsed Boeing, its sole competitor, in market share. Though the two have since traded places, the market remains split between them, pitting the two companies in a tit-for-tat development and sales cycle. The duopoly’s days are likely numbered: firms in Brazil, Canada, China, and Russia are developing commercial aircraft due to enter service in the next decade, which will directly challenge Boeing and Airbus’s market share. Nevertheless, the duopoly’s rise and surrounding controversy over subsidies catalyzed international political and legal action over the last three decades, pitting the United States against the EU.


95 See McIntyre, supra note 86, at 9–11. Following World War II, European leaders merged production and planning in crucial sectors such as coal and steel so as to avoid war; this process set off further economic and political cooperation, eventually leading to the current EU system. See Jonathan A.C. Wise, Note, Variable Geometry and the European Central Bank: How the ECB Can Assert Itself Against Attacks from Member States with Derogations, 20 B.C. Int’l & Comp. L. Rev. 407, 407 (1997). Leaders cited aerospace as a sector that would benefit from such integration. See McIntyre, supra note 86, at 9–11.

96 Lawrence, supra note 91, at 318–19. The A300, for which ninety percent of costs were paid by subsidies, was the first widebody, twin-engined aircraft. See Gellman Report, supra note 88, at 2–5; Lawrence, supra note 1, at 162.

97 See Lawrence, supra note 91, at 319, 322–25. Airbus developed a “family” of aircraft that share design traits, which reduced costs and increased competitiveness. See id. at 323–24. They include the A310, a shortened A300; the A320, a short-/medium-range narrowbody that competes with the 737; the A330/340, a twin- and/or quad-engined aircraft that competes with the 767 and 777; the double-decker A380, which surpassed the 747 as the world’s largest passenger aircraft; and the A350, a reaction to the 787. Id.; Thornton, supra note 89, at 108; Francis & Pevzner, supra note 12, at 643, 651; see Newhouse, supra note 7, at 7–8.

98 Boeing Gets Back on Track, Economist, June 4, 2005, at 59–60. By this time, Airbus had become a largely private entity. See Newhouse, supra note 7, at 10–11.

99 See Francis & Pevzner, supra note 12, at 651 (noting how Airbus answered Boeing’s 787 with its A350, akin to the A330 but with a composite body and cleaner engines).

100 See Robert Wall, After the Battle, Aviation Week & Space Tech., July 4, 2011, at 49. Canadian Bombardier’s C-Series, one such aircraft meant to compete with the A320 and 737 (along with the Chinese COMAC C919 and Russian Irkut MS-21), has spurred Airbus and Boeing to offer updated versions of these venerable aircraft. See id.

101 See infra text accompanying notes 102–159.
2. Surrounding International Political and Legal Developments

a. A Developing Rivalry, the GATT Subsidies Code, and the 1979 Agreement on Trade in Civil Aircraft

The U.S. government first raised concerns over Europe’s subsidization of Airbus in the mid-1970s. The Europeans concurrently blocked trade in aircraft and alleged U.S. subsidization through military funding and other financial instruments. Following this discord, the United States raised the aircraft dispute at the 1978 G7 summit, where leaders committed to “maximum freedom of trade possible in commercial aircraft.” The leaders maintained that the GATT’s Tokyo Round was the best mechanism through which such freedom of trade could be accomplished.

Upon its conclusion in 1979, policymakers praised the Tokyo Round for being the first of its kind to address, inter alia, non-tariff barriers to trade as well as specific sectors and industries. It heralded two important treaties with regard to the aircraft dispute: (1) the Subsidies...

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104 Gilbert R. Winham, International Trade and the Tokyo Round Negotiation 238–39 (1986). In full, states agreed to “the objective of negotiating maximum freedom of world trade in commercial aircraft parts, and related equipment, including elimination of duties and to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects of other measures.” Statement by Several Delegations on Current Status of Tokyo Round Negotiations, 5, MTN/INF/33 (July 14, 1978) [hereinafter Tokyo Round Statement], available at http://sul-derivatives.stanford.edu/derivative/CSNID=91910050&mediaType=application/pdf (statement by the GATT on behalf of G7 Member States).

105 Cf. Tokyo Round Statement, supra note 104, at 1, 5 (highlighting the aim of the Tokyo Round to generate mutual reductions in trade barriers in numerous sectors, including aircraft).

By tackling subsidies, the former was the first international agreement to set a standard for what had long been an untouchable area of international trade law. Yet the shortcomings of the Subsidies Code soon became apparent. It conceded that subsidies “promote important objectives of social and economic policy” and asked signatories merely to “avoid causing” adverse effects on partner states. In terms of reprieve for states adversely affected by foreign subsidies, it allowed such states either to impose unilateral countervailing duties against the subsidized items (already permitted under the GATT 1947), or to retaliate by subsidizing industries that export to the offending market, which was strongly discouraged. It also lacked an operational definition of the term “subsidy,” which caused further misinterpretation and discord.

The Civil Aircraft Agreement, though lauded, also led to disappointment. Language on credit and financing merely asked that “firms be provided with access to business opportunities on a competitive basis.” Governments agreed to “avoid” sales inducements, not

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109 See Andrew L. Stoler, The Evolution of Subsidies Disciplines in GATT and the WTO, 44 J. World Trade 797, 802, 805 (2010) (“Although the improvements . . . appeared fairly robust, . . . [they] were clearly largely cosmetic . . . . The Tokyo Round Subsidies Code was a step forward in disciplining subsidies but its ineffective approach . . . meant that there was more to do [in] the Uruguay Round.”).

110 Subsidies Code, supra note 52, arts. 8.1, 8.3.

111 Id. art 4.3; see GATT 1947, supra note 41, art. II.2(b).

112 See Subsidies Code, supra note 52, art. 13.4 (enabling states to resort to countermeasures “in the event the [panel] recommendations are not followed”). Nevertheless, such discouragement did not stave off retaliatory action, which increased following the Tokyo Round. See Howard P. Marvel & Edward John Ray, Countervailing Duties, 105 Econ. J. 1576, 1582–84 (1995).

113 See Marvel & Ray, supra note 112, at 1578.

114 See Shane Spradlin, The Aircraft Subsidies Dispute in the GATT’s Uruguay Round, 60 J. Air L. & Com. 1191, 1200–01 (1995). The Civil Aircraft Agreement appeared comprehensive by “eliminating tariffs, prohibiting licensing requirements, and banning discriminatory procurement,” but left much undone through its unclear connection to the Subsidies Code. Id. In other words, “the subsidy practices that had given Airbus an advantage were not addressed substantively in the GATT Tokyo Round.” Meier-Kaienburg, supra note 6, at 198.

115 Civil Aircraft Agreement, supra note 52, art. 4.3.
prohibit them.\textsuperscript{116} The treaty further stated that “governmental support, of itself, would not be deemed a distortion of trade.”\textsuperscript{117} Many labeled such language as weak, due to domestic political limits and the time constraints under which the parties negotiated.\textsuperscript{118} Nevertheless, the treaty and its resultant political circumstances would dictate the conflict for the next decade; by bringing the aircraft dispute into the GATT’s international forum and providing structural mechanisms such as dispute settlement, the Civil Aircraft Agreement effectively broadened a bilateral diplomatic issue.\textsuperscript{119}

b. The 1992 Bilateral Agreement

The 1979 Civil Aircraft Agreement integrated the transatlantic dispute into the GATT through the establishment of a Civil Aircraft Committee\textsuperscript{120} and the application of GATT dispute settlement to commercial aircraft disagreements.\textsuperscript{121} The Committee’s records reveal how the United States and the EEC repeatedly and inconclusively aired their grievances.\textsuperscript{122} Yet policymakers stated their support for the Commit-
and industry and political leaders described it as a restraining force.\footnote{See, e.g., Competitiveness of U.S. Commercial Aircraft Industry: Hearing Before the Subcomm. on Commerce, Consumer Prot., & Competitiveness of the H. Comm. on Energy & Commerce, 100th Cong. 4 (1987) (statement by S. Bruce Smart, Undersec’y for Int’l Trade, Dep’t of Commerce) (“[The Civil Aircraft Agreement] is the only GATT agreement that is specific to one industry. We place great importance upon its success . . . .”).}

By the mid-1980s, the two parties addressed the dispute through the GATT as well as bilaterally.\footnote{See, e.g., id. at 60–62 (statement by James Worsham, Corporate Vice President, Aerospace Group Executive, McDonnell Douglas Corp.) (discussing the positive influences of the Civil Aircraft Agreement).} Following the breakdown of these efforts, the United States utilized the Civil Aircraft Agreement’s second key contribution, GATT dispute settlement.\footnote{Id.} Its complaint against the EEC concerned Germany’s debt forgiveness and an alleged exchange rate subsidy included in the privatization of its Airbus arm.\footnote{Id.} The panel ruled that the subsidy was illicit under the Subsidies Code, after which the United States filed a broader case against all Airbus subsidies.\footnote{See Cunningham & Lichtenbaum, supra note 107, at 1171.} The Europeans responded by renewing bilateral negotiations, the result of which was the 1992 U.S.-EEC Bilateral Agreement.\footnote{Id. at 1171–72; see also Agreement Concerning the Application of the GATT Agreement in Trade in Civil Aircraft, U.S.-EEC, July 17, 1992, KAV 3362 (1992) [hereinafter 1992 Bilateral Agreement].}

The 1992 Bilateral Agreement explicitly built on the provisions of the 1979 Agreement\footnote{1992 Bilateral Agreement, supra note 129, pmbl. at 3 (“[T]he GATT Agreement on Trade in Civil Aircraft should be strengthened with a view to progressively reducing the role of government support . . . in pursuit of [the parties’] common goal of preventing trade distortions resulting from direct or indirect government support for the development and production of large civil aircraft . . . .”).} by including more stringent limits on subsidies.\footnote{See id. arts. 3–5. Under the Bilateral Agreement, direct support could constitute no more than thirty-three percent of an aircraft’s development costs, id. art. 4.2, and indirect support could constitute no more than three percent of the state’s national industry turnover, id. art. 5.2(a).} Notably, it involved several “escape clauses,” such as the exclusion of equity infusions,\footnote{Id. art. 7.} “exceptional circumstances” under which the states could exempt themselves from its provisions;\footnote{Id. art. 9.} the ability to with-
hold information on the basis of national security concerns;\textsuperscript{134} and the opportunity to withdraw from the treaty completely.\textsuperscript{135} Like its predecessor, the 1992 Agreement was greeted with some skepticism, but also with hope that the dispute was momentarily resolved.\textsuperscript{136}

c. The Creation of the WTO and the 2005 DSM Filings

The aircraft dispute was not a focus issue during the Uruguay Round that led to the creation of the WTO.\textsuperscript{137} The conclusion of the Uruguay Round in 1994, however, resulted in two institutional developments that would play major roles in the revival of the dispute: (1) the DSU and its contribution of a more rigorous DSM;\textsuperscript{138} and (2) the Agreement on Subsidies and Countervailing Measures (ASCM).\textsuperscript{139}

A revised version of the GATT Subsidies Code, the ASCM defines a subsidy as “a financial contribution by a government or any public body” where “a benefit is . . . conferred.”\textsuperscript{140} The Agreement only applies to subsidies “specific to an enterprise or industry,” which are deemed either “prohibited” or “actionable.”\textsuperscript{141} The Agreement also determines when and to what extent states may enact countervailing measures to combat a subsidy’s adverse effects—if a member state finds that another member state subsidizes exports that injure its domestic industry, and there is a causal link between the two, then the WTO will allow countervailing measures.\textsuperscript{142}

Following Airbus’s launch of the A380 and its capture of a majority market share in the early 2000s,\textsuperscript{143} Boeing and the U.S. government intensified their criticism of the EU and Airbus, with the United States ultimately withdrawing from the 1992 Bilateral Agreement in October 2004.\textsuperscript{144} Mandatory consultations followed; upon their failure in May

\textsuperscript{134} Id. art. 8.12.
\textsuperscript{135} Id. art. 13.3; Thornton, supra note 89, at 147.
\textsuperscript{136} See Spradlin, supra note 114, at 1208–09 (“[The Bilateral Agreement] provided a solution . . . . [though] many problems still exist.”).
\textsuperscript{137} Cf. id. at 1216–18 (discussing why member states did not address LCA during the Uruguay Round).
\textsuperscript{138} See supra text accompanying notes 57–79.
\textsuperscript{139} See Stoler, supra note 109, at 805.
\textsuperscript{140} Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 410 [hereinafter ASCM].
\textsuperscript{141} Id. arts. 2, 3, 5.
\textsuperscript{142} Id. art. 19.
\textsuperscript{143} See supra text accompanying note 98.
\textsuperscript{144} Gary G. Yerkey & Joe Kirwin, U.S., EU Bicker over U.S. Decision to Pull Out of Bilateral Aircraft Agreement, 21 INT’L TRADE REP. (BNA) 1674 (Oct. 14, 2004); see America Flies to War;
2005, the United States requested the formation of a panel, with the EU launching its own complaint on the same day. The filings were immediately complicated by both parties’ requests for additional panels concerning concurrent developments, leading the DSB to create a panel for each complaint—DS316 for the U.S. complaint, the “Airbus case,” and DS353 for the EU complaint, the “Boeing case.” Commentators labeled the collective case the “toughest” in the WTO’s history.

The DS316 Panel report, made public in June 2010, entails mixed findings, holding that the United States both established and failed to establish certain claims from its filing. Both sides claimed victory fol-

_Airbus and Boeing, Economist, Oct. 7, 2004, at 61–62. The A380, explicitly aimed at superseding the Boeing 747 as the world’s largest passenger aircraft, was the first new Airbus product following the 1992 Bilateral Agreement. See Pavcnik, supra note 11, at 742–43. EU subsidies for the A380 complied with the 1992 Bilateral Agreement (the launch aid, to be repaid at an interest rate of one-quarter percent within seventeen years, did not exceed thirty-three percent of development costs). Id. at 743–44. But the United States contended that the EU violated the ASCM (because the subsidies were targeted and did not account for the aircraft’s commercial risk), which the United States further alleged takes precedence over the 1992 Treaty. Id.

U.S. DSM Filing, supra note 15, at 1. The filing challenged European (1) launch aid/multi-state funding (LA/MSF); (2) loans; (3) infrastructure development; (4) debt forgiveness; (5) equity infusions; (6) R&D funding; and (7) all other measures related to the development and sale of the entire Airbus family of aircraft. Id. at 1–4.

EU DSM Filing, supra note 16, at 1. This filing challenged (1) state and local tax incentives; (2) NASA R&D subsidies; (3) NASA informational spillovers; (4) DOD subsidies; (5) Department of Commerce informational spillovers; (6) NASA and DOD intellectual property right waivers; (7) Department of Labor informational spillovers; (8) NASA and DOD contracts; (9) Boeing’s use of NASA and DOD facilities; and (10) federal tax incentives. Id. at 2–10.


Daniel Pruzin, WTO Delays Release of Interim Decision on Boeing Subsidies Until Mid-September, 27 Int’l Trade Rep. (BNA) 1076 (July 15, 2010).

Meier-Kaienburg, supra note 6, at 242. As one WTO Official put it, the case entailed “time-consuming” discovery and litigation that was “unprecedented” in its intensity. Interview with anonymous WTO Secretariat Official, in Geneva, Switz. (Nov. 18, 2010).

See DS316 Panel Report, supra note 21, ¶¶ 8.1–8. For example, it ruled that all LA/MSF constituted subsidies under the ASCM, but that only A380 subsidies from Germany, Spain, and the UK (not France) were export-contingent, and thus prohibited. Id. ¶¶ 8.1(a) (ii), 8.3(a) (ii). The Panel made similar distinctions for other allegations, such as infrastructure and R&D subsidies. See id. ¶¶ 8.1–8. The AB later altered these findings. Appellate Body Report, European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft, ¶¶ 1414–1415, WT/DS316/AB/R (May 18, 2011) [hereinafter DS316 AB Report].
lowing the Panel’s split finding\(^{151}\) and filed subsequent appeals.\(^{152}\) The AB handed down its report in May 2011, in which it upheld several of the Panel’s findings, but reversed others on the basis of procedural disagreements.\(^{153}\) Following the report’s adoption by the DSB and a standard six-month implementation period, the EU claimed that it satisfied its requirements in December 2011.\(^{154}\) The United States contested the EU’s implementation claim, requesting further consultations and the ability to impose up to $10 billion in sanctions.\(^{155}\) Following EU protests over the amount and methodology of the requested sanctions, the WTO commenced arbitration between the two sides.\(^{156}\)

The DS353 Panel report, made public in March 2011, validated some EU complaints; it found U.S. subsidies to be illicit,\(^{157}\) and gener-

\(^{151}\) See Daniel Pruzin, Boeing Disputes Significance of EU Win at WTO in Challenge to Aircraft Subsidies, 27 Int’l Trade Rep. (BNA) 1436 (Sept. 23, 2010). The Panel concluded that Airbus received illegal subsidies including $15 billion in below-market-rate loans, $2.2 billion in equity infusions, $1.7 billion in infrastructure, and $1.5 billion in R&D subsidies. Id. U.S. Trade Representative Ron Kirk called the ruling an “important victory [that would] . . . level the competitive playing field.” Daniel Pruzin, WTO Panel Ruling Slams Illegal Subsidies for Europe’s Airbus in Case Brought by U.S., 27 Int’l Trade Rep. (BNA) 1029 (July 8, 2010). EU officials quickly contested the outcome as limited, noting that the United States had alleged $205 billion of subsidies, and that the actual outcome was “worlds away” from that figure; likewise, Airbus noted how “[seventy] percent of the U.S. claims were rejected and wild allegations have been proven wrong.” Id.

\(^{152}\) Notification of an Other Appeal by the United States Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 23(1) of the Working Procedures for Appellate Review, European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft, WT/DS316/13 (Aug. 20, 2010); Notification of an Appeal by the European Union Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 20(1) of the Working Procedures for Appellate Review, EC and Certain Member States—Measures Affecting Trade in Large Civil Aircraft, WT/DS316/12 (July 23, 2010).

\(^{153}\) DS316 AB Report, supra note 150, ¶¶ 1414–1415. The AB “overturned the panel’s finding that [A380] launch aid provided by Germany, Spain, and the United Kingdom . . . constituted prohibited subsidies . . . . [It] concluded that the interpretation of WTO rules used by the panel . . . was incorrect . . . [and] it did not have enough factual evidence on hand to issue its own findings.” Daniel Pruzin & Len Bracken, EU Scores Gains in Airbus Subsidies Ruling by World Trade Organization Appellate Body, 28 Int’l Trade Rep. (BNA) 819 (May 19, 2011).


\(^{155}\) Id.


\(^{157}\) DS353 Panel Report, supra note 22, ¶¶ 8.1–.6. The Panel highlighted that some state tax incentives and federal R&D support constituted illicit subsidies, and it “exercised
ated both declarations of victory\textsuperscript{158} and appeals by both sides.\textsuperscript{159} Yet beyond the DSM and LCA industry’s history, exploration of GATT/WTO dispute settlement’s negotiation-oriented provisions is necessary in order to understand the likelihood of a negotiated settlement to this dispute.

II. Discussion

GATT/WTO dispute settlement encourages states to negotiate solutions, rather than automatically to comply with panel or AB decisions.\textsuperscript{160} This encouragement results from several factors, which can be categorized into two classes: (1) textual and intrinsic negotiation effects, which result from explicit provisions found within GATT/WTO treaties;\textsuperscript{161} and (2) empirical and theoretical support for these effects, which result from state behavior under the GATT/WTO system.\textsuperscript{162}

The first class of factors includes the development of the GATT/WTO system as one that emphasizes state autonomy, mutual agreement, and amicability,\textsuperscript{163} as well as the parties’ definition of success and the aim of dispute resolution in the international trade law system.\textsuperscript{164} The judicial economy\textsuperscript{158} regarding the actual monetary value of the policies’ adverse effects. See id. ¶¶ 8.1–10.

\textsuperscript{158} See Daniel Pruzin, \textit{WTO Publishes Final Ruling in Complaint Against Boeing Subsidies; EU, U.S. Claim Win}, \textit{28 Int’l Trade Rep. (BNA)} 564 (Apr. 7, 2011). EU representatives contended that the DS353 Panel “clearly confirmed” its “main claims” by finding subsidies of “at least $5.3 billion” in value; U.S. officials, claiming that they had “prevailed,” pointed to the Panel’s request that the U.S. government “remove . . . only $2.7 billion” worth of subsidies, “a fraction of the $23.7 billion the [EU] had originally claimed.” Id.

\textsuperscript{159} Notification of an Other Appeal by the United States Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 23(1) of the Working Procedures for Appellate Review, \textit{United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)}, WT/DS353/10 (Apr. 29, 2011); Notification of an Appeal by the European Union Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 20(1) of the Working Procedures for Appellate Review, \textit{United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)}, WT/DS353/8 (Apr. 4, 2011).

\textsuperscript{160} See DSU, \textit{supra} note 57, art. 3.7; GATT 1947, \textit{supra} note 41, art. XXII.

\textsuperscript{161} See discussion \textit{infra} Part II.A.

\textsuperscript{162} See discussion \textit{infra} Part II.B.

\textsuperscript{163} See Marrakesh Agreement Establishing the World Trade Organization art. IX:1, Apr. 15, 1994, 1889 U.N.T.S. 154 (hereinafter Marrakesh Agreement). The WTO aims to “continue the . . . consensus followed under the GATT” but allows for decisions by majority vote where consensus is not possible. \textit{Id.}

\textsuperscript{164} See \textit{infra} text accompanying notes 180–183.
second class of factors lies within the results of the DSM’s track record.\(^{165}\)

### A. Textual and Intrinsic Negotiation Effects

Although the GATT’s dispute resolution provisions are relatively meager and few compared to the DSM,\(^{166}\) they illustrate its sovereignty-centered attitudes towards settlement.\(^{167}\) This emphasis on sovereignty, however, generated a lack of enforcement mechanisms,\(^{168}\) and negotiation became essential to harmonized trade.\(^{169}\) Articles XXII and XXIII thus placed a strong emphasis on “sympathetic consideration;” such willingness to negotiate ultimately underpinned the GATT.\(^{170}\) States valued a framework that allowed them to determine outcomes rather than cede this responsibility to an external body.\(^{171}\)

Corollary agreements further supported the GATT’s negotiation effects: during the 1979 Tokyo Round, the GATT Contracting Parties issued an “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” (Understanding), which clarified and partially codified the procedures that the GATT 1947 had left unclear.\(^{172}\) The Understanding notes that use of GATT dispute settlement is not a “contentious act[]” and requires parties’ “good faith . . . effort[s] to resolve the disputes.”\(^{173}\) Other Tokyo Round treaties echo Article XXII and XXIII’s emphasis on negotiation.\(^{174}\) In short, relevant provi-

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\(^{165}\) See Harrington, supra note 27, at 323 (discussing DSM empirical patterns that demonstrate a high settlement rate).

\(^{166}\) Compare GATT 1947, supra note 41, arts. XXII–XXIII (outlining dispute settlement procedures in two out of thirty-four articles), with DSU, supra note 57, arts. 1–27 (devoting an entire separate treaty to dispute settlement).


\(^{168}\) See Davey, supra note 49, at 81, 85–88. Such a lack of enforcement ability was a primary motivating factor in creating a new DSM. See McLarty, supra note 59, at 265–66.


\(^{170}\) GATT 1947, supra note 41, arts. XXII, XXIII; see Petersmann, supra note 39, at 33.


\(^{173}\) Tokyo Round Understanding, supra note 172, at 211–12.

\(^{174}\) See Civil Aircraft Agreement, supra note 52, arts. 8.5, 8.6 (“Each signatory shall afford sympathetic consideration to and adequate opportunity for prompt consultation . . . to seek a mutually acceptable solution prior to the initiation of an investigation . . . .”).
sions in the GATT, policy statements by the institution, and subsequent treaties clarify that consultation and negotiation are both precursors to litigation as well as a preferred form of resolution. Even after legalization under the DSU, this spirit of negotiation as a first order preference persists. This persistence leads some to conclude that disputes are merely events that occur between rounds of interstate negotiation, and that the DSM is intentionally built to create multiple negotiation opportunities at every procedural level. The DSU itself highlights such potential opportunities: Article 4, for example, codifies and reinforces Article XXII and XXIII’s emphasis on consultation, implying that settlement is preferable before further litigation. Article 3.7 cautions states to exercise judgment with respect to disputes that would be unlikely to succeed, thus warning them of the gravity of enacting a DSM complaint and stating that it is in their best interest to resolve disputes bilaterally. The DSU does not explicitly define success, but the system’s efficacy hinges on such a definition, both in the aircraft dispute and in other cases. Some suggest that the DSM is only successful when it re-

Subsidies Code, supra note 52, art. 18.6, 18.8 (mandating panels to issue the descriptive parts of their reports first in order “[t]o encourage development of mutually satisfactory solutions”; if the parties fail to develop such a solution, only then can the panel submit its full written report).  
175 See Tokyo Round Understanding, supra note 172, at 211; Civil Aircraft Agreement, supra note 52, arts. 8.5, 8.6; Subsidies Code, supra note 52, arts. 18.6, 18.8; GATT 1947, supra note 41, arts. XXII–XXIII.  
177 Id. By mandating initial negotiation, the DSU provides time lapses during which parties can both negotiate and develop alternative methods of dispute resolution.  
178 Compare DSU, supra note 57, art. 4.1 (“Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.”), with GATT 1947, supra note 41, arts. XXII–XXIII (“Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation . . . . If no satisfactory adjustment is effected between the contracting parties . . . the matter may be referred to [a panel].”).  
179 See DSU, supra note 57, art. 3.7. The Article warns states to “exercise . . . judgment as to whether action under these procedures would be fruitful. The aim of the [DSM] is to secure a positive solution to a dispute. A solution mutually acceptable to the parties . . . and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the [DSM] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with . . . the covered agreements.” Id. (emphasis added).  
180 Cf. id. (implying that, in its preference for “a solution mutually acceptable to the parties” over mandated withdrawal, the DSU does not foresee a single result to any given
results in compliance with international law at all costs.181 Others argue that, given the nature of international relations, this is too ambitious.182 They contend that as long as the DSM can effectively push disputing states to resolve their issues, it has succeeded.183 Consultation and negotiation is a direct way to accomplish this goal;184 only when it fails, and a mutually agreed-upon solution has proven elusive, can the WTO use its enforcement power to bring states into conformity with its laws.185 The DSU also promotes further consultation, creating negotiation opportunities after the panel process has started.186

The textual provisions of the DSU that can promote settlement are not limited to those concerning the disputing parties: Article 10 promotes settlement by allowing countries with “a substantial interest in a matter before [the DSB]” to make oral and written submissions during panel proceedings.187 GATT Article XXIII also permits disputing parties to invite other countries into the consultation process.188 These provisions enable the disputing parties to broaden their disagreement beyond their immediate issues, creating incentive to find a solution that will be agreeable to all parties, not just disputing ones.189

dispute, and states, thus playing an active role in determining such outcomes, can lay out their goals for success). Such flexibility has enabled parties to create heterogeneous resolutions to large and complex disputes, utilizing panel and/or AB reports alongside their own negotiated terms. See infra, text accompanying notes 231–245.


182 See, e.g., Pauwelyn, supra note 33, at 29–30 (discussing the WTO’s institutional development and legalization, and implying that member states still operate in the international system, where they value their sovereignty and structure their behavior around it).

183 Interview with anonymous WTO Secretariat Official, in Geneva, Switz. (Nov. 19, 2010).

184 Cf. Harrington, supra note 27, at 325 (arguing that the strength of the DSM lies in its deterrent effect, which leads states to negotiate). Given the language of Article 3.7 and the overall history of GATT/WTO dispute settlement, the organization has indicated that the DSM’s success depends on mutually agreed-upon solutions. See DSU, supra note 57, art. 3.7. Thus, while the WTO seeks to enforce its regulations and remove illegal national policies, this goal is secondary to ensuring states’ satisfaction with the resolution of trade disputes. See id.

185 See DSU, supra note 57, arts. 21, 22.

186 Id. arts. 5.5, 5.6 (noting that parties can renew or continue negotiation at any point during the panel process, and that the DSU itself is meant to promote equivalent consultation provisions in other WTO agreements).

187 Id. art 10.2.

188 GATT 1947, supra note 41, art. XXIII.

Finally, consultation is not the DSU’s only form of alternative dispute resolution: Article 5 allows for conciliation and mediation,190 and Article 25 enables the parties to elect arbitration.191 With binding panel and AB decisions, however, stakes under the DSM are higher than under the GATT, providing incentives for states to settle their disputes.192

B. Theoretical and Empirical Support for Negotiation Effects

Along with the text of the GATT and the DSU, empirical and theoretical factors also push states towards negotiation. These factors include: (1) states’ level of development and experience with the DSM;193 (2) the role of informational availability;194 and (3) the binding nature of compliance measures.195

1. States’ Level of Development and Experience with the DSM

A positive correlation exists between the frequency with which states file DSM cases, their level of economic development, and the prospects for settlement.196 The higher a state’s level of economic development, the more resources it has to litigate within and gain experience under the DSM.197 This experience enables such a state to identify settlement junctures and opportunities, thus making it more likely to settle.198

During the first ten years of the WTO’s history, 45 percent of cases went on to litigation, while the remaining 55 percent were settled or resolved outside the DSM.199 During this same period, the United States and the EU were the two most frequent participants in the DSM system.200 Political and economic characteristics may explain this behavior—because developed states have the resources to file numerous

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190 DSU, supra note 57, art. 5.
191 Id. art. 25. The introduction of new and alternative forms of non-litigious dispute resolution, despite the formalization of litigation under the WTO, demonstrates that the WTO’s emphasis on amicable resolution is equal to, if not greater than, the GATT’s. See Pauwelyn, supra note 177, at 137–40.
192 See Horlick, supra note 171, at 687.
193 See infra text accompanying notes 196–206.
194 See infra text accompanying notes 207–221.
195 See infra text accompanying notes 222–252.
197 See id. at 639–40.
198 See id. at 648–52.
199 See id. at 637.
200 Id. at 631.
claims, they resort to the DSM most frequently, leading to greater experience with the process, which they can draw upon when dealing with less-experienced adversaries.\(^{201}\)

The nature of precedent within the WTO reinforces the importance of repeat interaction.\(^{202}\) Despite a lack of binding precedent, WTO legal institutions frequently rely upon previous decisions, leading many to conclude that the WTO utilizes a form of “de facto stare decisis.”\(^ {203}\) This jurisprudence enables experienced DSM actors to emphasize rules compliance, the effect of their disputes on macro-legal developments at the WTO, and greater concern for the effects of litigation on their reputations.\(^{204}\) Experienced actors’ filings are thus more strategic and focused on long-term gains, which are more likely to arise out of negotiation and settlement.\(^ {205}\) Less-developed and less-experienced DSM litigants are not as strategic, concentrating more on litigation and tangible returns.\(^ {206}\)

2. Informational Availability

Institutionalist political scientists argue that international organizations like the WTO make conflict less likely by increasing the availability of information.\(^ {207}\) States must frequently make policy decisions under

\(^{201}\) Id. at 629.


\(^{203}\) Steinberg, supra note 202, at 254.

\(^{204}\) See Conti, supra note 196, at 655–57. This focus on reputation results from the ability to participate in, and in turn build experience with, the DSM. See id. at 655–56.

\(^{205}\) See id. at 629. Because negotiation and consultation enable states to dictate their own terms, experienced states can better ensure long-term resolutions in their interest. See id. at 656–58 (“Repeat players are able to anticipate the implications of a ruling and act to secure changes to case law that they favor.”).

\(^{206}\) Id. at 629. The author of this Note does not mean to suggest that developed countries are superior to developing ones. Nevertheless, some commentators note that developing countries feel marginalized within the GATT/WTO system. See, e.g., Hansel T. Pham, Developing Countries and the WTO: The Need for More Mediation in the DSU, 9 Harv. Negot. L. Rev. 331, 335 (2004). The WTO has addressed this concern through measures such as the Advisory Centre (a legal aid bureau for developing states) and lenient DSU provisions for developing states. See id. at 348. Yet repeat litigants, largely consisting of developed states, are more likely to settle. See Conti, supra note 196, at 629.

imperfect conditions, generating less optimal outcomes. By improving information sharing, institutions lead states to make decisions that are more attuned to one another’s concerns and, thus, to cooperate. The DSM consultation requirement enables it to encourage states to reveal information. Yet because information asymmetries are most likely to exist before discovery and the panel process, and each side is optimistic that it can win, early settlement is usually unlikely.

Because the WTO gives panels a broad mandate to serve as triers of fact and interpret legal rules, the odds of information sharing increase substantially once parties initiate the panel process. Junctures before, during, and after panel proceedings provide opportunities to make information available and for parties to suspend proceedings in order to renew negotiations.

States utilize these junctures: during the WTO’s first five years, fifty-two percent of cases resulted in the establishment of a panel, but only thirty-five percent resulted in a panel ruling. Thus, in almost twenty percent of cases, a panel was established but the parties settled the dispute themselves. Moreover, this figure does not include cases where parties settled after a panel ruling. Even the AB, the last source of rule interpretation before states must implement findings, has been called an effective “starting point” for further talks or arbitration.

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208 See id. at 744–45 (utilizing the Prisoners’ Dilemma model to exemplify this challenge and illustrate international relations’ anarchic nature).
209 See id. at 742.
210 Horlick, supra note 171, at 692. Textual provisions in the DSU, such as sympathetic consideration and confidentiality, encourage disclosure and thus increase informational availability. See DSU, supra note 57, arts. 4.2, 4.6.
211 Porges, supra note 176, at 174. Similar conditions exist in domestic litigation; however, because WTO laws and obligations are continuously developing, such information may not be as easily available at the outset of a DSM dispute. See id. at 147.
212 DSU, supra note 57, art. 11; Gavin Goh & David Morgan, Political Considerations and Pragmatic Outcomes in WTO Dispute Rulings, 30 U. New S. Wales L.J. 477, 496 (2007).
213 Cf. Porges, supra note 176, at 147 (noting that panels adjudicate between two negotiations—a failed and a successful one, respectively—thus increasing the likelihood for shared information and settlement upon initiation of panel proceedings).
214 See Pauwelyn, supra note 177, at 133–37 (providing an outline of settlement opportunities before, during, and after panel proceedings). For example, the interim review period is ideal for settlement, as the panel has reached all of its factual and legal conclusions; this generates maximum information that is balanced by the protection of confidentiality. See id. at 155–36.
215 Porges, supra note 176, at 142.
216 See id.
217 See id.
218 Harrington, supra note 27, at 339. Because the AB may reinterpret WTO rules, it can provide an opportunity for parties to negotiate along re-characterized legal norms that
Of the 427 cases filed to date, 138 remain in consultation; in 88, states either settled or withdrew at some point during the dispute process. Thus, over fifty percent of cases have either yet to produce a decision or have been settled. Commentators suggest that such a rate is largely due to the increase of information following the initiation of panel proceedings.

3. States’ Reactions to the Binding Nature of DSM Ramifications

Because states must implement DSB recommendations, negotiation offers an opportunity for states to settle on their own terms and avoid expensive and protracted litigation. This binding nature sets the DSM apart from GATT dispute settlement.

When consultations fail and the DSB issues a report, the DSM’s central focus becomes compliance with WTO law. Compliance primarily occurs through the offending state’s mandated withdrawal or alteration of the violative policy. If the state fails to do so, the WTO can authorize the complaining state’s use of retaliatory measures. The DSB has rarely authorized retaliation, which causes economic harm, discord in the global trading system, and damage to states’ reputations.

may differ from the panel’s decision, generating a new negotiation environment. See Conti, supra note 196, at 656–57.


See id.

See Alilovic, supra note 169, at 298–99 (“[T]he automatic adoption of a potentially harsh report which must be complied with in a set period of time is a powerful incentive to resolve a dispute in a more conciliatory manner.”).

Compare DSU, supra note 57, art. 22.2 (“[T]he DSB [may] suspend the application to the Member concerned of concessions or other obligations of the covered agreements.”), and Horlick, supra note 171, at 687 (“The key factor in WTO consultations is the binding nature of the [DSM],”), with sources cited supra notes 53–55 (highlighting non-compliance as a problem with GATT dispute settlement).

DSU, supra note 57, art. 12.7 (“Where the parties . . . have failed to develop a mutually satisfactory solution . . . the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.”) (emphasis added); Patricio Grané, Remedies Under WTO Law, 4 J. Int’l Econ. L. 755, 756–62 (2001).

See DSU, supra note 57, art. 22.2.

Id. arts. 22.2–3; Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism, 6 Theoretical Inquiries L. 215, 228 (2005).
Consultation enables states to avoid these problems altogether. Yet even if initial negotiations fail, the DSU’s “reasonable period of time” for implementation enables “losers” to find common ground with “winners” and create an outcome in which compliance occurs in a mutually agreeable fashion, providing autonomy in the implementation of DSB recommendations.

Such autonomy may weaken the DSM. Yet because the DSM’s primary function is to lead states to mutually agreeable outcomes, this autonomy strengthens the DSM’s ability to accomplish its main goal. The dispute in European Communities—Regime for the Importation, Sale, and Distribution of Bananas exemplifies this debate. Bananas centered on the EU’s more favorable treatment of its former colonies in the global banana trade and entailed multiple panels and appeals. Although the DSB issued guidelines, the parties never implemented its rulings. Many cited Bananas as evidence that some cases, due to their complexity and political contentiousness, can neutralize the DSM’s binding nature. Yet the disputing parties ultimately used the AB’s findings as a basis for their own agreement, which combined various DSB recommendations. Thus, despite not strictly following the AB report, the parties still complied with it by structuring a negotiated outcome and eventual resolution per its recommendations.

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228 See Alilovic, supra note 169, at 298–99.

229 See DSU, supra note 57, art. 21.3(b). The ability to negotiate thus persists after the decision, though parties are constrained by the panel ruling. See Pauwelyn, supra note 177, at 136.


231 See Jackson, supra note 19, at 204.

232 See Len Bracken, U.S., EU Agree to Settle Dispute over Latin American Bananas, USTR Says, 27 INT’L TRADE REP. (BNA) 856 (June 10, 2010).

233 See id. at 230, at 143–44.

234 See Porges, supra note 176, at 146.

235 See, e.g., Lee, supra note 230, at 145 (“The Banana Wars have haunted the WTO for most of its history.”); see also Douglas Ierley, Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Bananas Dispute over Bananas, 33 LAW & POL’Y INT’L BUS. 615, 626 (2002) (noting that Bananas changed the “ambiance” in the DSM, reflecting a “loss of confidence” and “put[ting] the DSU in doubt”).

236 See Porges, supra note 176, at 146.

237 See id. (“The outputs in WTO disputes almost always permit more than one possible compliance outcome[.] . . . [In Bananas,] the panel recognized there were multiple compliance paths possible and picked one as a reasonable benchmark for comparison . . . .
Frequently, critics of the DSM’s ability to bind states also cite a series of cases filed by Brazil and Canada regarding export credit financing of small regional aircraft (collectively “Brazil/Canada–Aircraft”). Rather than retaliating, however, the two addressed many of their outstanding issues through a 2007 Organization of Economic Cooperation and Development (OECD) agreement.

Those who contend that the DSM’s strength comes from its ability to bind states to outcomes did not find much comfort in Brazil/Canada–Aircraft. Yet these are but two of the hundreds of DSM cases that have generated compliance. Moreover, in Brazil/Canada–Aircraft, retaliation would have sparked a trade war. This became clear when Brazil and Canada faced the choice of either complying with the DSB’s ruling or an extrinsic negotiated resolution. Were the DSB’s measures not binding, the parties may not have had an incentive to negotiate an outcome instead.

The above cases demonstrate that the binding force of DSB decisions works even when it may seem otherwise: it can (1) push states into negotiation and in turn, resolution; (2) provide a foundation, as in Bananas, upon which states create and enact their own compliance measures; or (3) as in Brazil/Canada–Aircraft, cause states to recogn...
nize the perils of retaliation in order to produce a more effective outcome.\textsuperscript{248} Finally, the WTO’s ability to bind states relates to a broader issue: the political sensitivity of panels and the AB, and the latter’s judicial restraint.\textsuperscript{249} This reflects the notion that, as an influential international organization, the WTO—and by extension, the DSB—does not operate in a vacuum.\textsuperscript{250} Rather, panelists and AB members are acutely aware of the broader ramifications of their decisions, structuring their legal reasoning and jurisprudence so as to not agitate international economic relations.\textsuperscript{251}

In other words, the system, while legalized, accounts for the nature of international diplomacy, continuing developments, and the importance of avoiding unrealistic expectations.\textsuperscript{252} In light of the LCA dispute’s history and the above structural mechanisms, the likelihood of a negotiated settlement becomes apparent.

III. Analysis

Under the right circumstances, GATT/WTO dispute settlement leads parties to settle their disputes rather than seek a mandated solution through litigation.\textsuperscript{253} Such effects are evident in the transatlantic aircraft dispute in the era leading up to the 1992 Bilateral Agreement,\textsuperscript{254} as well as in the contemporary litigation.\textsuperscript{255}

A. The Era Leading up to the 1992 Bilateral Agreement

The GATT/WTO system’s ability to generate a negotiated settlement to the transatlantic aircraft conflict is evident in the dispute’s recent history.\textsuperscript{256} In the years prior to the 1992 Bilateral Agreement, the United States and the EEC went through two stages before resorting to

\textsuperscript{248} See supra text accompanying notes 240–245.
\textsuperscript{249} See Goh & Morgan, supra note 212, at 482–84; Steinberg, supra note 202, at 263–67.
\textsuperscript{250} See Steinberg, supra note 202, at 263–67. Some point to the DSM’s political awareness as the reason for its success and the WTO’s influence. See id. The DSM possesses and utilizes “the most effective dispute resolution procedures” in the international legal system. Andrew T. Guzman, Global Governance and the WTO, 45 Harv. Int’l L.J. 303, 321 (2004).

\textsuperscript{251} See Steinberg, supra note 202, at 257.

\textsuperscript{252} See Goh & Morgan, supra note 212, at 480–82 (discussing how the WTO deals with extant circumstances by involving civil society, selecting language carefully, avoiding contentious findings, and coordinating timing with other international political events).

\textsuperscript{253} See discussion supra Part II.

\textsuperscript{254} See discussion infra Part III.A.

\textsuperscript{255} See discussion infra Part III.B.

\textsuperscript{256} See discussion infra Part III.B.
GATT dispute settlement: (1) talks in the GATT Civil Aircraft Committee, and (2) bilateral negotiation.\textsuperscript{257} The former failed due to weak treaty provisions and enforcement,\textsuperscript{258} and the latter broke down due to the parties’ inability to agree on common terms, definitions, and guidelines.\textsuperscript{259}

The U.S. strategy of investigating Airbus subsidies\textsuperscript{260} and requesting Article XXII consultations regarding EEC Subsidies Code violations enabled the United States to legitimize its viewpoint that the Europeans were not serious about resolving the aircraft dispute.\textsuperscript{261} By contesting only the merger/debt forgiveness issue, the United States attained an efficient GATT ruling that provided a legal definition of the debt program as an illicit subsidy.\textsuperscript{262} This gave the United States some needed international support to force the EEC to negotiate in earnest.\textsuperscript{263} In turn, it accomplished the stated goal of GATT dispute settlement to find a mutually agreeable solution by providing information and establishing norms.\textsuperscript{264} Moreover, the decision provided a starting point for a wider case against all Airbus subsidies, further catalyzing the EEC to move toward a bilateral resolution.\textsuperscript{265}

\textsuperscript{257} See supra text accompanying notes 120–129.
\textsuperscript{258} See supra text accompanying notes 114–119, 122.
\textsuperscript{260} See Thornton, supra note 89, at 138. Following the failure of bilateral talks, the U.S. government hired Gellman Research Associates (GRA) to conduct a private investigation of Airbus’s subsidization. See id. GRA’s report, released in 1990, was widely seen as a calculated effort to pressure the Europeans into negotiations and ultimate concessions. See id. at 138–41.
\textsuperscript{261} See Competitiveness of U.S. Commercial Aircraft Industry: Hearing Before the Subcomm. on Commerce, Consumer Prot., & Competitiveness of the H. Comm. on Energy & Commerce, 100th Cong. 25 (1987) (statement of Michael B. Smith, Deputy U.S. Trade Rep.). The United States saw the EEC as a flippant and intransigent negotiating partner; it thus needed a foundation for its allegations, so that the Europeans would “understand [its] seriousness and depth of concern.” Id. The United States thus pursued a two-pronged approach by seeking domestic political backing through the GRA Report and concurrent international legal support through a favorable GATT ruling. Thornton, supra note 89, at 136.
\textsuperscript{262} See Report by the Panel, German Exchange Rate Scheme for Deutsche Airbus, ¶ 6.1, SCM/142 (Mar. 4, 1992) (unadopted); see also Thornton, supra note 89, at 137–38 (noting that the time between the complaint and the ultimate panel report was less than a year). “Contrary to the [European] position . . . the [Subsidies] Committee agreed with the United States that the Subsidies Code was the proper forum for the U.S. dispute. . . . We cannot forego our legal rights under the Subsidies Code.” Comm. on Subsidies & Countervailing Measures, Communication from the United States 1–2, SCM/125 (Sept. 18, 1991).
\textsuperscript{263} See McGuire, supra note 259, at 154–55.
\textsuperscript{264} See supra text accompanying notes 39–44.
\textsuperscript{265} See McGuire, supra note 259, at 154–55.
At the time, however, feelings about GATT dispute settlement were mixed. Some policymakers expressed concern that U.S. efforts would bear little fruit, due to the GATT’s weak enforcement and failure to bind states, or worse, a possible loss. Yet the involved actors believed in the GATT’s legitimacy, encouraging the EEC to take the debt case panel’s finding seriously.

In sum, GATT dispute settlement during the pre-1992 era brought about a negotiated solution in several ways: (1) the Article XXII guidelines encouraged negotiation; (2) the information-provision function legitimized U.S. allegations, forcing the EEC to treat them seriously; and (3) the threat of a wider GATT case, which, even if it were to remain unadopted (like the debt case), would further legitimate U.S. views and weaken the Europeans.

Following negotiation of the Bilateral Agreement, the United States suspended its wider case against the EEC and Airbus, but did not withdraw it. Only after all outstanding GATT cases were terminated as part of the transition to the WTO did the case cease to exist, although its claims were resurrected a decade later. Yet just as GATT dispute settlement deterred the litigation of a wider case in the 1990s, it can now, through the updated DSM, prevent the negative ramifications of such litigation.

266 See Davey, supra note 49, at 61.
267 See McGuire, supra note 259, at 152; cf. Thornton, supra note 89, at 137 (“[T]he multinational forum and process really were inadequate to handle a dispute between powerful adversaries with vital economic and industrial interests at stake.”).
269 See John W. Fischer et al., Cong. Research Serv., Airbus Industrie: An Economic and Trade Perspective 41 (1992) (“Without the GATT committees and dispute process, the [parties] might not have an adequate alternative forum and the dispute might have ended in a destructive trade war . . . .”).
270 See supra text accompanying notes 39–44.
271 See McGuire, supra note 259, at 154–55; cf. supra text accompanying notes 207–214 (describing the WTO information-providing function, based on earlier GATT dispute resolution provisions).
273 Cunningham & Lichtenbaum, supra note 107, at 1172. Such a move seemingly reflects American doubt over the Bilateral Agreement’s long-term viability. See id.
274 See U.S. DSM Filing, supra note 15, at 1–4; Cunningham & Lichtenbaum, supra note 107, at 1171–72.
B. The Contemporary Era and Prospects for Settlement

When the two parties filed their consultation and subsequent panel requests in 2004 and 2005, commentators predicted that the case would generate a range of adverse effects.\textsuperscript{275} Some argued that the WTO was the wrong forum in which to litigate this dispute\textsuperscript{276} and that the reciprocal filings themselves represented the failure of both diplomacy and the DSM.\textsuperscript{277}

Hindsight improves the picture, and after extensive litigation, settlement is likely.\textsuperscript{278} While the prospects for a negotiated outcome are not certain, they are substantial, given the DSM’s proclivity to generate negotiated solutions.\textsuperscript{279} Additionally, historical patterns in this case also support settlement—the years prior to the 1979 and 1992 treaties saw increasing confrontation followed by successful negotiation.\textsuperscript{280} As such, this section outlines the factors underlying a negotiated outcome and its potential implementation.

\textsuperscript{275} See Lee, supra note 230, at 156–57 (predicting outcomes that ranged from at best, a stalemate that would discredit the WTO, to at worst, a trade war between the world’s two most powerful economies in one of its most lucrative sectors).
\textsuperscript{276} See, e.g., Meier-Kaienburg, supra note 6, at 237–39, 250 (“[T]his dispute should not have been brought to the WTO because it is too complex . . . . The DSU [also] has . . . a poor track record in resolving high-stakes cases . . . . [It] is not the appropriate forum to resolve the dispute between Airbus and Boeing.”); Mathis, supra note 94, at 214 (“[T]his current dispute over subsidies and large civil aircraft poses a long-term threat to the WTO’s relevance and viability.”); Jens van Scherpenberg & Nicolas Hausséguy, The Airbus-Boeing Dispute: Not for the WTO to Solve, Ger. Inst. for Int’l. & Security Aff. (July 2005), http://www.swpberlin.org/fileadmin/contents/products/comments/comments2005_30_spb_hausseguy_ks.pdf (“It is a purely bilateral dispute in which there is no clear division of the plaintiff’s and the defendant’s roles between the two sides.”).
\textsuperscript{277} Cf. Mathis, supra note 94, at 214 (“The continuing friction over [the aircraft subsidies dispute] and other trade issues has led some to question the long term efficacy of the WTO . . . .”). Curiously, many imply that resolution through the DSM and bilateral channels are mutually exclusive, thereby failing to see that the former can effectively lead to the latter. See, e.g., Mathis, supra note 94, at 203 (citing the negotiated settlement in Bananas as evidence of the DSM’s ineffectiveness); Meier-Kaienburg, supra note 6, at 248 (“Regardless of a possible decision made by the WTO, the parties to the Airbus-Boeing dispute need to enter into a new agreement governing subsidies because a decision by the WTO will not completely solve the issue of aircraft subsidies.”); Scherpenberg & Hausséguy, supra note 276, at 7 (“A bilateral U.S.-EU agreement on what constitutes prohibited subsidies and what doesn’t . . . is still required. The alternative would be leaving the decision to the WTO dispute-settlement body.”).
\textsuperscript{278} See Pauwelyn, supra note 177, at 128 (“As the resolution in the Bananas saga has shown, in those ‘hard cases,’ endless litigation does not offer a way out; negotiation does.”).
\textsuperscript{279} See discussion supra Part II.B.
\textsuperscript{280} See supra text accompanying notes 102–136.
1. Factors Underlying a Negotiated Outcome

Three factors underlying a negotiated settlement establish the foundation for its likelihood: the initial failure of consultations, the appellate process, and the involvement of third parties. 281

a. The Failure of Consultations

Some suggest that parties merely negotiate as a formality because the DSM requires it. 282 Following this logic, a negotiated outcome is unlikely in this case because initial consultations failed. 283 If the United States and the EU could not be pulled back from the brink of litigation, then nothing would be able to restrain them from pushing for and later instituting damaging retaliatory measures. 284

Yet expecting consultations to have worked at the outset of this case is unrealistic: pro-forma negotiations would have little chance of success, especially in light of the parties’ outlooks and viewpoints at the time of filing. 285 The stakes were too high, and the investment too deep, for either party to compromise at the outset. 286 But this does not necessarily mean that negotiations fail in the long-term. 287 The role of information availability is crucial: 288 as the two sides litigate, the panel makes factual and legal determinations that may affect states’ attitudes toward the likelihood of victory and thus, the dispute as a whole. 289 The

281 See infra text accompanying notes 282–326.
282 See Porges, supra note 176, at 160.
283 See Meier-Kaienburg, supra note 6, at 211–13. Because the parties spent the consultation phase “quarrelling over the clarity of the other’s request for consultations” rather than “discuss[ing] the claims asserted [to] possibly settle the dispute,” the DSM will not likely lead to a resolution of the transatlantic aircraft dispute. Id. at 215.
285 See William Drozdiak, The North Atlantic Drift, FOREIGN AFF., Jan./Feb. 2005, at 88, 90 (pointing out the trade-related tensions between the two powers, including the completion of the Doha Round); Nose to Nose, supra note 284 (noting that Boeing had just witnessed Airbus eclipse its market share and launch the A380, which robbed it of its claim to producing the world’s largest passenger aircraft, the 747). The aircraft dispute, in addition to being its own long-standing conflict, enabled both sides to express their broader discontent. See Drozdiak, supra note 285, at 90–91.
286 See Nose to Nose, supra note 284 (describing hardened U.S. and EU attitudes at the time of filing).
287 See Pauwelyn, supra note 177, at 135–36. Negotiated settlements can still occur despite the continuing progress of crucial DSU mechanisms, such as the establishment of a panel. Id.
288 See supra text accompanying notes 207–218.
289 See Pauwelyn, supra note 177, at 135–36 (“[The] interim review stage—in which the panel sends out its interim findings for comments by the parties before it sends out its final
DS316 Panel’s identification of some, but not all, subsidies as illicit demonstrates this trend. Moreover, the dispute’s length has tempered the parties’ attitudes, increasing the likelihood of a negotiated settlement as both sides are worn down.

The United States and the EU are seemingly less committed to the strict implementation of a DSM ruling than they were in 2005—essentially, they had to fail before they could succeed. Aborted negotiations followed by protracted litigation, informational availability, and a DSM that creates multiple negotiation opportunities can collectively draw states away from extreme attitudes, even as they seek sanctions—an additional way to generate concessions and ultimately, settlement, be it independent or arbitrated.

b. The Appellate Process

The case’s complexity and the number of appeals generate doubts about the imminence and likelihood of an agreement: both imply that litigation will continue for some time. However, the negotiation effects inherent to the DSM can mitigate such concerns.

The United States and the EU are the two most experienced litigants in the WTO. Moreover, as the DSM has developed, appeals report to all WTO Members—could constitute an important gateway to a last minute settlement.

290 See DS316 Panel Report, supra note 21, ¶¶ 8.1–8. By distinguishing between types of launch aid provided by different European states, the Panel report provides the EU with a platform on which to recalibrate its legal argument, as well as its litigation and negotiation strategies. See id.

291 See Pilita Clark, Airbus Chief Warns Dispute with Boeing Will Aid Rivals, Fin. Times, Oct. 22, 2010, at 6 (quoting Airbus CEO Thomas Enders, who called for a negotiated resolution and labeled the prolonged dispute an “absurdity”).

292 See Julie Johnson & Kathy Bergen, U.S. Puts Condition on EU Trade Talks, Chi. Trib., Apr. 15, 2011, at 28 (quoting U.S. Trade Representative Ron Kirk) (“[A] negotiated resolution would be the best thing . . . .”); Daniel Pruzin & Len Bracken, U.S. & EU “Pit” Arguments on Subsidies for Boeing at WTO Appellate Body Hearing, 28 Int’l Trade Rep. (BNA) 1492 (Sept. 15, 2011) (“[EU] trade commissioners, including the current office holder, have said they would like to reach a settlement . . . .”). The United States, however, has conditioned its offer to negotiate settlement on a European disavowal of any further subsidies. See Johnson & Bergen, supra.

293 See Harrington, supra note 27, at 339–40; Miles, supra note 156 (“Although the arbitration process has been triggered, nothing may happen until the two sides have exhausted other legal avenues. Many trade experts expect the two sides . . . to attempt to negotiate a settlement as the legal appeals and counter-appeals become more and more entangled.”).

294 See Pruzin, supra note 17.

295 See discussion supra Part II (outlining the DSM’s inherent and exigent negotiation effects).

296 Conti, supra note 196, at 631.
have become routine—between 1995 and 2010, one or both of the disputing parties appealed in 67 percent of cases.\textsuperscript{297} States are practically expected to appeal upon a panel report’s release.\textsuperscript{298}

Parties are unlikely to appeal when they commence negotiations immediately following the panel report or when the costs of appeal are prohibitive.\textsuperscript{299} In this case, however, immediate post-report negotiations did not occur, and given the size and power of the United States and the EU, cost is not an obstacle.\textsuperscript{300}

Moreover, an appeal gives the parties an opportunity to gain further-defined rules and norms,\textsuperscript{301} which will, as with other DSM cases, guide the eventual negotiation process.\textsuperscript{302} For example, the AB hearings in DS316 saw the United States and the EU specifically focus on several of the Panel’s decisions relating to infrastructure development,\textsuperscript{303} the length of subsidy benefits,\textsuperscript{304} and capital contributions.\textsuperscript{305} The AB had heretofore not addressed these issues with regard to LCA and the ASCM.\textsuperscript{306}

Because both sides have invested so much time and money into the proceedings, they will likely wait for the AB’s rulings before negoti-
ating further. But when both rulings emerge, the United States and the EU will possess an unprecedented amount of information, allowing both to recalibrate their positions with new legal norms. Thus, appeal reflects not only experience litigating before the DSM, but also an acknowledgement by both sides that they seek more information and interaction—factors that have proven to lead states to the bargaining table.

c. Third Parties and Changing Market Conditions

The final element that will contribute to a negotiated resolution involves the DSM’s third-party mechanism. Third-party concerns force the disputants to focus on the bigger picture, thereby encouraging settlement. When they filed their panel requests, both parties sought consultations under Article XXIII, thus enabling third parties to participate in negotiations. The third parties include Brazil, Canada, and China, all of which host firms that are planning products to compete with those of Boeing and Airbus.

Theory and empirical evidence suggest that third-party involvement will influence U.S. and EU policymakers. The complaints and concerns in this case represent those of countries whose firms are locked in a duopoly that is on the verge of cessation. Yet the United

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307 Cf. Porges, supra note 176, at 168 (noting parties’ commitment to the completion of panel proceedings once they have commenced).
308 See Thornton, supra note 89, at 138–45 (discussing both sides’ information-gathering techniques throughout this dispute). Much of the conflict has its roots in legal loopholes (for example, Airbus’s corporate structure for its first thirty years exempted it from reporting financial results) that generated ambiguity. See id. at 88–93. Through the DSM process, the two sides will now have access to facts and figures that were previously unattainable. See id. at 138–145.
309 See Conti, supra note 196, at 632.
310 See supra text accompanying notes 196–218.
311 See DSU, supra note 57, art. 4.11, 10; GATT 1947, supra note 41, art. XXIII:2.
312 See supra text accompanying note 189.
315 Kyle James, Airbus Chief Says Subsidy Spat with Boeing Helps Emerging Rivals, Deutsche Welle (Oct. 22, 2010), http://www.dw-world.de/dw/article/0,,6140280,00.html.
316 See Davey & Porges, supra note 189, at 700–02. For example, Airbus CEO Tom Enders noted that the DSM dispute could hasten the competitive entry of new rivals and asked whether, upon a DSM decision, “anyone . . . believe[s] that they will step back and say: ‘Now we understand the WTO rules, we will play exactly by the rules?’ . . . Absolutely not . . . .” James, supra note 315.
317 See James, supra note 315.
States and the EU realize that, no matter what the AB decides, its rules will apply in an industry with new players who will likely react in their own unique ways.\(^{318}\)

By providing third-party involvement, the DSM has endowed the United States and the EU with an ability to make explicit choices about how to move forward based on third-party attitudes.\(^{319}\) The two sides could thus create an agreement permitting forms of subsidization that favor their production methods, as opposed to those of competitors that threaten their market share.\(^{320}\)

Alternatively, the United States and the EU could take a more multilateral approach and include new market entrants in any eventual agreement.\(^{321}\) They have already begun to do so: the United States, EU, Brazil, Canada, and Japan negotiated the December 2010 Aviation Sector Understanding (ASU) through the OECD.\(^{322}\) The ASU regulates government export credits for commercial aircraft and may expand to China and Russia.\(^{323}\)

The enactment of and multilateral involvement inherent to the ASU demonstrate a willingness to negotiate, even if it only concerns one form of subsidization and does not resolve the transatlantic dis-

\(^{318}\) See id.; Wall, supra note 100. For example, the Airbus A320neo (New Engine Option) and Boeing 737 MAX are direct competitors to the Bombardier CSeries, indicating that Boeing and Airbus are taking new entrants seriously. See François Shalom, Who’ll Buy CSeries? Boeing CEO Asks, MONTREAL GAZETTE, Oct. 5, 2011, at B6. Given Chinese and Russian aircraft subsidization, Boeing and Airbus will likely lobby their governments to take action at the interstate level, as they have in the past. Pierre Sparaco, Leveling the Field, AVIATION WEEK & SPACE TECH., Sept. 21, 2009, at 62 (“China and Russia are pouring money into ambitious commercial transport programs . . . . Such goals could not be attained without government subsidies.”); see supra notes 84–89, 102–103 (discussing U.S. and EU firm-government ties and attendant lobbying).

\(^{319}\) Cf. DVD: Third-Party Opening Statements Before the Appellate Body in European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft (World Trade Org. 2010) (on file with World Trade Org.) (containing Brazilian, Canadian, and Chinese attitudes towards the dispute, including rules and norms governing infrastructure development).

\(^{320}\) See Jeffrey J. Schott, America, Europe, and the New Trade Order, Bus. & Pol., Oct. 2009, at 1, 12–13 (2009). Such behavior represents a broader shift in the WTO, where non-western economies are gaining increasing clout, and the transatlantic powers must coordinate their policies to adjust to this new political-economic landscape. See id. at 12–14. One way to do so is by resolving outstanding trade disputes, including LCA. See id. at 13.

\(^{321}\) Cf. id. at 17 (discussing the need to consider the interests of increasingly influential non-Western economies in international trade discussions).


pute. Yet as one WTO official noted, the proclivity to include third parties is more a sign of the U.S. and EU’s acknowledgement that the “real world is changing,” rather than any structural effect inherent in the DSM. The DSM’s third-party mechanism, however, enables disputing parties to further recognize this and plan accordingly.

2. The Implementation of a Negotiated Outcome

Once a negotiated solution is likely, the question arises of how to implement and reconcile it with DSB decisions. Three outcomes are possible: the parties could (a) seek a waiver concerning aircraft subsidization; (b) attempt to integrate any potential agreement into the current Doha Round; or (c) let the conflict settle with time.

a. Waiver

Under Article IX:3 of the Agreement Establishing the WTO, Member States may seek waivers of certain provisions “[i]n exceptional circumstances.” The United States and the EU could thus approach the WTO Ministerial Conference and ask for a waiver from relevant ASCM provisions. This approach is fraught with challenges—because waivers require parties to admit explicit violations of WTO provisions, and the United States and the EU have largely denied LCA subsidization, such a tacit admission is unlikely.

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324 See Bracken, supra note 322; see also EU DSM Filing, supra note 16, at 2–10; U.S. DSM Filing, supra note 15, at 1–4.

325 Interview with anonymous WTO Secretariat Official, in Geneva, Switz. (Nov. 18, 2010).

326 See supra text accompanying notes 319–320.

327 See supra text accompanying notes 67–77, 222–240. Were the AB to issue rulings ordering retaliation, a U.S.-EU negotiated settlement would likely seek to avoid such action on account of its adverse ramifications. See supra text accompanying notes 224–229.

328 See Marrakesh Agreement, supra note 163, art. IX:3.


330 See infra text accompanying notes 343–355.

331 Marrakesh Agreement, supra note 163, art. IX:3.

332 See id. art. IX:3(a).

333 See supra note 10 (demonstrating each side’s unwillingness to acknowledge its own subsidies); cf. Isabel Feichtner, The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests, 20 Eur. J. Int’l L. 615, 620 (2009) (“[T]he ability to request waivers . . . serves the function of a safety valve when individual members are unable to perform their obligations.”).
The two parties would also have to engage the WTO in a lengthy process entailing significant hurdles—at least a three-fourths majority decision of the Ministerial Conference is needed for a waiver. Finally, a waiver would constitute effective permission for potential competitors to subsidize aircraft production, as waivers suspend obligations for either all Member States or individual groups. A waiver would thus presumably apply to all WTO members that manufacture commercial aircraft.

b. Integration into the Doha Round

Alternatively, the United States, the EU, and other potential parties to an agreement regarding aircraft subsidization could integrate it into the Doha Round. Due to multiple delays and despite the stated goal of finishing the Round by late 2011, it will not likely be concluded until “2012 and possibly beyond.” This provides an opportunity for the parties to integrate an aircraft agreement into Doha, as they did during the Tokyo Round.

Granted, the odds of success are moderate at best, given the controversies surrounding the aircraft dispute and the Doha Round, as well as the limited timeframe. However, states could take advantage of the ASU, negotiated through the OECD, and the Doha Round, negotiated through the WTO, to integrate the former into the latter, rather than working through each organization separately.

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334 Marrakesh Agreement, supra note 163, art. IX.3. Moreover, GATT/WTO “waiver competence is intended to legalize non-compliant measures . . . in concrete situations of urgency in which compliance is not a feasible option.” Feichtner, supra note 333, at 620 (emphasis added).

335 See Feichtner, supra note 333, at 621.

336 See id.

337 Cf. Speeches—DG Pascal Lamy, supra note 329 (discussing the completion of the Doha Round and relevance of subsidies).

338 Daniel Pruzin, WTO Members Endorse Work Plan to Secure Doha Agreement in 2011, 27 Int’l Trade Rep. (BNA) 1832 (Dec. 2, 2010). Having started in 2001, the Doha Round of negotiations has consistently faltered over issues including agriculture and divergent views between the developed and developing world. See id.

339 Pruzin, supra note 1.

340 See supra text accompanying notes 102–119.

341 Cf. supra text accompanying notes 104, 109–119 (noting that the time pressure of concluding similar agreements during the Tokyo Round generated a weak treaty that failed to stave off later confrontation).

c. Settlement over Time

Finally, the parties could negotiate an agreement regardless of the AB’s decision; such outcomes have occurred in particularly contentious cases such as *Bananass* and *Brazil/Canada–Aircraft*. This result, however, may engender doubt about the DSM’s enforcement ability. Previous cases such as *Canada–Aircraft* led to rulings whose measures were not implemented, though the system remained intact and states continued to treat it seriously. Some argue that an outcome akin to that in *Canada–Aircraft* would be a “waste of time.” Yet *Brazil/Canada* evolved from Brazil’s desire to prove itself as an economic power vis-à-vis Canada. There is no such disparity here.

In short, a ruling without implementation can still be useful because the DSM’s primary goal is to lead states to mutually agreeable outcomes. Concomitant with this goal, a decision followed by a lack of retaliation demonstrates a positive outcome, as inaction could signify the parties’ satisfaction with the end result. A lack of compliance in a few cases will not undo a half-century of GATT/WTO development that has repeatedly catalyzed international cooperation.

The United States and the EU have invested a great deal of time, money, and political capital into resolving this dispute. But its history demonstrates that they are more likely than not to attempt resolution through negotiation. This, along with a DSM that pushes states to negotiate, means that a negotiated settlement to the most recent round of this rivalry is likely.

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343 See *supra* text accompanying notes 233–248.
344 See *supra* text accompanying notes 233–248.
345 See Speer, supra note 239.
346 See Harrington, *supra* note 27, at 341 (“[T]he WTO has created a truly democratic legal entity in the [DSB] . . . through which trade fights can be waged civilly . . . .”).
347 Lee, supra note 230, at 156–57.
349 See Schott, supra note 320, at 2–3 (discussing the existence of economic hegemony between the United States and the EU in the GATT/WTO system).
350 See *supra* text accompanying notes 166–192.
351 See *supra* text accompanying notes 230–248 (highlighting similar outcomes in *Bananass* and *Brazil/Canada–Aircraft*).
353 See text accompanying notes 102–159.
354 See id.
355 See *supra* text accompanying notes 144–252.
CONCLUSION

Despite its length and recalcitrance, the aircraft dispute between the United States and the EU will likely generate a negotiated settlement. The likelihood of this outcome is apparent considering the settlement-oriented nature of the DSM and its extrinsic effects, along with the history and nature of the aircraft dispute.

With the DSM, WTO members created enforcement mechanisms to improve an ineffective dispute settlement system. Yet they could not escape its foundations and the fact that states value autonomy. The DSM reconciles these concerns; by providing a legalized system, the WTO brings scofflaw countries into conformity with international rules. Through negotiation opportunities, it encourages experienced rational actors to consult early and frequently to seize the opportunity for settlement. Extrinsic factors, including state development and DSB experience; informational availability; and the prospect of binding compliance measures further cause disputing parties, in different cases, to choose litigation or settlement. Even with litigation, some states use DSB decisions as a foundation for negotiated settlements.

From a practical perspective, these observations are crucial for those who litigate before the WTO. The fact that the DSM is aimed at long-term negotiated solutions can profoundly affect how government and private attorneys approach certain cases, taking into consideration issues such as their representative state’s experience with the DSB, its level of development, and individual points in the DSM timeline that they can utilize in order to settle with the other side.

As history shows, this is not the first time that the two parties come to the brink of a trade war over LCA: the 1970s and 1980s saw periods of escalation followed by settlement, first through the Tokyo Round, and later through bilateral talks. In each instance, the GATT enabled both sides to air their grievances before negotiating a solution. This dispute has operated in cycles of interstate conflict followed by cooperation, none of which catalyzed a trade war. The DSM provides further reason to believe that this era is no different.

The entry of new competitors will also exert pressure on the two rivals to resolve their conflict, as delays will put the United States and the EU at greater risk of losing their market position. Granted, settlement will not eliminate new rivals. Rather, both sides will recognize that they are better served when they are not constantly at odds over subsidies, which only distracts them from larger issues.

Nor will a negotiated settlement necessarily provide a lasting resolution. As long as Boeing and Airbus exist, their home governments will
find something to contest. As they face new competition, the United States and the EU may even intensify their use of rhetoric and legal mechanisms with regards to LCA; it will just be aimed at other states. They may even ironically find themselves, after thirty years of rivalry, on the same side of this hotly contested issue.
THIS IS GUN COUNTRY: THE INTERNATIONAL IMPLICATIONS OF U.S. GUN CONTROL POLICY

LAURA MEHALKO*

Abstract: Mexican drug trafficking organizations are the largest providers of illicit drugs to the United States. They have also grown to rely on advanced, high-power weaponry and to use their nearly military-grade armament to maintain control over smuggling corridors, and local drug production areas. Cartels are also linked to nearly 40,000 deaths over the last five years, many of which were committed with guns originating in the United States. The United States is likely the most prevalent source of weapons for the increasingly violent cartels. The U.S. government estimates that nearly ninety percent of all weapons used in the drug war originate in the United States. An analysis of current gun control policy in the United States and Mexico suggests this is likely the case; Mexico has particularly strict gun control laws in contrast to the relatively lenient gun control regulation in the United States. Both countries have implemented domestic policies aimed at reducing the southward flow of arms into Mexico, yet so far have had little success. This Note argues that arms trafficking has been facilitated by current U.S. gun control policy, and it will likely continue without a foundational shift in either U.S. or international policy.

It’s a terrible problem. They have to do something about it.

—The Honorable Robert Gottsfield

INTRODUCTION

The rhetoric of the “War on Drugs” has been familiar to many U.S. citizens since the days of President Richard M. Nixon.¹ That language has taken on a more literal meaning in recent years due to the in-

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* Laura Mehalko is the Executive Comments Editor for the Boston College International & Comparative Law Review. She would like to dedicate this note to the memory of her father, Mark. Thank you for all the love.


creased threat posed by Mexican drug cartels and distribution networks. The Mexican government now faces an opponent that outspends it in the fight, while utilizing a governmental task force that has been plagued with murders from and defections to the cartels themselves. Mexico’s governmental efforts to reduce drug trafficking and associated gun crime have been met with a violent response from the cartels, including executions and mutilations, as well as a drug-related murder rate that doubled between 2007 and 2008.

The cartels are fueled by U.S. demand for drugs; many use their profits to purchase high-powered firearms from states along the border, where they can legally obtain weapons that are prohibited for sale in Mexico. In an effort to combat the threat presented by the Mexican cartels, the United States offered Mexico an aid package that provides funding for military, police, and joint intelligence operations. Yet by increasing support to the Mexican military, the United States has, in essence, armed both sides of the conflict.

Federal gun control policies in the United States, and state-level policies in the southwestern states, are a major factor in the increasing violence against both Mexican and U.S. citizens—that includes both increased murders and kidnappings domestically as well as over 40,000...

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3 See Stephanie Erin Brewer, *Rethinking the Mérida Initiative: Why the U.S. Must Change Course in Its Approach to Mexico’s Drug War*, HUM. RTS. BRIEF, Spring 2009, at 9, 10 (“[I]t reinforces the war-like mentality that has led Mexico to deploy its military and police in a territorial battle as the answer to drug trafficking.”).


5 Wright, supra note 4, at 367.


8 See Brewer, supra note 3, at 10 (“[T]his strategy has not led to a decrease in drug-related violence but rather has seen a tripling of drug-related homicides in the past three years.”); McKinley, supra note 6 (“ATF officials estimate 90 percent of the weapons recovered in Mexico come from dealers north of the border.”).
murders in Mexico since 2006.\textsuperscript{9} Mexican drug trafficking organizations (DTOs) purchase firearms in the United States, where there is greater access to weapons and more lenient regulation on sales.\textsuperscript{10} Moreover, many of the relevant purchases are made in Arizona and Texas, where the emphasis on the individual right to own firearms is manifested in relatively lenient gun control laws.\textsuperscript{11} These two states, along with California, host the top twelve dealers that are allegedly arming the cartels.\textsuperscript{12}

Arms trafficking is unlikely to decrease without increased cooperation between the United States and Mexico.\textsuperscript{13} Although regulations restricting trafficking are likely constitutional, cultural factors in the southwestern states make domestic reform, tightening restrictions on firearms sales, unlikely.\textsuperscript{14} One commentator suggested that lax regulations in Texas and Arizona “reflect both the libertarian traditions of the West and the anxious vigilance of firearms enthusiasts toward their Second Amendment rights.”\textsuperscript{15} State gun control laws impose few restrictions on firearms sales, making prosecution of those accused of transacting with Mexican cartels more difficult.\textsuperscript{16} Further, state laws creating an individual right to bear arms now find support in the federal Second

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\footnote{Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 4 (2011) (statement of Eric H. Holder, Jr., Att’y Gen. of the United States) [hereinafter Holder, Statement Before the S. Comm. on the Judiciary] (noting that in recent years the trafficking of firearms has led to approximately 40,000 deaths, and that the United States has recovered 64,000 guns attributable to U.S. sales); see also U.S. Ambassador to Mexico Resigns After Public Spat, \textit{Reuters} (Mar. 20, 2011), http://www.reuters.com/article/2011/03/20/us-mexico-usa-idUSTRE72J09F20110320 (noting that the death toll was at 36,000 in March 2011).}

\footnote{See McKinley, supra note 6.}

\footnote{See Eugene Volokh, \textit{State Constitutional Rights to Keep and Bear Arms}, 11 \textit{Tex. Rev. L. & Pol’y} 191, 193, 203 (2006) (noting that Arizona and Texas have recognized a constitutional individual right to own firearms since 1912 and 1836, respectively).}

\footnote{See Grimaldi & Horwitz, supra note 1.}

\footnote{See U.S. Gov’t Accountability Office, GAO-09-709, \textit{Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges} 4 (2009) (describing several challenges to combating arms trafficking due to a lack of cooperation within U.S. agencies and between the United States and Mexico).}

\footnote{See, e.g., Jerod E. Tufte, Comment, \textit{Some Explicitly Guaranteed Rights Are More Fundamental Than Others: The Right to Bear Arms in Arizona}, 33 \textit{Ariz. St. L.J.} 341 passim (2001). This comment was written from the perspective of an Arizona resident and suggests that the “right to bear arms is sufficiently important that it deserves stronger protection from the courts.” Id. at 342.}


\footnote{See Grimaldi & Horwitz, supra note 1 (quoting Arizona Judge Robert Gottsfield) (“There certainly was evidence that [arms dealer] Ikadosian was selling to people who were not buying the guns for themselves, and that’s a class one misdemeanor.”). \textit{But see} United States v. Hernandez, 633 F.3d 370, 379 (5th Cir. 2011) (upholding a sentence imposed against an arms dealer convicted of supplying Mexican drug cartels).}
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Amendment policy that was incorporated to the states in *McDonald v. City of Chicago*.\(^{17}\)

Despite Mexican attempts to regulate the illicit arms trade,\(^{18}\) arms trafficking has proliferated, operating either in accordance with gun control regulations or outside the reach of government action.\(^{19}\) Mexico is known for its particularly strict gun control laws and has only one operating gun store in the country.\(^{20}\) Yet, between 2004 and 2008, the government seized nearly five times as many firearms from drug crimes as there are legal permits.\(^{21}\) Government efforts to restrict access to firearms have thus proven ineffective in the drug war.\(^{22}\)

This rise in international crime, or “crime that crosses international borders,”\(^{23}\) has not been met with a coherent international effort intended to reduce access to high powered weapons by the DTOs.\(^{24}\) Under the current legal framework, it is likely that arms trafficking will continue, and any attempt by Mexico to reduce the illicit arms trade and related violence will be undermined by U.S. policy.\(^{25}\)

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\(^{17}\) 130 S. Ct. 3020, 3050–51 (2010).


\(^{20}\) Id.

\(^{21}\) Id.


\(^{25}\) See discussion *infra* Part III; U.S. Gov’t Accountability Office, *supra* note 13, at 58 (“U.S. and Mexican government officials in locations we visited told us that, while they have undertaken some efforts to combat illicit arms trafficking, they are concerned that without a targeted, comprehensive, and coordinated U.S. government effort, their efforts could fall short.”); cf. Donald E. deKieffer, *The Mexican Drug Connection: How Trade in Pharmaceuticals Has Wrecked the FDA*, 9 Sw. J.L. & Trade Ams. 321, 328–29 (2002) (suggesting that domestic regulations become meaningless when undermined by a prevalent illegal black market trading system).
Part I of this Note outlines the Mexican cartels’ rise to power as the prominent source of wholesale drugs for the U.S. market. Additionally, Part I highlights the current state of legal policy in relation to arms trafficking as demonstrated by the attempted prosecution of prominent arms dealer George Iknadosian. Part II discusses the implications of the asymmetries between U.S. and Mexican gun control policy in the context of arms trafficking to Mexican cartels. Specifically, Part II notes that U.S. gun control regulations dominate the arms trafficking pattern, and for practical purposes are the only relevant authority in terms of regulating arms trafficking to Mexico. Finally, Part III argues that regulations directed at arms trafficking would be constitutional, but are unlikely to be made without consideration of foreign implications of domestic policy. It notes that Mexico’s gun-control regulations are at continued risk of arbitrage without potential for remedy, and that the United States may be the only entity capable of providing a solution.

I. BACKGROUND

A. The Rise and Operation of Mexican Drug Trafficking Organizations

The nearly 2000 mile border between the United States and Mexico represents the trade boundary where large amounts of illicit drugs are smuggled into the United States and where many illegal firearms, weapons and currency are shipped back into Mexico. Mexican DTOs are currently the predominant source of illicit drugs in the United States, having largely replaced the Colombian cartels. It is estimated that the DTOs earn tens of billions of dollars each year as wholesale providers of illicit drugs. Mexican drug trafficking organizations have grown to be so powerful that they have been called “driving forces, pillars even, of [Mexican] economic growth.” The U.S. Drug Enforcement Agency (DEA) estimates that billions of dollars enter the Mexican

26 See U.S. Gov’t Accountability Office, supra note 13, at 20; Andreas, supra note 4, at 160; see also Grimaldi & Horwitz, supra note 1. Texas gun dealer Bill Carter, who has sold more guns seized in Mexico than any other dealer in Houston, commented on the border traffic: “Why all the talk about guns going south when so many drugs are coming north that our cows along the interstate are gettin’ high off the fumes!” Id.
28 Dep’t. of Justice, supra note 27, at 9.
29 Andreas, supra note 4, at 160 (quoting Eduardo Valle, personal advisor to the Mexican attorney general in 1994).
economy each year as a result of the drug trade, and that hundreds of thousands of Mexican citizens earn their living growing drug crops or providing transportation, security, banking, and communications services to the various DTOs.\textsuperscript{30}

The growing violence in Mexico is associated with a few “large, sophisticated and vicious criminal organizations” engaged in the illicit drug trade.\textsuperscript{31} Perhaps as a result of their growing influence, there has been greater conflict between the DTOs over maintenance of “zones of control” and smuggling routes into the United States.\textsuperscript{32} In addition to the growing conflict between the most predominant DTOs, organizations without established trafficking routes utilize governmental disruption of larger cartels to gain an advantage in the market, leading to “unprecedented, high intensity violence.”\textsuperscript{33} In 2009 alone, an estimated 6500 to 8000 individuals were killed as DTOs battled for control over smuggling corridors.\textsuperscript{34} Although most of the dead were associated with the cartels themselves, since 2006 approximately 2000 police officers and Mexican soldiers have been murdered in drug related violence.\textsuperscript{35}

DTOs have also increasingly engaged in public conflicts and in assassinations of Mexican officials.\textsuperscript{36} The DTOs’ attempts to exert political and social control signify their intention to expand their power beyond what might typically be associated with criminal organizations.\textsuperscript{37} For example, drug gangs have enforced their own laws and even impose “fees like taxes” as a means of maintaining social and geographic control over trafficking areas.\textsuperscript{38}

U.S. and Mexican government officials estimate that DTOs primarily use guns originating in the United States.\textsuperscript{39} The United States estimates that thousands of guns are smuggled into Mexico every year, of-

\textsuperscript{30} Id.
\textsuperscript{32} See Astorga & Shirk, supra note 27, at 33–35.
\textsuperscript{33} Id. at 13.
\textsuperscript{34} Dep’t. of Justice, supra note 27, at 15; Julian Miglierini, Crunching Numbers in Mexico’s Drug Conflict, BBC News (Jan. 14, 2011), http://www.bbc.co.uk/news/worldlatina merica12194138 (suggesting that a new, more complete database estimates that 34,612 people have been killed between 2006 and late 2010).
\textsuperscript{35} See Elisabeth Malkin, Lawmakers in Mexico to Debate Drug Fight, N.Y. Times Aug. 18, 2010, at A12.
\textsuperscript{36} Goodman & Marizco, supra note 22, at 168–69, 171–73.
\textsuperscript{37} See id.
\textsuperscript{39} U.S. Gov’t Accountability Office, supra note 13, at 22.
ten orchestrated by the DTOs themselves.\textsuperscript{40} The United States hosts nearly 7000 gun stores along the Mexican border.\textsuperscript{41} Moreover, the Bureau of Alcohol, Tobacco and Firearms (ATF) has determined that approximately eighty-seven percent of firearms seized by Mexican authorities in the last five years originated in the United States, with heavy concentrations of relevant purchases in Texas, California, and Arizona.\textsuperscript{42} In total, tracing data from guns seized after drug crimes demonstrate that ninety percent of the firearms originate in the United States.\textsuperscript{43}

Drug-related violence has risen partly due to the cartel's ability to acquire high powered weapons.\textsuperscript{44} It is estimated that over 15,000 people were killed in 2010 alone.\textsuperscript{45} As DTOs increasingly use high-caliber weapons, competing groups must respond by utilizing competitive weapons to maintain their market control.\textsuperscript{46} Mexican officials have noted a trend toward increasingly "powerful and lethal" weapons—specifically higher caliber and high-power weapons.\textsuperscript{47} For example, the Gulf-Zeta cartel now employs RPG-7 rocket launchers, anti-tank missiles, grenades, submachine guns, and "cop killers"—handguns known for their potential to pierce bulletproof vests.\textsuperscript{48} Mexican law enforcement utilizes weapons far less advanced than the DTOs, and is often rendered incapable of effectively responding to instances of gun violence.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{40} See Dep't. of Justice, supra note 27, at 16.
\item \textsuperscript{41} Id. at 3.
\item \textsuperscript{42} Id. at 20. Some commentators have questioned this statistic. E.g., Kopel, supra note 18, at 12 ("Professor George W. Grayson [of the Center for Strategic & International Studies] calls the ninety percent factoid a 'widely exaggerated percentage,' which is being pushed by President Calderón for purposes of domestic Mexican politics."). But see U.S. Gov't Accountability Office, supra note 13, at 69–72 (acknowledging the controversy but stating that the eighty-seven percent statistic is not misleading).
\item \textsuperscript{43} See U.S. Gov't Accountability Office, supra note 13, at 15–16 (noting that the data available relates only to gun trace requests submitted from seizures in Mexico, not all guns seized).
\item \textsuperscript{44} See Luis Astorga, IDPC Policy Briefing—Arms Trafficking from the United States to Mexico: Divergent Responsibilities 1 (Lucien Chauvin trans., 2010), available at http://www.idpc.net/sites/default/files/library/IDPC%20policy%20briefing%20Mexico.pdf ("Violence is always a possibility in any illegal activity, but the magnitude of the current violence is largely related to the availability of high powered firearms being trafficked across the border from United States to Mexico.").
\item \textsuperscript{45} See Malkin, supra note 35; see also Miglierini, supra note 34 (suggesting that 2010 was the "bloodiest year yet").
\item \textsuperscript{46} See Astorga, supra note 44, at 2.
\item \textsuperscript{47} U.S. Gov't Accountability Office, supra note 13, at 17.
\item \textsuperscript{48} Id. at 3.
\item \textsuperscript{49} See Astorga, supra note 44, at 1; Goodman & Marizco, supra note 22, at 187–88.
\end{itemize}
Although much of the violence is concentrated in Mexico, the Department of Justice (DOJ) and the National Drug Intelligence Center considers Mexican DTOs the gravest organized crime threat facing the United States today.\(^{50}\) In addition to establishing drug distribution networks in at least 230 U.S. cities, Mexican cartels have been associated with shootings, kidnappings and assaults in the United States.\(^{51}\) Moreover, without increased restrictions on access to weapons, U.S. law enforcement will be unable to effectively respond to any further escalations of gun violence.\(^{52}\)

### B. The George Iknadosian Trial: U.S. Treatment of Arms Traffickers

The United States has acknowledged it is the source of the majority of weapons used by the DTOs.\(^{53}\) Despite this recognition, however, current U.S. gun control regulations do not facilitate the investigation or prosecution of those suspected to be involved in gun smuggling.\(^{54}\) Mexican officials have urged the U.S. government to supplement its laws to restrict access to certain weapons, particularly in light of the fact that it is nearly impossible for DTOs to purchase firearms in Mexico.\(^{55}\)

One of the most prominent attempted prosecutions of a U.S. citizen for supplying guns to Mexican drug cartels occurred in Arizona state court in 2009.\(^{56}\) George Iknadosian was charged with fraud, conspiracy, and assisting a criminal syndicate, based on alleged weapon sales to smugglers supplying the Sinaloa drug cartel.\(^{57}\) Iknadosian, a native of Egypt, owned a store near the Mexican border named X-Calibur Guns,

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\(^{52}\) Id.

\(^{53}\) See Ginger Thompson & Marc Lacey, U.S. and Mexico Revise Joint Antidrug Strategy, N.Y. TIMES, Mar. 23, 2010, at A4 (quoting Sec. of State Hillary Rodham Clinton) (“Yes, we accept our share of the responsibility.”).

\(^{54}\) See Grimaldi & Horwitz, supra note 1 (describing the dismissal of a case against an accused arms dealer).


\(^{56}\) See McKinley, supra note 6; Dennis Wagner, Trial of Phoenix Gun Seller to Start, ARIZ. REPUBLIC, (Mar. 9, 2009), http://www.azcentral.com/community/phoenix/articles/2009/03/09/20090309guns0309.html (“The case has drawn international attention as a landmark effort against gunrunning.”).

\(^{57}\) McKinley, supra note 6.
and was accused of selling over 700 firearms with the knowledge that the weapons were bought on behalf of DTOs.\textsuperscript{58} Iknadosian’s clients purchased guns largely prohibited from private ownership in Mexico, including AK-47s, SKS rifles, and .50-caliber rifles.\textsuperscript{59} X-Calibur Guns sold a large number of weapons implicated in illicit gun trafficking, so much so that ATF officials believed they had discovered a “direct pipeline from Iknadosian to the Sinaloa cartel.”\textsuperscript{60} In fact, U.S. officials traced rifles back to Iknadosian and X-Calibur after Mexican officials recovered them at the scene of a gunfight that left eight Mexican police officers dead.\textsuperscript{61} Similarly, Arizona prosecutors believed that a narcotics crime boss had on his person an Iknadosian pistol with a $35,000 diamond-studded map of Sinaloa on the butt of the gun when he was arrested.\textsuperscript{62}

The ATF brought the case to Arizona attorney general Terry Goddard, who investigated Iknadosian for over a year with the Phoenix Police Department.\textsuperscript{63} The department’s evidence against Iknadosian was extensive, and included his advice on sneaking weapons across the border: \textsuperscript{64} “When you guys buy them [guns], I run the paperwork, you’re ok, you’re gone. On my end, I don’t give a crap.”\textsuperscript{65} Moreover, his nine co-defendants all pled guilty in return for reduced charges and sentences.\textsuperscript{66} Judge Robert Gottsfeld dismissed the case, finding that the charges against Iknadosian were too severe, and that many of the sales were legitimate.\textsuperscript{67} Concerning the allegations that the guns were headed directly to Mexico after purchase, Judge Gottsfeld stated, “It’s a terrible problem. They have to do something about it.”\textsuperscript{68}

Persons involved in arms trafficking to drug cartels have not been entirely outside the reach of U.S. law enforcement.\textsuperscript{69} Yet the Iknadosian

\textsuperscript{58} Id.
\textsuperscript{59} See Wagner, supra note 56.
\textsuperscript{60} McKinley, supra note 6 (quoting Thomas G. Mangan, spokesman for the federal ATF).
\textsuperscript{61} Michel Marizco, Toxicity in Arms Trafficking, Law Enforcement Tech., Sept. 1, 2009, at 10, 14 (quoting ATF Agent William Newell) (“The officers ‘ran out of ammunition in the fight’ . . . . ‘They got overwhelmed.’”).
\textsuperscript{62} Id.
\textsuperscript{63} Grimaldi & Horwitz, supra note 1.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Wagner, supra note 56.
\textsuperscript{67} Marizco, supra note 61, at 14; see Grimaldi & Horwitz, supra note 1 (quoting Arizona Judge Robert Gottsfeld) (“There certainly was evidence that Iknadosian was selling to people who were not buying the guns for themselves, and that’s a class one misdemeanor.”).
\textsuperscript{68} Grimaldi & Horwitz, supra note 1 (quoting Arizona Judge Robert Gottsfeld).
\textsuperscript{69} See, e.g., United States v. Hernandez, 633 F.3d 370, 379 (5th Cir. 2011) (upholding a 97-month sentence for supplying the Zeta cartel with 103 firearms, 23 of which were military-
case highlights the problems associated with enforcing criminal sanctions within the context of Mexican gun trafficking.\footnote{See Grimaldi & Horwitz, supra note 1; McKinley supra note 6.} Specifically, a lack of tailored legislation makes convictions difficult.\footnote{See U.S. Gov't Accountability Office, supra note 13, at 38; Grimaldi & Horwitz, supra note 1.} Nevertheless, those opposed to gun control, including members of the powerful gun lobby, do not agree that more restrictions would curb drug violence in Mexico.\footnote{See Chris Cox, Mexico's Drug Wars: Will Gun Owners Be the Scapegoats?, Nat'l Rifle Ass'n Inst. for Legis. Action (Apr. 27, 2009), http://www.nraila.org/Issues/Articles/Read.aspx?id=354&Issue=014; Chris Hawley, Mexico Says Gun Controls Undermined by U.S. Laws, USA Today, Apr. 1, 2009, at 5A.} As one Mexican resident observed, “If the United States had a system like ours, we wouldn’t have so many problems here in Mexico.”\footnote{Id. (quoting Agustin Villordo, a Mexican resident of Puebla).}

II. Discussion

The high level of drug trafficking and the increasing violence has resulted in heightened efforts by both the U.S. and Mexican governments to disarm and dismantle DTO operations at the border.\footnote{See John Bailey, Combating Organized Crime and Drug Trafficking in Mexico: What Are Mexican and U.S. Strategies? Are They Working?, in Shared Responsibility, supra note 22, at 327–28, 340–41; Randal C. Archibold, National Guard Will Be Deployed at Border, N.Y. Times, May 25, 2010, at A1 (noting President Obama’s intention to seek increased spending on law enforcement to combat drug smuggling in response to bipartisan pressures).} Although the United States and Mexico have engaged in a variety of initiatives to address the gun smuggling problem, many have been unsuccessful because of structural problems or insufficient funding.\footnote{See U.S. Gov’t Accountability Office, supra note 13, at 57–58 (noting there has not even been a coordinated effort between U.S. agencies); Brewer, supra note 3, at 9 (“Yet an examination of the current Mexican and regional context leads to the conclusion that without a paradigm shift in design, the hundreds of millions of taxpayer dollars earmarked for the Mérida Initiative and other antidrug aid to Mexico will fuel a dysfunctional approach to public security.”); see also U.S. Dep’t of Justice, Office of the Inspector Gen., Evaluation & Inspections Div., I-2009-006, Interim Review of ATF’s Project Gunrunner 34 (Sept. 2009) (noting that the ATF’s resources are not utilized efficiently and the strategies for reviewing success of the program are insufficient).} Consequently, little headway has been made to reduce arms trafficking by "style assault rifles"; United States v. Gutierrez, 359 Fed. Appx. 540, 541–42 (5th Cir. 2010) (upholding sentence of 46 months for making materially false statements to a federally licensed firearms dealer).
The Mexican government under President Calderón employed the military to combat the DTOs. The United States has initiated programs to aid Mexico’s government, but there has not been consistent cooperation between U.S. and Mexican police and armed forces. Despite the attempted alliance between the two governments, arms trafficking has proliferated under the existing framework.

A. Gun Control in the United States

The United States has a strong policy favoring limited regulation of firearm ownership. At the federal level, the Gun Control Act of 1968 permits a wide range of purchasing and sale rights to licensed dealers, including rights to interstate and foreign transfer of weapons. The Act also places limits on who may own and purchase firearms. Additionally, it regulates the administration of federal permits to sell firearms, and in many instances, it allows licensed sellers to transport an unlimited number of weapons in interstate and foreign commerce without reporting those sales to federal authorities. Particularly relevant to arms trafficking, the Act makes it illegal for a licensed dealer to knowingly transfer weapons to an unlicensed person who lives out of state, yet it permits the sale of weapons to an unlicensed person if the transaction is completed at the dealer’s place of business. Similarly, under the Act it is illegal for any seller to transfer a firearm to a prohibited person, although the enforcement mechanisms are limited to li-

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77 See U.S. Gov’t Accountability Office, supra note 13, at 59 (recommending greater intelligence sharing and cooperation between the U.S. and Mexican governments).
78 Bailey, supra note 75, at 328 (“Its central logic was to employ the armed forces, principally the Army, to confront armed bands of criminals in selected locales in order to disrupt their activities and to buy time to implement a long menu of institutional reforms.”).
79 See id. at 340.
80 See Wright, supra note 4, at 369 (“It is largely the demand from the United States for drugs that makes the drug business profitable, and the United States’ commerce in firearms that makes the cartel business more deadly.”); U.S. Ambassador to Mexico Resigns, supra note 9 (noting the alliance between the United States and Mexico has been damaged due to the failure of the United States to stop arms trafficking to Mexico).
81 See McMann v. City of Tucson, 47 P.3d 672, 674 (2002) (describing Arizona state legislation intended to prevent the enactment of municipal gun control legislation); Sari Horwitz & James V. Grimaldi, Firearms Watchdog on Short Lease, Wash. Post, Oct. 26, 2010, at A1 (quoting an NRA fact sheet) (“Those who wonder what motivates American gun owners should understand that perhaps only one word in the English language so boils their blood as ‘registration,’ and that word is ‘confiscation.’”).
83 Id.
84 Id. passim.
85 Id. § 922(b)(3).
Censed dealers. As a result, the problem of illicit sales by unlicensed dealers falls outside the scope of the Act.

In addition to federal legislation, U.S. Second Amendment policy was recently redefined by the Supreme Court. In District of Columbia v. Heller, Justice Scalia reasoned that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” Only two years later, Heller was affirmed and the Second Amendment was incorporated against the states as an individual right in McDonald v. City of Chicago.

In Heller, the Court considered whether a District of Columbia prohibition on the possession of functional handguns in the home violated the Second Amendment. The ordinance also required that any lawfully owned firearms be kept unloaded and inoperable when not being used for recreational activities. The case arose after Dick Heller, a police officer in the District of Columbia, was denied a registration certificate for a handgun he desired to keep at home. Heller filed suit in District Court, seeking to enjoin the city from enforcing the handgun restrictions on Second Amendment grounds. After engaging in a lengthy analysis of the linguistics and history of the Second Amendment, the Court held that the District’s handgun ban amounted to a Second Amendment violation in that it forbids “use for protection of one’s home and family.”

Two years later, McDonald v. City of Chicago incorporated the individual right to keep and bear arms established in Heller to all fifty states. Heller addressed the issue within the confines of a federal en-

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86 See id. § 922(s), (t).
87 See id. § 922(s)(1)(A)(i)(II) (requiring only licensed sellers to perform background checks or verify the identity of buyer).
88 McDonald v. City of Chicago, 130 S. Ct. 3020 passim (2010); District of Columbia v. Heller, 554 U.S. 570 passim (2008) (outlining the debate of Second Amendment interpretation as either a right to maintain a militia or an individual right to own firearms, and resolving the debate as a right for individuals); Mark Tushnet, Permissible Gun Regulations After Heller: Speculation About Method and Outcomes, 56 UCLA L. Rev. 1425, 1432–33 (2009) (noting that the Court’s decisions have created a barrier to constitutional challenges of most federal gun regulations).
89 554 U.S. at 570.
90 130 S. Ct. at 3050–51.
91 554 U.S. at 573.
92 Id.
93 Id. at 574–75.
94 Id. at 575–76.
95 Id. at 628–29.
96 McDonald, 130 S. Ct. at 3026–27.
clave, and therefore did not address state firearm regulations. The case was filed against the city only hours after Heller came down, alleging that the Chicago ordinances were in violation of the Second and Fourteenth Amendments. The Court rejected the petitioner’s challenge under the privileges and immunities clause of the Fourteenth Amendment. Instead, the Court engaged in a selective incorporation analysis, ultimately determining that the “right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty.” The Court thus agreed with the petitioner’s contention that the law essentially prevented citizens from defend themselves, leaving them more susceptible to injury and gun-related crime. In the end, the Court held that the Second Amendment as recognized in Heller would be incorporated through the Due Process clause of the Fourteenth Amendment.

While the individual right to keep and bear arms is not without limits, it is also without a clear category of exception. Both Heller and McDonald recognize the necessity of governmental regulations in certain circumstances. Heller stressed that the right would not extend to every manner and purpose, and included a list of exceptions where prohibitions on ownership would be reasonable. The Court permits prohibitions for “presumptively lawful regulatory measures” without providing a standard for determining which regulations might fit into that category. The Court did not elucidate a standard for evaluating gun regulations, instead reasoning that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if those exceptions come before us.”

Overall, Heller addresses the individual right to carry arms for the purpose of self-defense. Therefore, it is unlikely that Heller or McDonald would prohibit certain regulations aimed at reducing drug traffick-
While the Court in *Heller* seemed to apply a strict-scrutiny analysis to regulations aimed at restricting law-abiding person’s access to weapons, a regulation only peripherally related to the individual’s access to weapons would probably receive only intermediate scrutiny. This would likely include laws aimed at gun-trafficking, which might include registration requirements, or increased efforts to funnel sales through regulated, licensed sellers.

One relevant issue to be addressed in the future will be the constitutionality of regulations requiring registration of guns by the federal government. The federal government’s inability to trace firearms has hampered policing of gun trafficking. Yet gun-rights advocates are wary of registration requirements and the “slippery slope” from registration to confiscation. *Heller* suggests that registration requirements will be constitutional so long as they do not amount to a complete ban.

Firearms are further regulated at the state level. All states operate under federal gun control laws, but it is within their discretion to enhance those regulations with additional requirements for background checks and dealer inspections by state officials. Some states, including those along the southwestern border, have opted not to enact additional regulations, and therefore have relatively limited gun control laws.

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109 See id. at 626–29 (noting that although a complete ban on handguns is unconstitutional, other regulations would likely withstand a Second Amendment challenge).
110 See id. at 626–27, 634–35 (noting that the Second Amendment right is not unlimited, but also that it is not to be subject to a “freestanding ‘interest-balancing’ approach”); U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (finding that government regulations concerned with constitutional rights will be subjected to heightened scrutiny).
112 See Tushnet, supra note 88, at 1436.
114 See Tushnet, supra note 88, at 1436 (“The slippery slope to gun confiscation is not quite as slippery after *Heller*, though gun-rights proponents can continue to argue that there is still some grease in the slope.”).
115 See id.; *Heller*, 554 U.S. at 626–27.
116 See Mayors Against Illegal Guns, The Movement of Illegal Guns in America Report 3 (2008) (“The key finding of this report is that states that supply crime guns at the highest rates have comparatively weak gun regulations.”).
117 Id. at 2.
118 Id; see Fredrick Kunkle, Gun Toting Soccer Moms a Scary Thought in D.C. Area, but Not out West, Wash. Post, Aug. 18, 2010, available at http://www.washingtonpost.com/wpdyn/content/article/2010/08/17/AR2010081705427.html (quoting Hildy Saizow, President of Arizonans for Gun Safety) (“Out here in the Southwest, it’s really a Wild West mentality,
This is perhaps not surprising, as many residents in those states place special emphasis on a broad reading of the Second Amendment, and prefer relaxed restrictions on firearms.\textsuperscript{119} In fact, an individual right to keep firearms was recognized in state constitutions in Arizona and Texas, long before the Court’s decision in \textit{Heller}.\textsuperscript{120}

In general, states implicated in arms trafficking to DTOs, including Arizona and Texas, have done little to augment federal regulations on selling weapons.\textsuperscript{121} Moreover, state regulations in Arizona and Texas do not include provisions on registration, or bans on assault weapons.\textsuperscript{122} For example, Arizona permits the sale of high-caliber assault rifles to American citizens who present identification without requiring dealers to report those sales to the government.\textsuperscript{123} Similarly, Texas law makes sales of handguns illegal only if the seller “knowingly” transfers the weapon to a person who intends to use that weapon unlawfully.\textsuperscript{124} Gun regulations in the border states ensure that citizens can own weapons with very few restrictions.\textsuperscript{125}

\textbf{B. Gun Control in Mexico}

In contrast, Mexico has adopted particularly strict gun control laws.\textsuperscript{126} Currently, there is only one firearm store in the entire country; it is located in Mexico City, and operated by the military.\textsuperscript{127} In order to obtain a permit to own a firearm, a person must apply at a military base, and demonstrate that he: (1) lives an honest life; (2) has com-

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\textsuperscript{119} See McKinley, \textit{supra} note 6 (noting an alleged arms dealer engaged in illegal trafficking moved to Arizona to take advantage of the more lenient laws); Vick, \textit{supra} note 15.

\textsuperscript{120} Volokh, \textit{supra} note 11, at 193, 203.

\textsuperscript{121} See Kunkle, \textit{supra} note 118 (comparing the strict handgun restrictions in the D.C. to those in Arizona, which require only a computerized background check to obtain a handgun).


\textsuperscript{123} Tex. Penal Code Ann. § 46.06(a)(1) (West 1997).

\textsuperscript{124} See Hawley, \textit{supra} note 72; Kopel, \textit{supra} note 18, at 6–7.

\textsuperscript{125} Kopel, \textit{supra} note 18, at 6.
pleted any required military service; (3) has not been convicted of any crimes involving weapons; and (4) does not use any drugs. To receive a permit, a person must also show that he has a justifiable reason for owning a weapon. Unless the person obtains a permit for use as a governmental employee, he must have his permit reissued every two years. Additionally, private ownership is limited to low-power firearms, primarily those smaller than .22 caliber. Anyone who uses or sells a weapon of a higher caliber, specifically those restricted for military use, may face a prison sentence of up to thirty years. In contrast to U.S. regulations, Mexico has established a national registry for firearms, and requires that all weapons be reported to the government for inclusion in a database.

In an effort to enhance its own laws and reduce arms imported from the United States, the Mexican government has attempted to increase its involvement with U.S. security officials along the border. To control the influx of weapons, the Mexican government has focused on seizing illegal weapons, engaging in raids of property associated with drug traffickers and inspecting incoming vehicles. Additionally, in 2009, the Mexican government aided U.S. tracing efforts by submitting an extensive list of firearms to the ATF’s U.S. database for use in discerning trafficking patterns. Even in light of the strict Mexican regulations and international cooperation, ATF officials and Mexican authorities predict that the DTOs will continue to import weapons from U.S. dealers along the border. One ATF special agent observed that the relative ease of acquiring guns in the United States as compared to Mexico will encourage DTO members to continue to travel north across the border to purchase firearms.

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129 Id.

130 Id. art. 25.

131 See Kopel, supra note 18, at 6.

132 Ley Federal de Armas de Fuego y Explosivos, art. 84.

133 Astorga, supra note 44, at 2.

134 Goodman & Marizco, supra note 22, at 177–79.

135 Id.

136 Id. at 169.

137 Grimaldi & Horwitz, supra note 1.

138 Id.
C. Effect of the Conflicting Policies

Despite strict Mexican regulations, buyers are nevertheless able to acquire and import the weapons they desire from U.S. arms dealers.\textsuperscript{139} Although the Mexican government granted only 4300 licenses that allow persons to carry firearms outside of their homes, between 2004 and 2008 over 20,000 guns were seized and traced to the United States.\textsuperscript{140} In fact, it is estimated that 2000 weapons are brought into Mexico each day from the United States.\textsuperscript{141} Likely, the individuals Mexico aims to exclude from permitted gun ownership—those involved in drugs and crime—are those most likely to obtain a weapon illegally from the United States.\textsuperscript{142} For these reasons, Mexican officials have described the illicit arms market as the most important domestic crime problem, and the primary threat to Mexican national security.\textsuperscript{143}

Certain U.S. regulations directly facilitate sales to individual DTO members, and thus operate in direct conflict to Mexican attempts to reduce DTO access to firearms.\textsuperscript{144} For example, ATF officials are only permitted to inspect individual gun stores once a year without a warrant.\textsuperscript{145} Because there are nearly 7000 gun dealers along the border, few stores are inspected even annually.\textsuperscript{146} Although licensed dealers are required to inform state or local law enforcement if a non-licensed person purchases more than one handgun within a five day period, there is no similar requirement for assault rifles.\textsuperscript{147} Moreover, sales by unlicensed dealers are in large part unregulated.\textsuperscript{148} Lastly, ammunition

\textsuperscript{139} See Hawley, supra note 72 (quoting Lt. Col. Raúl Manzano Vélez, Director of Civilian Gun Sales in Mexico) ("I would dare say that Mexico has some of the strictest regulations about gun ownership in all the world, and we’re right next to a country . . . that has some of the easiest ones. . . . That creates a huge vacuum between the countries and feeds weapons trafficking.").

\textsuperscript{140} U.S. Gov’t Accountability Office, supra note 13, at 15.

\textsuperscript{141} Hendrix, supra note 7, at 108.

\textsuperscript{142} See U.S. Gov’t Accountability Office, supra note 13, at 23–24 (noting that most arms trafficked into Mexico end up in the hands of the cartels).

\textsuperscript{143} Id. at 10.

\textsuperscript{144} See Goodman & Marízcó, supra note 22, at 195–98 (summarizing certain U.S. regulations that present a contrast to Mexican regulations within the arms trafficking context).

\textsuperscript{145} Id.

\textsuperscript{146} See U.S. Gov’t Accountability Office, supra note 13, at 20 (noting that there are over 6700 gun stores along the border); Astorga & Shirk, supra note 27, at 47–48.

\textsuperscript{147} See Goodman & Marízcó, supra note 22, at 198 (noting that these measures are generally unenforceable without a registration system that would provide an enforcement mechanism).

\textsuperscript{148} Id.
sales, which occur far more frequently than sales of weapons, are also generally unmonitored.\textsuperscript{149}

Mexican officials have appealed to U.S. officials for reinstatement of the assault weapons ban\textsuperscript{150} that expired in 2004.\textsuperscript{151} Mexican President Felipe Calderón suggested that increased violence in Mexico can be correlated with greater access to high-power assault weapons.\textsuperscript{152} In fact, one state along the border, Chihuahua, has seen a 1800 percent increase in murders between 2007 and 2010.\textsuperscript{153} The availability of these weapons has also negatively impacted Mexican law enforcement, as many officers are not equipped to combat the high-caliber guns employed by the cartels.\textsuperscript{154} Much of the Mexican police force is armed with older, low caliber weaponry and lacks body armor; it is thus unable to control the virtually militarized DTOs.\textsuperscript{155} The severe imbalance in firepower has necessitated the use of the Mexican military, as the police force has been rendered inoperable.\textsuperscript{156}

Although buyers can legally obtain firearms in the United States, many weapons are also available from illegal, unregulated sources.\textsuperscript{157} In actuality, it appears that few federally-licensed dealers engage in firearm trafficking, suggesting that many “crime guns,” or those suspected to have been used in a crime, come from other, illicit sources.\textsuperscript{158} Policing these weapons is generally done through a system known as “e-Trace,” that permits authorities to follow the movement of a weapon from a manufacturer or importer to a first purchaser.\textsuperscript{159} Serial numbers or

\begin{itemize}
\item Id.
\item Knowlton, \textit{supra} note 150.
\item Miglierini, \textit{supra} note 34.
\item See Goodman & Marizco, \textit{supra} note 22, at 185–87.
\item See id.
\item See Bailey, \textit{supra} note 75, at 327; Grimaldi & Horwitz, \textit{supra} note 1 (quoting Mexican Ambassador to the United States, Arturo Sarukhan) (“We need to defang drug trafficking organizations of these highcaliber and semiautomatic and automatic weapons and we need to do it now.”).
\end{itemize}
other information about the weapon is submitted to the ATF’s National Tracing Center to determine the original source of the weapon.\textsuperscript{160} Mexico has submitted weapons to the United States for tracing—between 2004 and 2008, the ATF was able to determine the original source of the weapon for only 52 percent of tracing requests.\textsuperscript{161}

Tracing the number and type of weapons used by the Mexican DTOs has proved difficult under current U.S. regulations.\textsuperscript{162} Although the ATF has increased its use of traces on crime guns, the data remains incomplete because it does not account for all weapons used in Mexico; it instead accounts only for weapons both seized by authorities and submitted for trace.\textsuperscript{163} This has proven to be an obstacle to policing those involved in arms smuggling because officials are unable to discern clear trafficking patterns that might be useful for making arrests and seizing weapons.\textsuperscript{164} It is likely, however, that the ATF will be forced to continue to operate with limited tracing data, as the gun lobby has expressed strong opposition to the creation of a national database.\textsuperscript{165}

Moreover, the firearm purchases are generally made by “straw purchasers,” individuals with clean background records who are paid by representatives of various DTOs to purchase firearms.\textsuperscript{166} The use of straw purchasers insulates the actual owner from the transaction by concealing his identity.\textsuperscript{167} Thus, the problems presented by a limited ability to trace a weapon are compounded by an inability to identify the ultimate owner in many firearm sales.\textsuperscript{168}

Project Gunrunner is the ATF initiative targeted specifically at reducing firearms trafficking to Mexico, yet it has been hampered by its reliance on incomplete tracing data.\textsuperscript{169} In implementing this project, the ATF analyzes data from crime guns supplied by the Mexican government.\textsuperscript{170} One operation under Project Gunrunner, known as “Fast and Furious,” attempted to use e-Trace to establish links between

\begin{footnotesize}
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\item See \textit{U.S. Gov’t Accountability Office}, \textit{supra} note 13, at 14 n.10.
\item See id.
\item McKinley, \textit{supra} note 19.
\item \textit{U.S. Gov’t Accountability Office}, \textit{supra} note 13, at 16; Goodman & Marizco, \textit{supra} note 22, at 177–78.
\item See \textit{U.S. Gov’t Accountability Office}, \textit{supra} note 13, at 25–27.
\item See Hornstein & Grimaldi, \textit{supra} note 77.
\item \textit{U.S. Gov’t Accountability Office}, \textit{supra} note 13, at 21.
\item See \textit{U.S. Dep’t. of Justice}, \textit{supra} note 27, at 16.
\item See id.
\item See \textit{U.S. Gov’t Accountability Office}, \textit{supra} note 13, at 25–26 (noting that ATF does not always have access to trace data within a timeframe that would be most helpful); \textit{U.S. Dep’t of Justice}, \textit{supra} note 76, at 2–3.
\item \textit{U.S. Gov’t Accountability Office}, \textit{supra} note 13, at 25–26.
\end{enumerate}
\end{footnotesize}
weapon purchases and high ranking members of the cartels.\textsuperscript{171} ATF officials in Phoenix spent nearly $650,000 on just over 1000 weapons and permitted “gunwalking,” or allowing known straw purchasers to make the firearm sales.\textsuperscript{172} Tracing after the sale proved difficult, however, as ATF officials in Mexico were only able to learn of weapons seizures through public sources like newspapers, and could only access weapons for a few days following seizure before the Mexican military locked the guns in a vault.\textsuperscript{173} The operation ended after an ATF agent was killed by one of the weapons associated with the program.\textsuperscript{174}

In order to bolster individual domestic initiatives, the United States and Mexico agreed on a support package largely focused on providing military assistance and financial aid for Mexican security forces.\textsuperscript{175} The Mérida Initiative signed in 2007 by Mexican President Felipe Calderón and President George W. Bush, promised $400 million in aid in the first year, with an estimated total payment of over $1 billion over three years.\textsuperscript{176} The initiative represents an international complement to U.S. domestic efforts to reduce demand for illegal drugs, halt the trafficking of firearms and weapons, and prosecute criminals engaged in drug trafficking.\textsuperscript{177} Additionally, the initiative aims to support law enforcement to improve public security, and to strengthen the Mexican judicial structure and rule of law.\textsuperscript{178} One objective of this program is to reduce the U.S. demand for drugs in an effort to curtail the growth of some of these organizations.\textsuperscript{179} The ultimate success of the Mérida Initiative is questionable, however, as drug related killings have dramatically increased in the years since its signing.\textsuperscript{180} In March 2010, the initiative was revised to address this violence by increasing funding for civilian police training and reducing military technical assistance.\textsuperscript{181}

\textsuperscript{171} Horwitz, \textit{supra} note 113.
\textsuperscript{172} U.S. Dep’t of Justice, \textit{supra} note 113, at 25–26; Horwitz, \textit{supra} note 113.
\textsuperscript{173} U.S. Dep’t of Justice, \textit{supra} note 113, at 16, 22; Horwitz, \textit{supra} note 113.
\textsuperscript{174} U.S. Dep’t of Justice, The Department of Justice’s Operation Fast and Furious: Accounts of ATF Agents 43–44 (2011); Horwitz, \textit{supra} note 113.
\textsuperscript{175} Brewer, \textit{supra} note 3, at 9.
\textsuperscript{176} Id.; The Mérida Initiative: Fact Sheet, \textit{supra} note 7.
\textsuperscript{177} The Mérida Initiative: Fact Sheet, \textit{supra} note 7.
\textsuperscript{178} See Hendrix, \textit{supra} note 7, at 112.
\textsuperscript{179} See id.
\textsuperscript{180} See Brewer, \textit{supra} note 3, at 10. \textit{But} see Hendrix, \textit{supra} note 7, at 110 (“With the Mérida Initiative, the old ‘name and blame’ game has receded to the past, and has been replaced with a new security partnership based on collaboration and mutual respect.”).
III. Analysis

The violence associated with drug trafficking now threatens every aspect of Mexico’s national security.\textsuperscript{182} DTOs have infiltrated Mexican government and law enforcement using threats and bribery,\textsuperscript{183} and have maintained economic growth in the face of a financial downturn.\textsuperscript{184} The “politically savvy” DTOs have forced the Mexican government to engage military forces to battle the heavily armed cartels, as traditional forms of law enforcement have been ineffective.\textsuperscript{185} These organizations have risen to a level of power never before seen in the Mexican criminal context, and are expanding to create a threat to the international community.\textsuperscript{186} Despite the fact that criminal law is traditionally a domestic matter,\textsuperscript{187} such a limitation in this context has inhibited the ability of the Mexican government to reduce the levels of violence, and has contributed to a staggering death toll.\textsuperscript{188} As such, the failure of the United States and Mexico to create an international solution virtually guarantees that the arms trafficking problem and the associated violence will continue.\textsuperscript{189}

\textsuperscript{182} See Bailey, supra note 75, at 327 (“What in the past had been a chronic but tolerable problem of public security has passed the tipping point to become a genuine threat to national security and democratic governance.”).

\textsuperscript{183} Cf. id. at 331 (noting that part of President Calderón’s strategic plan to address the DTOs is to purge corrupt people from the Mexican police force).

\textsuperscript{184} See id. at 327; Kopel, supra note 18, at 12 (noting that Mexican cartels earn approximately twenty-five billion dollars in revenue a year, which amounts to two percent of the gross domestic product of Mexico).

\textsuperscript{185} See Bailey, supra note 75, at 327; Wright, supra note 4, at 368 (“The government’s plan . . . led some to predict a prolonged violence in the country with little or no gains in public order.”).

\textsuperscript{186} Bailey, supra note 75, at 327.

\textsuperscript{187} See Jenia Iontcheva Turner, Transnational Networks and International Criminal Justice, 105 Mich. L. Rev. 985, 986 (2007) (“[I]nternational criminal law has largely been enforced at either the purely domestic or the international level.”).

\textsuperscript{188} See Louis Michael Seidman, Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State, 7 J. CONTEMP. LEGAL ISSUES 97, 102–03 (“The key insight is that government inaction is just as likely to limit freedom as government action.”); Turner, supra note 187, at 989 (“While international crimes often do not create externalities for powerful states, the argument that the international community must act to prevent and punish international crimes has deep moral resonance.”); Miglierini, supra note 34 (suggesting that the death toll associated with Mexican drug violence is now over 34,000).

\textsuperscript{189} See William J. Aceves, The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice, 17 U. PA. J. INT’L ECON. L. 995, 1004 (1996) (“By developing a relationship that recognizes the importance of dynamic responses to change, the parties can establish a mutually reinforcing relationship that can resolve disputes as well as new issues.”); Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599, 2602 (1997) (“[T]he modern transformation of sovereignty has made interna-
A. The Importance of International Cooperation: A Brief Digression into the Cross Border Pharmaceutical Trade

In a global economy, domestic regulatory schemes are subject to influence and arbitrage from competing policies abroad. The consequences of this modern dilemma are evident in the illegal pharmaceutical trade between the United States and Mexico. U.S. citizens are able to purchase pharmaceuticals in Mexico, or online from Mexican distributors, at a much lower cost than in the United States, and are not required to report those purchases under U.S. law. The pharmaceutical market has evolved in a remarkably parallel fashion to the illegal arms market, as Mexican cities near the border host nearly ten times as many pharmacies as exist in comparably sized cities across the border. The importation of pharmaceuticals through unregulated channels has grown enormously, and threatens to compete with drugs available in the legal prescription market. The Food and Drug Administration (FDA) has extensive regulations designed to protect people and markets from illegal or counterfeit drugs, yet those rules only apply to those who willingly subject themselves to the intended regulatory system. In other words, the regulatory scheme is not equipped to address the growing market for drugs imported across the border. The wide availability of drugs in Mexico suggests that the “grey market” of pharmaceutical drugs will continue to proliferate, undermining the efforts of the FDA. The extensive regulatory scheme prohibiting the importation of pharmaceuticals is thus likely to become extraneous as consumers are able to purchase drugs at a lower cost abroad.

The pharmaceutical trade affects more than just the ability of U.S. citizens to access drugs. Pricing mechanisms in individual countries

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190 Cf. deKieffer, supra note 25, at 322 (“The volume of undocumented prescription drug imports from Mexico . . . [has] severely damaged the regulatory regime of the Food and Drug Administration.”).
191 See id.
192 Id. at 321–22.
193 Id. at 322–23.
194 Id. at 325.
195 Id. at 327–28.
196 See deKieffer, supra note 25, at 328.
197 See id. at 327–29.
198 See id. at 329.
199 See Kevin Outterson, Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets, 5 Yale J. Health Pol’y L. & Ethics 193, 195–96
reflect an internal regulatory attitude: some systems impose higher prices to facilitate research, while others offer drugs at lower prices to improve access.\textsuperscript{200} The concern is that a divergence from the intended policy may undermine high-price regulatory systems and reduce financial support for research and development, which may in turn threaten the ability to provide low cost drugs to benefit low income countries in the future.\textsuperscript{201} Although current patients may thus benefit from lower priced drugs, the quality of future medicine may be sacrificed due to the reduced revenue available for research.\textsuperscript{202} As such, the deliberate attempt to create a regulatory structure to promote domestic interests may be rendered irrelevant by the flowering grey market of pharmaceutical drugs.\textsuperscript{203}

In the present instance, Mexican attempts to restrict access to weapons will be similarly undermined.\textsuperscript{204} Drug and arms traffickers will continue to take advantage of the disparities in legal systems, trading illegal narcotics for guns across the border between the United States and Mexico.\textsuperscript{205} To prevent Mexican gun control laws from meeting the same fate as FDA regulations in the prescription drug context, the United States ought to consider the international implications of its domestic gun policy.\textsuperscript{206}

Where issues with international implications are presented, combining international and domestic considerations is difficult because of the inherent self-interest employed by nation-states in the international

\textsuperscript{200} Id. at 195.
\textsuperscript{201} Id. at 195–96.
\textsuperscript{202} Id. at 219.
\textsuperscript{203} See id. at 196 (“So long as R&D costs continue to be partially funded by sales revenues, the conventional wisdom holds that pharmaceutical arbitrage is a major threat to both differential pricing and innovation. Preventing pharmaceutical arbitrage from low income markets to high income markets is generally viewed as the linchpin of this analysis.”).
\textsuperscript{204} See ASTORGA, supra note 44 (“Mexico and the United States must reinforce, without fail, cooperation among institutions that deal with weapons trafficking . . . given that the disappearance of weapons is not a realistic scenario and the weapons manufacturers and vendors, as well as the traffickers, are not about to impose self-regulations.”); deKieffer, supra note 25, at 329 (noting that the FDA regulations have been rendered irrelevant).
\textsuperscript{205} See U.S. Gov’t Accountability Office, supra note 13, at 58; Zagari, supra note 24, at 511 (“Either [nation-states] will be able to adapt their conception of international organizational theory to account for and counter new international criminal actors, or they will eventually find themselves unable to effectively counter corrupt practices.”).
\textsuperscript{206} Cf. Koh, supra note 189, at 2602; Morais, supra note 23, at 626 (“[T]he disparities in the legal provisions of national laws between different jurisdictions pose serious practical problems for law enforcement. . . . One unfortunate consequence of such disparity in laws is that it provides an opportunity for criminals to engage in regulatory arbitrage.”).
sphere.\textsuperscript{207} State governments are charged with protecting the interests of those within their borders, so any conflicting interests have the potential to impede international cooperation.\textsuperscript{208} Within issues of domestic significance, contemplation of international obligations is often avoided by the United States due to a fear that such considerations would result in damage to U.S. sovereignty.\textsuperscript{209} Additionally, courts fear that application of international law threatens the separation of powers by encouraging the judiciary to enter into foreign affairs or other areas traditionally vested in the other two branches.\textsuperscript{210}

The use of foreign law in areas of constitutional interpretation has been severely criticized.\textsuperscript{211} Justice Scalia discouraged the Court’s consideration of international practices, noting that “views of other nations . . . cannot be imposed upon Americans through the Constitution.”\textsuperscript{212} Even in cases related to U.S. treaties, the Court has been reluctant to consider the foreign court’s interpretation of treaty provisions.\textsuperscript{213} Thus, in the present case, it is extremely unlikely that the courts or the legislature would consider the Mexican gun problem when defining Second Amendment policy or ownership rights.\textsuperscript{214}

Yet the importance of considering the potential international implications of domestic regulations and policy should not be understated.\textsuperscript{215} The modern world is experiencing a trend toward globaliza-

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\item \textsuperscript{207} See Aceves, supra note 189, at 1000 (“Studies of international cooperation examine the problem of developing cooperative behavior among egoistic actors and maintaining such collaboration under conditions of anarchy.”).
\item \textsuperscript{208} See id. at 1017 (suggesting that transaction costs present in international agreements may impede the development and operation of cooperative structures).
\item \textsuperscript{209} See id.; Austen L. Parrish, Reclaiming International Law, 93 Minn. L. Rev. 815, 815–16 (2009) (“[I]nternational law poses a threat to democratic sovereignty, and in turn to American culture and uniqueness.”); Milena Sterio, The Evolution of International Law, 31 B.C. Int’l & Comp. L. Rev. 213, 222 (2008) (“Historically, jurisdiction was conceived as the sovereign’s power within a defined territory to impose and enforce its laws on its subjects and in its judicial organs. Today, however, jurisdiction in international law is mostly extraterritorial.”).
\item \textsuperscript{210} See Donald Earl Childress, Comity as Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. Davis L. Rev. 11, 15 (2010).
\item \textsuperscript{211} See Parrish, supra note 209, at 825 (“Plenty of scholarship questions whether international law and institutions are consistent with the U.S. constitution and principles of democratic sovereignty.”).
\item \textsuperscript{212} Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J. dissenting).
\item \textsuperscript{214} See Atkins, 536 U.S. at 348 (Scalia, J. dissenting); Parrish, supra note 209, at 825.
\item \textsuperscript{215} See Turner, supra note 187, at 987–88 (“Transgovernmental networks could offer an effective response to the ‘globalization paradox’ in international criminal law.”).
\end{itemize}
tation and away from explicit national sovereignty. Such globalization entails inter-reliance in business, economy, policy and crime. The international economy permits regulations to be subject to arbitrage and exploitation, suggesting that nations ought to consider the global effect of domestic regulations. In the present instance, Mexican gun control regulations have been ineffective because of conflicting restrictions in the United States in the same way U.S. FDA regulations were undermined by the availability of pharmaceutical drugs in Mexico.

B. War in the War on Drugs

In 2009, President George W. Bush spoke with Guatemalan President Oscar Berger concerning the relationship between the U.S. demand for drugs and the Central American source of drugs. President Bush stated, “Our countries are working together to fight transnational gangs. . . . You’ve got to understand that these gangs are able to move throughout Central America and up through Mexico into our own country, and therefore, we’ve got to think regionally and act regionally.”

Within the United States, however, the debate over gun control reform has been internally focused—simultaneously highly polarized and muddled with conflicting interpretations of existing authorities. Nevertheless, nearly all states with a constitutional provision for firearms

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216 See Koh, supra note 189, at 2631.
217 See Morais, supra note 23, at 584 (“It is a sorry testament to the state of affairs in the world today that the term [international crime] now encompasses a much wider range of international crimes such as drug trafficking, money laundering, terrorism, the financing of terrorism, corruption, trafficking in women and children, tax evasion and cyber crime.”).
218 See Morais, supra note 23, at 626.
219 See deKieffer, supra note 25, at 329; Sheridan, supra note 55.
220 See Hendrix, supra note 7, at 110 (quoting President George W. Bush).
221 Id.
222 See Erwin Chemerinsky, Putting the Gun Control Debate in Social Perspective, 73 Fordham L. Rev. 477, 481 (2004) (“Society is obviously deeply divided over the issue of gun control and the meaning of the Second Amendment.”); Robert A. Creamer, Note, History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment, 45 B.C. L. Rev. 905, 906 (2004) (“To a startling degree, both sides cite the same case law, history, and other authorities to support their views.”); see also U.S. Gov’t Accountability Office, supra note 13, at 45–46 (noting that cooperative efforts between U.S. and Mexican agencies has been limited); cf. Parrish, supra note 209, at 818 (“In the last two decades, the United States has disengaged from the traditional sources of international law, declining to enter into multilateral conventions or undertake new international legal obligations.”).
have explicitly allowed for an individual right of ownership.\textsuperscript{223} This suggests that the individual right to own guns is closely held—perhaps particularly so by citizens residing near the Mexican border—and thus regulation will not be enacted without opposition.\textsuperscript{224}

Arms trafficking to DTOs will likely continue without a foundational change in U.S. or international drug and firearm policy.\textsuperscript{225} In 2007, over 24,000 people died in the United States as a result of drugs.\textsuperscript{226} Mexico’s homicide rate is currently more than three times the world average.\textsuperscript{227} Moreover, despite qualms about revising constitutional rights based on foreign impact\textsuperscript{228} the violence is no longer simply contained within Mexico.\textsuperscript{229} In addition to many domestic murders and kidnappings, the U.S. government has cited the DTOs as a potential threat to national security.\textsuperscript{230} Practically, then, it appears that the United States may be providing the framework to arm the most prolific criminal organizations in history.\textsuperscript{231}

Regulations targeted at reducing trafficking or sales to known DTO members would likely withstand challenge under \textit{Heller} or \textit{McDonald}.\textsuperscript{232} Each case reserves discretion for police and national security issues by permitting certain types of regulations to stand despite potential infringement on Second Amendment rights.\textsuperscript{233} Regulations

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\item \textsuperscript{223} See Chemerinsky, \textit{supra} note 222, at 478 (outlining the debate between liberals and conservatives over the interpretation of the scope of the Second Amendment); Volokh, \textit{supra} note 11, at 192.
\item \textsuperscript{224} See Tufte, \textit{supra} note 14, at 342 (“Both men and women, young and old, can and do carry handguns concealed on their person . . . [and] feel that is is a right guaranteed to them by the Arizona Constitution that ‘shall not be impaired.’”).
\item \textsuperscript{225} See id.; see Zagaris, \textit{supra} note 24, at 465 (“While states can act on collective interests without institutions or formal organizations, institutionalization can strengthen collaboration that is more sustainable and dependable than under \textit{ad hoc} measures, with a view towards consistent cooperation and collaboration.”).
\item \textsuperscript{226} Hendrix, \textit{supra} note 7, at 107.
\item \textsuperscript{227} Id. at 111–12.
\item \textsuperscript{228} See Cox, \textit{supra} note 72 (noting that the blame of violence ought to be placed on the Mexican government or the cartels themselves, and should not amount to a restriction on gun ownership in the United States).
\item \textsuperscript{229} See Arabit & McMahon Testimony, \textit{supra} note 50; Archibold, \textit{supra} note 51.
\item \textsuperscript{230} Archibold, \textit{supra} note 51.
\item \textsuperscript{231} Calderon: Mexico Drug Gangs Seek to Replace State, BBC News (Aug. 5, 2010), http://www.bbc.co.uk/news/worldlatinamerica10857156.
\item \textsuperscript{232} See McDonald v. City of Chicago, 130 S. Ct. 3020, 3047–48 (2010) (noting that not all state gun control laws are presumptively unconstitutional); District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (reasoning that many gun regulations are presumptively lawful).
\item \textsuperscript{233} See McDonald, 130 S. Ct. at 3047–49; \textit{Heller}, 554 U.S. at 626–27; see also U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (outlining different levels of scrutiny to be applied by the Court when addressing regulations concerning fundamental or constitutional rights).
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that do not amount to a total ban on access to usable weapons, or those that are tangentially related to ownership by U.S. citizens are thus likely to withstand constitutional challenge. Still, any U.S. regulation aimed at decreasing arms trafficking to Mexico would have to be sufficiently tailored to fit within the social context of the strong preference for permitting ownership of firearms.

The originalist analysis in both *Heller* and *McDonald* of the Second Amendment lend little support to an argument against passing regulations restricting access to weapons by those involved in DTOs because such a restriction would not be related to a U.S. citizen’s ability to own a gun. Practically, it is the current regulations, permitting access to weapons, that defines the scope of the Second Amendment right. After *Heller*, it is understood to mean an individual right to carry a weapon for self-defense; and most gun control regulations are primarily concerned with uses for other reasons. In some regard, this ought to lessen concerns about too much government oversight of gun-owners by conceding that ownership is no longer related to the creation of an anti-government militia. Registration requirements need not be instinctively distrusted, or thought to be prelude to confiscation.

Regulations prohibiting a foreign citizen from bypassing his own country’s laws are neither prohibited nor informed by the Second Amendment.

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235 See U.S. Gov’t Accountability Office, *supra* note 13, at 24 (“[R]elevant law enforcement officials we met with noted certain provisions of some federal firearms laws present challenges to their efforts to address arms trafficking.”).

236 See *McDonald*, 130 S. Ct. at 3042–43; *Heller*, 553 U.S. at 628.

237 See *Astorga*, *supra* note 44, at 2 (“The importance of the U.S. weapons industry . . . make[s] the United States the ideal market to obtain weapons of war . . . .”). Chemerinksy, *supra* note 222, at 481 (“The point is that the meaning of the Second Amendment is not determined by the application of constitutional theory or interpretive methodologies. It is the product entirely of the values and politics of the individual . . . .”); Cox, *supra* note 72 (“That’s right Mexico. Anti-gun activists and politicians are already planning to make gun bans, gun sales restrictions and even licensing and registration a part of their ‘solution’ to Mexico’s problems.”).

238 See *Heller*, 553 U.S. at 626–27.

239 See id.; Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1350 (noting that, had the *Heller* Court determined the Second Amendment right related to a militia, it would have been forced to strike down the regulations for being inconsistent with that goal, and concluding that such a holding would have been very difficult); Tushnet, *supra* note 88, at 1436 (noting that registration requirements are likely constitutional).

Amendment.\textsuperscript{241} Moreover, a person has no Second Amendment right to sell illegal guns, or to sell to prohibited persons.\textsuperscript{242} A right of access to high-power weapons by straw purchasers, and an ability to sell illegal weapons without risk of prosecution is therefore not defined by the Second Amendment, but merely by a lack of enforcement mechanisms.\textsuperscript{243} The problem of DTO access to weapons is thus not permitted by the Second Amendment, rather, it often carries on in spite of it.\textsuperscript{244}

One operation aimed at reducing arms trafficking highlights the inability of law enforcement to effectively trace or halt the trafficking of weapons.\textsuperscript{245} Operation Fast and Furious involved an attempt to trace weapons to cartel members who purchased guns from undercover ATF agents.\textsuperscript{246} Poor execution, an inadequate statutory framework, and ineffective enforcement mechanisms ensured that the operation ended in tragic failure.\textsuperscript{247} Despite the fact that Congress has been unwilling to strengthen gun-control laws, it has expressed outrage at the idea that the government was supplying DTO members with weapons.\textsuperscript{248} Yet with

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  \item \textsuperscript{241} See U.S. Const. amend. II; Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda, 56 UCLA L. Rev. 1443, 1513–15 (2009) (outlining possible interpretations of a “right of the people” in the Second Amendment to determine whether bans on gun ownership by noncitizens are constitutionally valid); cf. McDonald, 130 S. Ct. at 3047–49; Heller, 554 U.S. at 626–27; Hawley, supra note 72 (quoting Lt. Col. Raúl Manzano Vélez, Director of Civilian Gun Sales in Mexico) (“I would dare say that Mexico has some of the strictest regulations about gun ownership in all the world, and we’re right next to a country . . . that has some of the easiest ones . . .”).
  \item \textsuperscript{242} See U.S. Const. amend. II; Heller 554 U.S. at 626–27; cf. Grimaldi & Horwitz, supra note 1 (quoting Arizona Judge Robert Gottsfeld) (“There certainly was evidence that [arms dealer] Ikadosian was selling to people who were not buying the guns for themselves, and that’s a [only a] class one misdemeanor.”).
  \item \textsuperscript{243} See Grimaldi & Horwitz, supra note 1; James V. Grimaldi, ATF Faces Federal Review over Tactics to Foil Gunrunning Rings, Wash. Post, Mar. 10, 2011, at A4 (noting that the investigation of a suspected assault rifle dealer was dropped after the House voted against permitting the ATF to engage in tracing assault rifles after purchase).
  \item \textsuperscript{244} See McKinley, supra note 19; see also United States v. Hernandez, 633 F.3d 370, 379 (5th Cir. 2011) (upholding a sentence imposed against an arms dealer convicted of supplying Mexican drug cartels).
  \item \textsuperscript{245} See U.S. Dep’t of Justice, supra note 113, at 6.
  \item \textsuperscript{246} Id.
  \item \textsuperscript{247} See Holder, Statement Before the S Comm. on the Judiciary, supra note 9, at 5 (“One critical first step should be for Congressional leaders to work with us to provide ATF with the resources and statutory tools it needs to be effective.”); U.S. Dep’t of Justice, supra note 174, at 9 (“Avila purchased three AK-47 style rifles, two of which ended up being found at the murder scene of U.S. Border Patrol Agent Brian Terry.”).
  \item \textsuperscript{248} See Holder, Statement Before the S. Comm. on the Judiciary, supra note 9, at 5 (“Unfortunately, earlier this year the House of Representatives actually voted to keep law enforcement in the dark when individuals purchase multiple semi-automatic rifles and shotguns in southwest border shops.”); see also Tim Mak, Issa: Holder ‘Owes’ Fast & Furious,
the current legal framework in place, is the mere provision of access to weapons sufficiently distinct from actually supplying weapons to DTOs?

The Mexican arms trafficking dilemma demonstrates that an inappropriate convergence of laws has occurred where U.S. regulations are dominant. Conflicting goals, as well as problems in coordination, have created gaps that permit trafficking to continue. Mexican restrictions on access to weapons have not prevented DTO members from acquiring high-power weapons because those guns are widely available in the United States. Thus, the central problem in arms trafficking is the ease with which purchasers can obtain weapons, legally and illegally, in the United States. As evidence, numerous Mexican and U.S. officials have cited U.S. gun regulations as the source of the problem, and proposed U.S. legal reform as the solution. Although reform of U.S. policies in the way of restricting access to high-caliber weapons may encourage a reduction of violence in Mexico, it is unlikely that the United States would undergo domestic reform in that area.

Without a foundational reform in international gun control, efforts focused on policing along the border will continue to be inefficient and inadequate. Moreover, the U.S. government has admitted

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249 See Parrish, supra note 209, at 849.
250 See Bailey, supra note 75, at 343.
251 See Grimaldi, supra note 243.
252 See Parrish, supra note 209, at 849 ("In some contexts, domestic law as an instrument of international governance is beginning to replace international law."); see also Cox, supra note 72 (suggesting that Mexican regulations are inefficient because they are largely disregarded).
253 See Jimmy Carter, Op-Ed., What Happened to the Ban on Assault Weapons?, N.Y. Times, Apr. 27, 2009, at A23 ("Across our border, Mexican drug cartels are being armed with advanced weaponry imported from the United States—a reality only the NRA seems to dispute.").
254 See, e.g., Grimaldi, supra note 243 (quoting retired ATF supervisor James Canavan) ("There is no gun trafficking statute... We’ve been yelling for years that we need a gun trafficking statute, because these cases are so difficult to prove."); Sheridan, supra note 55 (noting Mexican authorities have requested that the United States modify its policies to reduce access to high powered rifles).
255 See Knowlton, supra note 150 ("After Mr. Calderón’s speech, Senator Richard J. Durbin, the majority whip from Illinois, lamented the violence—especially along the northern border of Mexico—that has spilled into both countries. But he, too, noted the lack of a receptive climate in Congress toward restoring the assault weapons ban.").
256 See McKinley, supra note 19 (quoting Assistant Director of the Federal Firearms Agency, William J. Hoover) ("Guns are legal to possess in this country... If you stop me between the dealer and the border, I am still legal, because I can possess those guns.").
that its own policing agencies are unable to effectively address the gun trafficking problem in the face of current gun control regulations. Yet so far, U.S. efforts have generally been limited to targeted police initiatives along the border, and have not included directives aimed at comprehensive reform of drug and gun use. In 2009, the U.S. government implemented a $95 million outbound inspection program. Nevertheless, the port director in El Paso Texas noted that while his team had recovered nearly $400,000 in cash, they had recovered only one handgun during the first six weeks of searches at four border crossing points. In 2010, the Obama administration pledged 1200 troops to the Mexican border to aid in the fight against drug smuggling. The decision was applauded by those who interpreted it as a timely solution to violence and immigration issues. Even so, in 2010 approximately 9000 persons were killed in Mexico in associated drug violence. Accordingly, a continuation of current unilateral policing efforts will be insufficient to reduce the number of firearms crossing the border.

In the same vein, the success of unilateral efforts to monitor the black market for small weapons rests on reform of U.S. law and policy. The United States has implemented many programs intended to address the issue of gun smuggling, but admits that there has been little success in reducing the number of weapons transported across the border. The United States has spent over $1 billion on programs for the ATF and Immigration and Customs Enforcement (ICE) to combat arms trafficking, but acknowledged that these efforts have been unsuccessful.

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257 See U.S. Gov’t Accountability Office, supra note 13, at 24.
258 See Grimaldi, supra note 1.
260 Checking Up on Drug War Border, supra note 259.
261 id.
262 See Holder, Statement Before the S. Comm. on the Judiciary, supra note 9, at 5; Angelica Duran-Martinez et al., 2010 Mid-Year Report on Drug Violence in Mexico 4 (Trans-Border Inst. ed., 2010).
263 See Brewer, supra note 3, at 10 (noting that U.S. emphasis on policing and narcotics both overlooks and exacerbates the underlying issues related to the drug war).
264 See U.S. Gov’t Accountability Office, supra note 13, at 58 ("U.S. and Mexican officials in locations we visited told us that, while they have undertaken some efforts to combat illicit arms trafficking, they are concerned that without a targeted, comprehensive, and coordinated U.S. governmental effort, their efforts could fall short."); Zagaris, supra note 24, at 464 (suggesting that the United States “discontinue ‘cowboy politics’ to bolster OAS efforts and improve relations with Latin America).
in light of legal constraints and lack of coordination. The ATF program, Project Gunrunner, has inherent flaws based on the overriding legal restrictions, including an inability to meet its own goals or to analyze the success, if any, of the program overall. The problem remains that the focus of both of these programs is policing; merely increasing law enforcement efforts without facilitating needed legal reform.

Other organizations devoted to international crime have been similarly ineffective in addressing the problem of arms trafficking, due in part to a lack of true cooperation by the United States. Across the globe, many regulatory and policy-based efforts are enacted by intergovernmental organizations. The Organization of American States (OAS) operates as the primary regional organization with regard to international criminal issues. The OAS has exerted significant effort in combating drug smuggling from Latin America, but its attempts to create regional harmonization have been largely undermined by the United States’ internal focus on gun policy and general rejection of multilateralism. For example, in its report concerning the arms trafficking dilemma, the U.S. Government Accountability Office made no mention of OAS collaborative efforts, instead focusing entirely on ATF and ICE measures. It is unlikely that any initiative spearheaded by an intergovernmental organization would be effective due to the United States’ reluctance, for political reasons, to enter into or cooperate with these types of organizations. Thus, current initiatives, both bilateral and unilateral, have proven ineffective in reducing the number of arms transported to Mexico from the United States.

267 Id.; Thompson & Lacey, supra note 53 (noting that the United States and Mexico revised the strategy against drug trafficking because prior efforts were showing little effect).
268 See U.S. Gov’t Accountability Office, supra note 13, at 58; U.S. Dep’t of Justice, supra note 76, at 31 (noting that the ATF did not establish reasonable goals for gun-running teams to respond to arms trafficking data).
269 Kleck & Wang, supra note 158, at 1240–41 (describing the gaps between policing models and actual gun trafficking patterns); Grimaldi & Horwitz, supra note 1.
270 See Zagaris, supra note 24, at 454.
271 Turner, supra note 187, at 991 (describing the trend to utilize intergovernmental agencies in the European Union).
272 See Zagaris, supra note 24, at 454.
273 See id. at 463–65.
274 See U.S. Gov’t Accountability Office, supra note 13, passim.
275 See Parrish, supra note 209, at 818.
276 See Brewer, supra note 3, at 11 (“A change in the design of this high profile initiative, coupled with a decisive shift away from directing other foreign aid to Mexico’s military, would thus ensure that the administration’s recent statements regarding shared U.S. responsibility for drug trafficking truly signify a new level of commitment by the United States to address efficiently the particular ways in which it perpetuates the drug trade.”).
Moving forward, one option may be a directed bilateral initiative targeted at drug and arms trafficking. Mexican efforts have been rendered effectively irrelevant in the current circumstances. A unilateral U.S. initiative aimed at international arms trafficking, while constitutionally viable, would likely be met with opposition from the powerful gun lobby that refutes the connection between U.S. arms dealers and Mexican violence. Similarly, state action is unlikely in this area due to prevailing attitudes toward lenient restrictions on ownership and sales. In contrast to unilateral efforts, a coherent strategy would simultaneously embrace the growing trend toward globalization while encouraging both parties to clearly assert their national interests as they move forward. Further, the United States’ general aversion to multilateral treaties suggests that an agreement with a more regional focus may appropriately address U.S. concerns in the drug war without raising political concerns related to extensive international obligations.

A bilateral initiative focusing on international crime is not a new idea. The growth of international crime alongside globalization and regional integration has encouraged governments worldwide to adopt international criminal procedures. Recent efforts to create international criminal standards in the areas of terrorism and money launder-
ing have been well received.\textsuperscript{285} In contrast, as the international community trends toward globalization, the United States' persistent disregard of international law and cooperation threatens the reputation of the U.S. legal system, and may undermine future efforts to obtain assistance on U.S. initiatives.\textsuperscript{286}

Although there has been no final agreement to date, several factors suggest that a concerted effort in the future is not unlikely.\textsuperscript{287} The United States has initiated several programs related to the war on drugs, many of which contemplate cooperation with Mexico.\textsuperscript{288} One is the Mérida Initiative, a $1 billion program aimed at improving Mexico’s law enforcement capacity and bolstering shared interests including intelligence, prosecution, and extradition.\textsuperscript{289} This agreement has been criticized, however, for merely increasing funds for ineffective programs and for promoting a U.S. focus on militarization.\textsuperscript{290} The plan underwent revision in 2010 after acknowledgement that the war against DTOs had made little headway,\textsuperscript{291} suggesting that the United States recognizes the importance of its role moving forward. Unfortunately, this recognition has translated into increased funds for policing the border, and other measures that have proven unsuccessful in addressing the problem.\textsuperscript{292}

\textsuperscript{285} See id. at 643 (“The international legal framework to combat international crime, especially money laundering, the financing of terrorism and corruption, is now well established.”).\textsuperscript{286} See Parrish, supra note 209, at 831 (“When a U.S. court fails to vindicate an international right or to enforce an international obligation, the court’s failure is attributed to the nation as a whole, and the nation is held responsible.”); Zagaris, supra note 24, at 425 (describing the European trend toward harmonization of criminal justice systems).\textsuperscript{287} See U.S. Gov’t Accountability Office, supra note 13, at 3–4 (noting that U.S. law enforcement has assisted its Mexican counterparts, but does not suggest the efforts are part of an overall prohibitive scheme); see also Brewer, supra note 3, at 9 (outlining the Mérida Initiative, a cooperative effort between the United States and Mexico to combat drug trafficking); Morais, supra note 23, at 586 (suggesting that new international criminal concerns have encouraged governments to adopt international criminal law despite the fact that it is traditionally within national regulation).\textsuperscript{288} See Zagaris, supra note 24, at 440–43.\textsuperscript{289} Arabit & McMahon Testimony, supra note 50.\textsuperscript{290} See Brewer, supra note 3, at 10–11 (suggesting that the Mérida Initiative “has led to a tripling of drug related homicides” and ought to consider a shift away from an emphasis on “law enforcement battles”); see also Morais, supra note 23, at 588 (“[T]he use of military strategies to fight international crime is inappropriate and likely to fail.”).\textsuperscript{291} Thompson & Lacey, supra note 53.\textsuperscript{292} See U.S. Dep’t of Justice, supra note 76, at 10 (noting that ATF policing measures are inefficient and insufficient in many instances); Press Release, White House, Administration Officials Announce U.S.–Mexico Border Security Policy: A Comprehensive Response & Commitment (Mar. 24, 2009), available at http://www.whitehouse.gov/the_press_office/
CONCLUSION

It is true of course, that the rights explicit within the Constitution deserve our utmost protection and reverence both in society at large and as members of the legal community. The Second Amendment granting the right to own guns has been closely held by U.S. citizens since the country’s founding. Yet, since then, it has become a polarized, nearly untouchable, debate based more on politics than substance. The alarming number and rate of deaths in Mexico may present an opportunity for a new understanding of the impact of U.S. gun policy.

Mexican DTOs present a threat to Mexican and U.S. citizens alike. It is unlikely that any person would interpret the Second Amendment as guaranteeing criminals access to any weapons at all, much less military-grade assault rifles, tanks and grenades. Rather than merely ensuring that citizens can protect themselves against each other or the government, U.S. policy has created a paramilitary criminal organization in Mexico—paying them for drugs, and allowing weapons to be purchased with the profits.

As the world trends toward globalization, there ought to be extensive consideration of international implications within domestic policy. The strictly internal focus of the United States in the enactment of rules and regulations has facilitated tragic consequences for Mexican citizens across the border. Although the U.S. government is rightly charged with protecting the interests of its own citizens, social circumstances within the national and international community indicate that this may no longer be the only valid consideration. Describing the problems ahead, Attorney General Holder summed up the issue thusly: “We have serious problems to address—and sacred responsibilities to fulfill. We must not lose sight of what’s really at stake here: lives, futures, families, and communities.”


293 Holder Statement Before the Comm. on the Judiciary, supra note 9 at 5.