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Two-Thousand and Fourteen

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On Human Life, Between Nature and Artificial Creation

FRANCESCO DONATO BUSNELLI*

1. INTRODUCTION

North America's limitless faith in the so-called "enhancement technologies" baffles law scholars, philosophers and scientists, all the while pushing the boundaries of what used to be identified as the natural state of human life.

Professor J.A. Robertson titled one of his works *Children of Choice*, an expression which summarizes the author's view that parents ought to have the freedom to choose if their second child should be the result of natural procreation or an exact genetic replica, *i.e.* a clone, of their first child. The premise of this conclusion is that freedom to procreate implies a choice and therefore cannot be hindered in any way.[1] On the scientific front, professor C. Elliot writes that technology makes the pursuit of happiness all the more approachable, thus it is no surprise that his boundless faith in new technologies goes hand in hand with an "impatience with moral authority."[2]

As a matter of fact, new technologies tend to create the expectation of future happiness, however vague, based on the potential improvement of the human body,[3] an idea embraced by the so-called "eugenetic liberals,"[4] according to whom there is nothing wrong in allowing future generations to live longer, fuller, more satisfying lives.[5]

Even though liberal genetics hail from North America, significant traces can be found in Europe, whether provocative, restrained or simply media-originated. For instance, English philosopher John Harris certainly had it in his mind to provoke when he paraphrased Marx by writing that genetics' objective is that of changing mankind, not understanding it.[6] In a book which focuses on artificial uteri, French biologist Henry Atlan takes a moderate stance by stating that technology does not necessarily imply an unnatural regression, but rather

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1. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22 (1994). More recently, the author had a change of heart: "reproductive rights are not absolute, and can be restricted or limited for good cause." John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7 (2004).

2. CARL ELLIOT, BETTER THAN WELL: AMERICAN MEDICINE MEETS THE AMERICAN DREAM 52-53 (2003).

3. *See* PAOLO VINEIS, EQUIVOCI BIOETICI 45 (2006) (It.).

4. *See* Ross Douthat, *Eugenics, Past and Future*, N.Y. TIMES, June 9, 2012, *available at* http://www.nytimes.com/2012/06/10/opinion/sunday/douthat-eugenics-past-and-future.html?_r=0.

5. *See* Michael J. Sandel, *The Ethical Implications of Human Cloning*, 48 PERSP. IN BIOLOGY & MED. 241, 241 (2005); *cf.* VINEIS, *supra* note 3, at 31.

6. JOHN HARRIS, ON CLONING 118 (2004).

the possibility of getting to a more advanced stage of human evolution.[7] Italian scientist Umberto Veronesi noted that, since scientific progress has made it possible for little girls who are born today in a wealthy country to live until they are 102, it must be possible to make sure that those extra years are in fact quality years.[8] More generally, enhancement technologies tend to emphasize the concept of a "post-human future" politician.[9]

Basically, as we may perceive from the quotes here above, there is great enthusiasm, the kind of enthusiasm which makes those who hail from a classical background - such as myself - feel like Prometheus felt before he was punished by the gods.

2. MORALITY, DIGNITY, LIFE

However, the race towards artificial life hides a fatal flaw, a *quid pro quo* bioethics-wise, as the Italian epidemiologist Paolo Vineis suggests. "Impatience with moral authority" is none other than the product of a battle against political, religious and medical paternalism, but it is far from liberating and it undoubtedly has its limits. Therefore, the main issue becomes that of identifying the cultural, constitutional and legal principles which set these limits.

At one time the fine line between good and evil, true and false, licit and illicit might have been the distinction between what was natural and what was artificial. But nowadays it is no longer sustainable, even though some concepts are still being defined by employing ambiguous terms, for the sole purpose of thwarting perplexities related to artificial creation in itself. There are two very significant examples of this: the first is the expression "assisted reproduction," which serves as a less threatening substitute for "artificial insemination"; the second is the idea of "life support" as opposed to "artificial hydration and feeding."

Religious beliefs have also become ominous as far as the boundaries which separate right from wrong are concerned, since they tend to compromise the principles upon which a plural state is built, by discriminating between those who recognise a God-given moral order (*pacem in terris*) and those who don't. One must not forget that some of the so-called "catholic ethicists" refuse the liberal distinction between morals and law and are thus perceived as "catholic

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7. HENRI ATLAN, L'UTERO ARTIFICIALE 105 (2006) (It.).

8. UMBERTO VERONESI, LONGEVITÀ 86 (2012) (It.). A sharp commentator, however, argued that Veronesi failed to warn that most of these girls will find themselves enduring one of the afflictions which come with old age without any possibility of prevention or recovery. Arnaldo Benini, IL SOLE 24 ORE, Mar. 4, 2012, at 27.

9. *See* FRANCIS FUKUYAMA, L'UOMO OLTRE L'UOMO: LE CONSEGUENZE DELLA RIVOLUZIONE BIOTECNOLOGICA 71-72 (2002) (It.).

fundamentalists," opposed to the political and legal implication of modern times.[10]

Then again, if the assessment were left to common sense, i.e. a special insight into what is intelligible and what advantages may be drawn from it, the kind of common sense Carlo Flamigni has in his riveting *Racconti di medicina della riproduzione* (it translates to "Tales of reproductive medicine"),[11] which he dedicates to "children of the water, children of the fire," a criterion of significance could come to life. Unfortunately, most of the time common sense is exactly what is missing and therefore the argument is hardly decisive. Leon Kass - an important member of the President's Council of Bioethics set up under the George W. Bush administration (superseded in 2009 by the Presidential Commission for the Study of Bioethical Issues) - narrates that even Dolly's creator thought that cloning a human being would be offensive, but, in that regard, he states that "repulsion is not an argument."[12] As a matter of fact, Kass adds, some of yesterday's repulsions are nowadays an accepted reality.[13] On his turn, Hans Jonas notes that, paradoxically, repulsion is a way of regaining the respect that we lost, a form of insurance from the deviations of the powers we hold (for example, in conducting experiments which tackle human nature).[14] Therefore, the solution must be found in our culture's perception of the contention between nature and artificial creation and the meaning of human dignity within such contention, as the Italian law scholar Stefano Rodotà notes.[15]

At this point, human dignity must be intended as a superior principle, which transcends individual self-determination. It is no surprise that the Charter of Nice sets dignity above freedoms.[16] Dignity, it must be noted, is not the same concept today as it was in Germany's 1949 *Grundgesetz*, in which dignity constituted a fundamental check to political power,[17] in stark moral and spiritual

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10. GIOVANNI FORNERO, BIOETICA CATTOLICA E BIETICA LAICA 49 (2005) (It.).

11. CARLO FLAMIGNI, FIGLI DELL'ACQUA, FIGLI DEL FUOCO. RACCONTI DI MEDICINA DELLA RIPRODUZIONE 143 (1996) (It.). Also see CARLO FLAMIGNI, FIGLI DEL CIELO, DEL VENTRE, DEL CUORE. RACCONTI (2010) (It.), where, in the preface, the author confides his strenuous opposition against all kinds of morals which do not participate in the natural evolution of common morals.

12. Leon Richard Kass, *The Wisdom of Repugnance. Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679, 686-87 (1998), *available at* http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1423&context=vulr.

13. *Id.* at 686.

14. HANS JONAS, DALLA FEDE ANTICA ALL'UOMO TECNOLOGICO 156-57 (1991) (It.).

15. Stefano Rodotà, *Bionico. Quando il corpo si fa scienza*, LA REPUBBLICA, July 20, 2007, at 41 (It.).

16. *Cf.* Charter of Fundamental Rights of the European Union, 2010 O.J. C (83/02). The Charter was signed at Nice on Dec. 7, 2000. Ch. 1 is titled *Dignity* (saying, "Human dignity is inviolable. It must be respected and protected." *Id.* at art. 1.), and Ch. 2 is titled *Freedoms*.

17. On the difference between the German Constitution and other constitutional experiences, as regards a formal recognition of dignity, and more in general on the same concept of dignity within the contemporary legal language, see Rex Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 85 (2011), *available at* http://www3.law.columbia.edu/hrlr/hrlr_journal/43.1/Glensy.pdf.

contrast with the country's National Socialist past and the tragic violation it entailed, in hopes of warding off its return. For instance, dignity and freedom combined in article 2 of the Italian constitution embody a firm aversion to any form of exploitation of human beings, as the Oviedo convention remarks.[18]

Another distinct nuance expressed by the word "dignity" can be found within North-American bioethics and it refers to one of the many implementations of the principle of autonomy, which adheres only to single, "competent" individuals,[19] a clear departure from European constitutionalism, which favours a wider, objective view of the principle, since it is associated with any human being – sentient or not, competent or not, born or unborn – and no one may arbitrarily decommission them, as illustrated by French scholar Muriel Fabre Magnan, who defines dignity by quoting the *Littré* (*"un respect qu'on se doit à soi même,"* which roughly translates to "the kind of respect each person owes to themselves") and states that no one may choose to renounce human dignity, not for others nor for themselves.[20] Therefore, human dignity is not left to an unquestionable individual choice; it is rather a check on that very same choice.

3. ON LAW, BIOETHICS AND REAL LIFE: SOME STORIES

At this point, in order to allow this theory to be put to the test, real-life stories which exemplify the tug of war between nature and artificial creation ought to be examined.

A. THE PRODUCT OF CONCEPTION: SOMEWHERE BETWEEN A HUMAN BEING AND A THING

In 2007, the Grand Chamber of the European Court of Human Rights[21] stated that, since there was no common definition - neither scientific nor legal - for the exact moment when life begins, each State had to create its own. The case in point dealt with the possibility of destroying embryos after their preservation

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18. *Cf.* EUR. PARL. ASS., Convention for the Protection of Hum. Rts. and Dignity of the Hum. Being with regard to the Application of Biology and Med., ETS n. 164 (Mar. 4, 1997). In one of the 1998 Paris Additional protocol's recitals, this principle is associated with the ban on human cloning.

19. HUGO TRISTRAM ENGELHARDT, MANUALE DI BIOETICA 129 (1991) (It.). In more detail, the author argues that people ought to choose for themselves: they are, in that fundamental sense, self-legislating. However, that is not the case for people who cannot determine their own order of pros and cons, i.e. infants, people affected by serious mental illnesses and others in similar predicaments. For a stance in favor of the European perspective, see Leon Richard Kass, *Defending Human Dignity*, *in* DEFENDING HUMAN DIGNITY AND BIOETHICS. ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL OF BIOETHICS 297 (2008).

20. Muriel Fabre Magnan, *La Dignité en Droit*, 58 REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES 13 (2007) (Fr.), *available at* http://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2007-1-page-1.htm.

21. EUROPEAN COURT OF HUMAN RIGHTS, *Evans v. the United Kingdom, App. No 6339/2005, in* RESEARCH REPORT. BIOETHICS AND THE CASE-LAW OF THE COURT 9-11 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80046.

had been revoked, as far as the English legal system was concerned. Since English law did not recognize the embryo as a person from the moment it was conceived, its termination would not violate article 2 of the European Convention on Human Rights, which states that every person's life must be protected.[22]

Five years later, the Grand Chamber of the Court of Justice of the European Union stated that, "although the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems," "the concept of human embryo must be understood in a wide sense,"[23] i.e. any human egg must be regarded as a human embryo from its insemination. In this case, the regulation that comes to light is article 6(2)(c) of Directive 98/44/EC, whereby "uses of human embryos for industrial or commercial purposes" are considered "unpatentable": "The Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive."[24] Taken into consideration that the Directive provides no definition of human embryo, nor does it refer to national legislations, the court's conclusion must be combined with the necessity of avoiding a further problem: "The lack of a uniform definition of the concept of human embryo would create a risk of the authors of certain biotechnological inventions being tempted to seek their patentability in the Member States which have the narrowest concept of human embryo and are accordingly the most liberal as regards possible patentability, because those inventions would not be patentable in the other Member States."

By comparing the European courts' different views, a strange paradox comes to light: the same court that is meant to protect human rights shuns away from giving an actual answer and opts for a non-answer reminiscent of the Pirandellian "così è, se vi pare," which loosely translates to the Shakespearian "as you like it"; on the contrary, the EU Court of Justice, entrusted first and foremost with the judicial interpretation of EU law, actually makes an attempt to give an answer. Even though the answer in question is aimed at guaranteeing a functional market, the court calls upon the protection of human rights, especially human dignity. This sentence was received as an attempt to establish an absolute, i.e. the protection of the embryo, and was criticized by some who observed that, while the universal values of human dignity and integrity were attributed exclusively to the embryo, the chance of saving other human lives dependent

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22. Council of Europe, *The European Convention on Human Rights*, at art. 2.

23. Case C-34/10, Oliver Brüstle v. Greenpeace eV, 2011 E.C.R. I-09821, *available at* http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d50836b57a3b7848e5a285d63ff196cf6f.e34KaxiLc3eQc40LaxqMbN4OahqSe0?text=&docid=111402&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=147807.

24. *Id.* at § 30 (citing Case C-506/06, Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG, 2008 E.C.R. I-1017).

upon scientific and medical research, not to mention its possible applications, wasn't even taken into account.[25]

That is not the case, if common sense is anything to go by. The principle of human dignity is used in direct contrast with the recurring qualification of the embryo as a thing and, in particular, with the much too successful utilitarian prospect of considering a fourteen-day lapse as a way of distinguishing the so-called "pre-embryo" from the actual embryo. In the court's view, this solution ignores the continuous growth process a human being goes through from fertilization, which is not however sufficient to grant absolute protection in accordance with article 2 ECHR, nor to exclude it from consideration alongside other fundamental values. The Italian Constitutional Court, for instance, embraced a similar line of reasoning by declaring manifestly inadmissible the asserted constitutional violation represented by article 4 of the 1978 law on abortion.[26]

If anything, the case in question served as a sign of a more moderate approach, which may tone down the liberal attitude that had taken root in most European jurisdictions.

B. THE OFFSPRING OF ADVERSE EXPERIMENTATION

What is the fate of embryos which were refrigerated as a result of there being too many for the purposes of the original parental plan?

In Italy, the legislation on artificial fertilization (Ref. Law 19 February 2004, no. 40) established that the product of conception is a person, giving rise to some serious issues. The hibernation and suppression of embryos is forbidden in all but a few cases.[27]

The law in question does not specify how these embryos are supposed to be dealt with. Some have put forward the concept of perpetual preservation,[28] which is paradoxical, since there is little comfort to be gained from having faith in the possible discovery of a method to ascertain the "death" of hibernated embryos.

Those who study and practice law cannot rely on mere eventualities, however quick the progress of science. They need to make a choice *hic et nunc* and they

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25. Rosaria Romano, *La brevettabilità delle cellule staminali embrionali umane*, 28 NUOVA GIURISPRUDENZA CIVILE COMMENTATA 249 (2012) (It.).

26. Corte Cost., 10 febbraio 1997, n. 35, Giur. it. 1997, 281 (It.).

27. The Constitutional Court targeted some specific aspects with a declaration of unconstitutionality: first, the maximum limit of three implantable embryos; second, the omitted consideration of possible dangers to the prospective mother's health. Corte Cost., 8 maggio 2009, n. 151, Giur. it. 2009, 3, 1656 (It.).

28. *See* COMMISSIONE DI STUDIO DEGLI EMBRIONI CRIOCONSERVATI NEI CENTRI DI P.M.A., RELAZAIONE FINALE, Jan. 8, 2010 (It.) [hereinafter RELAZIONE FINALE]. The Commission was created on June 25, 2009 by Order of the Italian Minister for Health and Social Policies. *See also* Francesco Donato Busnelli, *Lo sgretolamento della L. 40 sulla procreazione assistita*, *in* 1 PARTE GENERALE E PERSONE. LIBER AMICORUM PER DIETER HENRICH 99 (2012) (It.).

cannot shy away from choices that might be defined "tragic"– the obvious title reference being here the celebrated book of two distinguished Yale scholars.[29] The Italian legislator's choice is undoubtedly tragic. It is not just because of a question of legality that regulation should be put in place to deal with hibernated embryos in the clearest way possible, but, first and foremost, because of a question of humanity. It should certainly be possible for a woman who is willing to carry someone else's embryo - that someone not having the chance or will to carry it herself - to be allowed to do so.[30] Even though the idea of an "adoption for the purpose of birthing"[31] may not underline to a sufficient degree the peculiar crossroads between the idea of pre-natal adoption and that of an atypical donation, it would still be a starting point for an issue which is already being perceived by society as a whole.[32] If one were to object that a premise such as this would not solve the problem of embryo "survival" - given their significant number[33] - on a comprehensive scale, they would certainly be telling the truth but, at the same time, they would be ignoring the ethical value of the proposal, turning it into a cold, utilitarian pros and cons analysis.

The viability of the option in question is demonstrated by the French legislation on artificial fertilization, which distinguishes the concepts of "hospitality" and "adoption" in regard to embryos.[34] If the prospective parents who have embarked on this specific parental plan no longer wish to pursue it, they may consent to another couple "welcoming" their embryo, provided the latter are eligible and aware of the risks that come with the procedure. To that effect, it is up to a judge to give out an authorization, which lasts three years and can be renewed, having previously made sure that the "welcoming" couple can guarantee a stable family environment, a proper education and appropriate psychological care to the infant. Clearly, the spirit is that of Samaritan compassion.[35] As a

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29. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

30. The aforementioned Commission thinks this might be a solution. *See* RELAZIONE FINALE, *supra* note 28, at 3 n.23.

31. *See* COMITATO NAZIONALE PER LA BIOETICA, L'ADOZIONE PER LA NASCITA DEGLI EMBRIONI CRIOCONSERVATI E RESIDUALI DERIVANTI DA PROCREAZIONE MEDICALMENTE ASSISTITA (2005) (It.), *available at* http://www.governo.it/bioetica/pareri_abstract/abstract_adoz_%20per_nascita.pdf.

32. *Cf.* Donato Carusi, *In vita, "in vitro," in potenza. Verso una donazione del'embrione sopranumerario?*, RIVISTA CRITICA DEL DIRITTO PRIVATO 340 (2010) (It.). But see COMITATO NAZIONALE PER LA BIOETICA, *supra* note 31, which takes into account a different perspective, that of "abandoned embryos."

33. AMEDEO SANTOSUOSSO & CARLO ALBERTO REDI, Commentary, *Opinione dissenziente alla Relazione finale* 7 (2010) (It.).

34. *See* Loi 2004-800 art. 2141(4), 2141(5) & 2141(6) du 6 août 2004 relative à la bioéthique [Law 2004-800 art. 2141(4), 2141(5) & 2141(6) of Aug. 6, 2004 on Bioethics], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2004 (Fr.).

35. The most recent document by the Italian Comitato Nazionale per la Bioetica takes a similar stance on kidney donation, by defining it a "Samaritan donation," since it occurs between two people who are not related, do not otherwise know each other and do not regard the donation as a financial transaction of any sort. COMITATO NAZIONALE PER LA BIOETICA, LA DONAZIONE DA VIVO DEL RENE A

matter of fact, the two couples involved cannot find out about their respective identities.

Another important aspect of the issue is the ban that the Italian legislation poses on experimentation on embryos, in order to preserve their "life":[36] is it not hypocritical and somewhat dehumanizing to assume that a static, everlasting preservation under glass and ice is a worthier fate than serving the purposes of scientific research - the duplication of stem cells in particular - which may benefit humanity as a whole?[37]

Such a solution, based on the concept of "Samaritan compassion," makes the choice less tragic when it comes to overcoming the impossibility of "survival." If, on the contrary, it is not embraced, it is completely irrational to expect that at one point it shall be possible to establish that preservation no longer makes sense.[38] The pertinent French legislation, for instance, states that, once there no longer is a parental plan, preservation is terminated, provided that it is set for a minimum of five years.[39]

C. THE OFFSPRING OF AN UNGRATEFUL WOMB

The third story took place in England. Miss MB was about to give birth when the doctors suggested a caesarian, given that, in the event of a "natural" birth, the position of the fetus was susceptible to serious cerebral damage. MB, who, during the pregnancy, had refused to give blood samples because of an asserted fear of needles, did not consent to the procedure: the Hospital then made an *ex parte* application and obtained a court order; MB appealed. The Court of Appeal reaffirmed the right of the mother to refuse an anesthetic injection, even though she is fully aware that the chances of the infant being born alive are significantly reduced. However, the Court resolved that the lack of the mother's consent had not invalidated the procedure that had been performed on her, since she was incapacitated by an irrational fear so terrifying as to compromise her mental faculties.[40]

In a similar case, the outcome was different: the judges assigned to the case decided that, even though in specific cases the refusal to undergo a procedure may seem "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have

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PERSONE SCONOSCIUTE (C.D. DONAZIONE SAMARITANA) 4, Apr. 23, 2010 (It.), *available at* http://www.governo.it/bioetica/pareri_abstract/abstract_donatori_rene.pdf.

36. SANTOSUOSSO & REDI, *supra* note 33, at 9.

37. *Cf.* Carusi, *supra* note 32, at 337.

38. For an example of the opposite tendency, see RELAZAIONE FINALE, *supra* note 28, at 3.

39. CODE DE LA SANTÉ PUBBLIQUE art. 2141-4 (Fr.).

40. Re M.B. (Medical Treatment). Court of Appeal: Butler-Sloss, Saville and Ward L.JJ. [1997] 2 F.L.R. 426 (U.K.).

arrived at it,"[41] it doesn't mean that the right to refuse consent is voided for that reason alone.

Neither solution looks convincing: the first bypasses principles by employing a typical lawyer's trick to give a "fair" solution; the second is perfectly in line with the principles but arguable - to say the least - when it comes to the case at hand.

According to the Italian constitutional principle set by article 32(2) of the Constitution, no one can be forced to undergo a medical procedure unless the law provides for it. Therefore, doctors who stand down because the patient did not consent to the procedure cannot be held responsible for the consequences. Again, this theory is not convincing, as refusing medical treatment cannot have consequences on anyone but the person who refuses. Undoubtedly, an infant about to be born can't be identified with its mother.[42] Australian philosopher Peter Singer[43] is right in observing that birth does not attribute a different status to the infant, but merely a different degree. Therefore, only two options are viable: the first is to protect the infant's life and health; the second, which Singer supports, is infanticide. However, the Italian legal system does not employ the latter and consequently, doctors must intervene. As a matter of fact, the Italian Code of medical conduct[44] forces doctors to make sure that, if there is an emergency, the essential care is provided (for example, in the case of MB's son), taking into account the person's explicit wishes.

D. THE CONTENDED GENDER

The fourth story concerns a South African runner, Caster Semenya, who was the victim of a specific form of identity contention.

At the 2009 Berlin Athletics World Championship, Semenya won the gold medal in the 800 meter-women and established a new world record. Soon after, the International Association of Athletics Federations (IAAF) ordered the athlete to undergo a gender verification test, a complex procedure which involves genetic, hormonal and physiological aspects, the object of which is to determine a person's gender. After eleven months and a suspension, it was left to a mere press release to announce the IAAF's decision to accept "the conclusion of a panel of medical experts that she can compete with immediate effect." Even though the actual goal of the procedure was to ascertain the athlete's suitability for international sports competitions, the end result was a violation of human

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41. St. George's Healthcare NHS Trust v. S, R v. Collins, *ex parte S* [1998] (U.K.). As a matter of fact, the infant was born gravely deformed.

42. *See* ANTONIO LA TORRE, EGO E ALTER NEL DIRITTO DELLE PERSONE 19 (2011) (It.), which argues that the womb is where the contention between the self and the other is at its clearest.

43. PETER SINGER, RIPENSARE LA VITA. LA VECCHIA MORALE NON SERVE PIÙ 212 (1996) (It.).

44. *See* Codice di deontologia medica, art. 36 (It.), *available at* http://www.salute.gov.it/imgs/C17pubblicazioni_1165_allegato.pdf.

dignity and health. In a similar case, Spanish runner María José Martínez Patiño, who had been disqualified from competing and had waited three years for the measure to be withdrawn, released the following statement: "What happened to me was like being raped. I'm sure it's the same sense of incredible shame and violation. The only difference is that, in my case, the whole world was watching."[45]

Perhaps the most dramatic case was that of Indian runner Santhi Soundarajan (800 meter silver medalist at the 2006 Asian Games), who was affected with a genetic anomaly, the androgen insensitivity syndrome. As a result of being an "XY woman," she was disqualified and her victory was declared void. A few months later, newspapers reported that she had attempted to commit suicide. Now, the Medical code of the International Olympic Committee recognizes gender verification tests as medical evaluations and, therefore, an athlete may refuse a medical intervention: the problem is that, if such an intervention takes place, undergoing the test is the pre-requisite to participate in the competitions. The effective immunity sports legislation and jurisdiction are endowed with, not to mention the widespread reluctance of national courts to intervene outside "very exceptional circumstances," is gravely prejudicial to the dignity, health and identity of women. That's not all: these rules, devoid of any constitutional legitimacy, arbitrarily redefine gender boundaries and, by lending particular attention to the concepts of chromosomic gender, genetic anomaly and transexuality, defy the traditional binary gender order.[46]

E. THE PURSUIT OF A 'GOOD LIFE'

In Italy, the fine line between life and death made headlines in two cases, the Welby case and the Englaro case, which shall form the object of this final narration. The former case was dealt with by the Tribunale di Roma; the latter by the Corte di Cassazione.[47] Both attempted to embrace a moderate, balanced and cohesive approach within the difficult alternative between letting oneself die ("nature") and relying on artificial hydration and feeding, all the while veering towards the imperscrutable objective of a "life well lived," or "good life."[48]

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45. *See* Berit Skirstad, *Gender Verification in Competitive Sport: Turning from Research to Action*, *in* VALUES IN SPORT: ELITISM, NATIONALISM, GENDER EQUALITY AND THE SCIENTIFIC MANUFACTURE OF WINNERS 121 (Törbjörn Tännsjö & Claudio Tamburrini eds., 2000).

46. For some sharp comments (explicitly dedicated to the Soundarajan case) on "[t]he legacy of humiliations that accompanied gender verification testing," as well as further references to IAAF Gender Verification policy, see KATH WOODWARD, SEX POWER AND THE GAMES 55-56 (2012).

47. Trib. di Roma, 23 luglio 2007, n. 2049, Foro it. 2008, II, 105; Cass., 16 ottobre 2007, n. 21748, Foro it., 2008, I, 125. For a collection of comments on both cases, see THE PRE-CHOSEN DEATH: END OF LIFE ARRANGEMENTS AND INSTRUCTIONS, 10 SALUTE E SOCIETÀ (Carmine Clemente & Giuseppina Cersosimo eds., 2011).

48. Erica Palmerini, *Che cosa si può fare per la "vita buona"? La prospettiva del giurista*, *in* DIRITTO ALLA SALUTE E ALLA "VITA BUONA" NEL CONFINE TRA IL VIVERE E IL MORIRE 55 (Elettra Stradella ed., 2011) (It.).

The essential arguments of both courts can be summarized as follows.

The principle of near indispensability of human life was reaffirmed, as, in the words of the Tribunale di Roma, it is supposed to represent an advanced defense that the legal system readies against the very person it strives to protect with the principle in question. The Corte di Cassazione, on its turn, reminded that those who find themselves in a permanent vegetative state are human beings for all intents and purposes and their tragic predicament could never justify less care and support, since that would constitute a violation of the principle of human dignity. Artificial feeding is an ordinary aspect of the guaranteed care and support; therefore, it does not embody a case of therapeutic harassment from an objective point of view, unless it clashes with the patient's right of self-determination.

Self-determination must be interpreted restrictively, i.e. inasmuch as it concerns a specific medical treatment[49] and not the fundamental choice between life and death. Refusing treatment is not the equivalent of euthanasia, i.e. the act of causing and/or hastening death, and there must be no confusion between the two if the facts are to be taken into account rigorously, despite the actual consequences of the aforementioned refusal.

As to the subjects who may choose to refuse treatment, the two sentences differ in view of the peculiarities within each case, but the base logic is the same. Piergiorgio Welby was entirely capable of understanding the implications of his refusal and therefore, in this case, the Tribunale di Roma concluded in a categorical manner that the legal guardians of minors and mentally challenged people may not make that choice in their stead, since they only have the power to intervene to protect these subjects' lives and not the opposite. In the Eluana Englaro case, given that the patient had been in a permanent vegetative state for many years - and still was, the Corte di Cassazione reaffirmed the principle of equality, despite the cognitive status of each individual. Therefore, it deemed it necessary that the doctor-patient relationship be re-established via the legal guardian's mediation. However, even though the choice is in the guardian's hands, there is a common ground between this sentence and the one previously examined: the guardian must not decide in the patient's stead, but rather in accordance with the incapacitated person's expressed wishes on the issue. If the latter never managed to make their will crystal clear, their wishes must be re-created presumptively, by inferring them from their personality, lifestyle, inclinations, values and ethical, religious, cultural and philosophical convictions. This seems to be the essential threshold of the patient's dignity and, therefore, it must not be discarded.

In conclusion, the considerations outlined above offer a convincing balance between the patient's self-determination with regard to specific medical treat-

49. Once again, art. 32(2) of the Italian Constitution comes to light.

ments and the protection of human dignity at its highest expression, i.e. the indispensability of human life.

4. CONCLUSION

There is no doubt whatsoever that we live in exciting and troubling times. What can we expect next? Will the expectation of creating Aldous Huxley's "brave new world" or, in other words, of recreating Prometheus's ancient scheme prevail? Or, on the contrary, the return to an unwavering, unidentified "natural law"?

The task that those who study and/or practice law and those in the medical profession are entrusted with - even more so than philosophers or theologists - is to prove to the society they serve that there is a third way. However, Hans Jonas's conclusion to his fundamental work[50] may function as a warning. He argues that protecting mankind's legacy under the flag of preservation, which also implies protection from degradation of any kind, must always be the paramount commitment. Preserving that legacy against all odds, including the dangers caused by mankind itself, is not a utopian fantasy, but rather the not-so-modest aspiration of those who decide to take on the responsibility of securing a future for the human race.

50. HANS JONAS, DAS PRINZIP VERANTWORTUNG (1979) (Ger.).

Using Trusts to Manage Private and Charitable Patrimony: An Overview and Comparison of U.S., EU, and Chinese Law*

ANTONIO CAPPIELLO**

This article includes some parts of the academic interview I conducted with Prof. T. P. Gallanis, Prof. R. Roth, Prof. R. H. Sitkoff and with the civil law notaries, Dr. G. Liotta and Dr. D. Muritano, who are gratefully thanked (their contributions as well as their short biographies are indicated in the reference notes).

1. INTRODUCTION

Trust Law is a typical very flexible common law instrument which may be adapted for many purposes. In common law countries, a trust is commonly used to manage real estate, family patrimony, company assets and many other properties. The Hague Convention, from 1992, enables trusts to operate also in jurisdictions where they previously have not been accorded legal status. Moreover, some civil law countries have recently adopted a national law in order to regulate trusts. This paper will analyse the peculiarities of U.S. private and charitable trusts, trusts in civil law jurisdictions, and the regulation of Chinese public trusts.

One of the most interesting fields of U.S. trust application is the undeveloped land as private or charitable trust. We start with analysing some cases of Hawaii in order to understand the timeline of a private trust limited by the "rule against perpetuities." The termination of a private trust covering, for example, a huge undeveloped land could be managed, as we see in the next paragraph, in different ways, usually by the means of a public bid for development purposes. Afterwards, we analyse the "rule against perpetuities" and the role of lawyers and independent authorities in trust matters. To complete the U.S. Trust review, we give some insight on private and charitable trust.

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* The contributions of Prof. T.P. Gallanis, Prof. R. Roth, Prof. R.H. Sitkoff and the civil law notaries, Dr. G. Liotta and Dr. D. Muritano are gratefully acknowledged.

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As concerns Europe, some information on the approach of EU notaries concerning Trust Law and its applicability in Civil Law Countries is presented.

Finally, in order to complete the global overview with the Eastern hemisphere - where especially Confucian Asians are more likely to view themselves as part of a collective - we present some aspects of the Chinese Trust Law of public interest.

2. THE PARTICULAR SITUATION OF HAWAII'S UNDEVELOPED LAND: PRIVATE AND CHARITABLE TRUSTS[1]

A trust can be used to manage land and to exploit specific resources for its development. The particular situation of Hawaii deserves some insight to explain certain characteristics of some of the most commonly used trusts.

A large amount of Hawaii's undeveloped land is held in private and charitable trusts. Unless a trust's governing document authorizes or requires the trustee(s) not to develop that land, the trustee(s) generally has a duty to make trust assets "productive" – i.e., developed or otherwise used to produce significant amounts of income – which as a practical matter usually means the land must eventually be developed. An exception exists when non-productive use of the land furthers a specific trust purpose. Private trusts in Hawaii have long been required to terminate within 90 to 100 years of their formation, because of a legal doctrine known as the "rule against perpetuities." The law in Hawaii was recently changed, however, so that new private trusts can usually be designed to avoid that doctrine. Charitable trusts have never been subject to the rule against perpetuities, however, and so they have always been able to continue in existence indefinitely. This helps explain the absence of private trusts older than 100 years (i.e., they all have terminated, with undivided interests in the land passing to the private beneficiaries), and the on-going existence of large charitable trusts that were established by Hawaiian Royalty more than 100 years ago, such as the Queen Liliuokalani Trust, the King Lunalilo Trust, and Princess Pauahi's Kamehameha Schools Trust. The last of these holds more than 350,000 acres of undeveloped land (including 63 miles of ocean frontage).

When a private trust terminates and its land passes in undivided interests to the private beneficiaries of that trust, any one of the beneficiaries can file a partition action, which essentially means that all the former trust land (not just

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1. Contribution by Prof. Randall Roth (rroth@hawaii.edu), Professor at University of Hawaii, specializes in professional responsibility, trusts and estates, federal taxation, and non-profit organizations. He has served as President of the Hawai'i State Bar Association, Hawai'i Justice Foundation, Hawai'i Institute for Continuing Legal Education, and Hawai'i Estate Planning Council; and currently serves as Associate Reporter for the Restatement of the Law (Third) Trusts project. Roth was named Civic Leader of the Year in 1993 and again in 1997, and in 2009 he received the Gandhi, King, Ikeda award from Morehouse College for pursuit of social justice. Prof. Roth wrote the book *Broken Trust*, (http://www.brokentrustbook.com) which was named book of the year by the Hawaii Book Publishers Association.

that of the single beneficiary) will have to be sold to the highest bidder.[2] The highest bidder in such sales is generally someone motivated by the land's development potential. One major exception is the so-called land trust, or nature conservancy, which is a type of charitable trust, the mission of which is to acquire and hold land with the specific purpose of keeping that land from being developed. Such trusts are financed by charitable donations and enforced by the state attorney general and by the courts.[3]

3. RULE AGAINST PERPETUITIES AND GUARANTEE[4]

A particular aspect related to the land trusts is the rule against perpetuities and the role of the lawyers and independent authorities in general trust matters. As regards the rule against perpetuities, there could be some concerns with the possible implication of trusts settled for public interest.

The need for a rule against perpetuities is widely recognised. This view is shared by The American Law Institute, which recently affirmed its support for such a rule. As stated in the Restatement (Third) of Property: Wills and Other Donative Transfers, Introductory Note to Chapter 27 (2011): "It is the considered judgment of The American Law Institute that the recent statutory movement allowing the creation of perpetual or near-perpetual trusts is ill advised . . . . A rule [against perpetuities] that curbs excessive dead-hand control is deeply rooted in this nation's history and tradition, and for good reason . . . . An important reason for maintaining a reasonable limit on dead-hand control is that the limit forces control of encumbered property to be shifted periodically to the living, free of restrictions imposed by the original transferor. The living can then use the property as they wish, including transferring it to new trusts with up-to-date provisions."

As classically formulated by Professor John Chipman Gray, the rule against perpetuities is a rule against the remote vesting of contingent future interests, a rule framed in the vocabulary of lives-in-being plus 21 years. T.P. Gallanis has argued that the rule against perpetuities should instead be framed as a direct durational limit.[5] This idea was adopted by The American Law Institute, which

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2. Julia Flynn Siler, *The Descendants Aims to Lay Down the Law in Hawaii*, WALL ST. J., Nov. 26, 2011; Deborah L. Jacobs, *George Clooney Makes Estate Planning Sexy*, FORBES, Feb. 23, 2012.

3. Samuel P. King & Randall W. Roth, *Erosion of Trust*, A.B.A. J. (Aug. 2007).

4. Contribution by Thomas P. Gallanis (thomas-gallanis@uiowa.edu), Professor at the University of Iowa, is a prize-winning legal historian and an expert on trust, probate, and fiduciary law. He teaches and writes in the fields of trusts and estates, estate and gift taxation, property, and English and European legal history. He is an active participant in trusts and estates law reform. Elected to the American Law Institute, he serves as Associate Reporter for the Restatement (Third) of Trusts, as an adviser to the ALI Principles of the Law of Non-profit Organizations, and as a member of the consultative group for the Restatement (Third) of Property: Wills and Other Donative Transfers.

5. *See* Thomas P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 588-60 (2003).

has reformulated the rule as a direct limit on trust duration.[6] Note that the rule against perpetuities – at common law, and as reformulated by statute or by the Restatement (Third) of Property – does not apply to charitable trusts. Instead, a charitable trust whose purpose has failed, or for which it has become unlawful, impossible, impractical, or wasteful to carry out the purpose, is subject to modification under the doctrine of cy-près. Under this doctrine, the court directs the application of the trust assets to a different purpose that reasonably approximates the original purpose.

Lawyers and independent authorities play important roles in trust formation. In order to understand the role of lawyers, we should start from the three main parties to a standard trust: the grantor ("settlor"), the trustee, and the beneficiaries. They may be lawyers but need not be. Trusts are typically drafted by lawyers, so the settlor's lawyer has an important role in translating the settlor's wishes into clear and proper language in the trust instrument. The trustee of the trust may be a lawyer and/or may hire a lawyer to provide legal advice to aid the trustee in the performance of fiduciary duties. The beneficiaries may be lawyers and/or may hire lawyers for advice about their rights and interests in the trust. Lawyers thus have very important roles in assisting each of the parties to a trust. As concerns the role of independent authorities in U.S. law, trusts (other than testamentary trusts) are considered private documents rather than public records. Still, there are important roles for the court as an independent authority. For example, the trustee may, if appropriate, apply to the court for instructions about how to administer the trust or how to distribute trust assets – or the trustee may seek court approval of the trust accounts. To take another example, the beneficiaries may go to court to enforce the performance of the trustee's fiduciary duties or to remedy a breach of trust. And there are circumstances when a court may act *sua sponte*, for example to appoint a trustee ad litem when the trustee is unavailable or unable or unwilling to act. On the concept of a trustee ad litem, see the Restatement (Third) of Trusts, Sec. 107, Comment d (2012). These examples are designed to be illustrative, not exhaustive, of the court's role.

Finally, as concerns the enforcement of a trust, in a non-charitable trust, the power to enforce the trustee's obligations (or to seek a remedy for a breach of trust) rests with the beneficiaries and with co-trustees or successor trustees. A charitable trust typically has undefined beneficiaries, so another source of enforcement is needed. To this end, the law turns to an independent authority: the state attorney-general, who is given the primary role in, and responsibility for, monitoring and enforcing charitable trusts.

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6. *See*, RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, § 27.1 (2011).

4. PRIVATE AND CHARITABLE TRUSTS[7]

This section gives some insight on the difference between a private trust and a charitable trust and on how the conduct of the trustee is policed in a charitable trust.

A private trust is a fiduciary relationship in which the trustee holds legal title to specified property, entrusted to him by the settlor, and manages that property for the benefit of one or more beneficiaries. Hence, the trust presents the standard agency problem that arises when risk-bearing (the beneficiaries) and management (the trustee) are separated. To safeguard the beneficiary from mismanagement or misappropriation by the trustee, trust law supplies a set of default terms known as fiduciary duties that prescribe the trustee's level of care (the duty of prudence) and proscribe misappropriation (the duty of loyalty). A beneficiary who believes that the trustee acted disloyally or imprudently may sue the trustee for breach of trust. Moreover, because trust default law makes it difficult for the beneficiary to remove the trustee, and because the beneficiary's interest is typically inalienable (i.e., there is no market for trust control), the threat of fiduciary litigation is the primary force for aligning the interests of the trustee and the beneficiary—that is, for minimizing agency costs in the modern private trust.

The paramount role of fiduciary law in minimizing agency costs in trust governance explains the traditional rule that a private trust must be for the benefit of an ascertainable beneficiary. Requiring an ascertainable beneficiary ensures that there is someone with an economic incentive to enforce the trustee's fiduciary duties.

Unlike a private trust, however, a charitable trust must be for the benefit of a charitable purpose such as advancing education or the relief of poverty — not for a specific beneficiary. Thus, for a charitable trust, there is no identifiable beneficiary with an economic incentive and legal standing to ensure that the trustee acts in accord with the settlor's charitable purpose and refrains from abuse or breach of fiduciary obligation. Professor Evelyn Brody aptly frames the resulting agency problem: "In the case of an entity having no owners and established for the benefit of indefinite beneficiaries, who is the principal on

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7. Contribution by Robert H. Sitkoff (rsitkoff@law.harvard.edu), an expert in trusts and estates, he is the John L. Gray Professor of Law at Harvard Law School. Sitkoff's primary research focus is economic and empirical analysis of the law of trusts and estates. His work has been published in leading scholarly journals such as the *Yale Law Journal*, the *Stanford Law Review,* the *Columbia Law Review*, and the *Journal of Law and Economics*. Sitkoff is a co-author of *Wills, Trusts, and Estates* (Aspen 8th ed. 2009), the leading American coursebook on trusts and estates. He is currently working on a series of empirical studies of trust law reforms that will form the core of a book to be published by Yale University Press (co-authored with Max Schanzenbach). Sitkoff is an active participant in trusts and estates law reform. Sitkoff serves under gubernatorial appointment on the Uniform Law Commission, for which he is a liaison member of the Joint Editorial Board for Uniform Trusts and Estates Acts, the principal oversight body for all uniform law activity pertaining to trusts and estates.

whom the law can rely to monitor the agents and enforce the charitable purposes?"[8] The traditional answer to the problem of agency costs in charitable trusts is to vest the state attorney general, as *parens patriae*, with standing to enforce such trusts. Many states have broadened the attorney general's common law enforcement power to include the power to investigate the operation of charitable entities. Most states also require charitable trusts and other charitable entities to make regular reports to the attorney general's office (a disclosure requirement backstopped by federal law applicable to tax-exempt entities). In many instances, the state attorney general is a necessary party in litigation involving a charitable trust or other charitable entity.

The state attorney general, however, is a political official, typically elected, with neither a personal financial stake nor, in the usual case, a political stake in the operation of a charitable trust. Most state attorneys general assign few (if any) lawyers to the supervision of charities. Unless an alleged breach of trust obtains enough media attention to achieve political salience, actual scrutiny of a charitable trust by the attorney general is unlikely. As a result, it is the politically salient, egregious cases that prompt investigations, not active review of annual reports. In the usual case there simply is not enough of a political payoff to the attorney general to warrant the diversion of resources from other initiatives. The mirror-image worry, recently developed nicely by Professor Brody, is that when the attorney general does intervene in response to political pressure, he or she will be tempted to promote his or her political interests at the expense of the trust's charitable purpose. Brody provides the apt summation: "Political cynics believe that 'A.G.' stands not for 'attorney general' but for 'aspiring governor.'"[9]

Accordingly, a diverse array of scholars have theorized that supervision of charitable trusts by the attorneys general is either lackadaisical, in which case the trustees will lack an incentive to manage the trust's assets in an efficient manner, or perverse, entailing imposition of local political preference irrespective of whether those preferences match the donor's charitable purpose. The prevailing scholarly view, in other words, is that agency costs are rampant in charitable trust governance.[10]

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8. Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1429 (1998).

9. Evelyn Brody, Whose Public? Parochialism and Paternalism in State Charity Law Enforcement, 79 IND. L.J. 937, 946 (2004).

10. R. Sitkoff has analyzed this problem and adduced some empirical evidence in Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence From Hershey's Kiss-Off,* 108 COLUM. L. REV. 749 (2008).

5. APPLICABILITY IN CIVIL LAW COUNTRIES[11]

The situation in the main European civil law countries is very variegated. The most interesting case seems to be France that, since 2007 (law n. 2007-211 19 February 2007), has adopted its own legislation on trust[12] (*fiducie*). Afterwards la *Loi de Modernisation de l'économie* (art. 18 law n° 2008-776 4 August 2008) and the Decree n° 2009-112 30 January 2009 extended, among other things, also to individuals (besides legal persons subject to corporate tax) the possibility of creating a *fiducie* and allowed lawyers to also act as trustee.

In the French system the *fiducie* is mainly used as *fiducie-garantie* (guarantee) and *fiducie-gestion* (management). It is expressly forbidden to use the *fiducie-libéralité*. In fact, the French legislator preferred to exclude the use of *fiducie* for property transfer in order to avoid conflict with public policy norms regarding the succession law (in particular as concerns the legal share of inheritance) and also to prevent whatever use of it for possible tax evasion.

Other major countries like Germany and Spain do not have any statutory trust law and have not yet ratified the Hague Convention on the Law applicable to Trusts and on their Recognition (1985).

It is worth noting that in Europe only Cyprus, France, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, San Marino, Switzerland and the United Kingdom signed the Hague Convention.

As concerns Italy, which ratified the Hague Convention on 1990, we should say that the trust, especially the so-called "internal trust,"[13] is now widely diffused in the Italian system.

> The academic doctrine surely contributed to this diffusion; nevertheless the professional practice, especially the civil law notarial practice, and the jurisprudence played a central role for the application of this legal instrument. In fact, there are many issues to solve. First of all, there are problems coming from the conflict between the particular trust dispositions and the imperative norms of the national system. Moreover, we have to face issues related to the tax treatment. Actually, the fiscal aspects of trusts are not completely regulated by the Italian law and maybe there is not much conformity with the basic principles of the Italian tax system. Finally, there are difficulties related to the lack of trial procedural rules concerning the trust functioning. In Italy the judge (court) supervision of trusts is still missing.
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> As concerns the "legal professional-client" relationship, a trust could be (wrongly) viewed, and sometimes offered, as a tool for avoiding the claims of

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11. In this section, contributions by Dr. Muritano and Dr. Liotta (Italian civil law notaries) are indicated by the reference notes.

12. Emanuele Calò & Antonio Cappiello, *La legge francese sulla fiducie (trust): prospettive e possibilitá per una legge italiana*, 6 FAMIGLIA, PERSONE E SUCCESSIONI 452 (2010) (It.).

13. Trust presenting, as the only element of extraneity from the Italian legal system, the "Regulating Law," which is necessarily a foreign law (considering the lack of a specific Italian legislation on trusts).

> creditors. This is an erroneous vision that could imply a misfortune for the trust similar to the unfortunate destiny of the "fondo patrimoniale."[14]
>
> It would be significant to mention the recent experience of the "trust liquidatorio"[15] (winding-up trust) that was rejected by Italian jurisprudence because it was considered an obstacle instead of an advantage for the creditors.
>
> Another aspect of a trust that would not always be well accepted by an Italian client is the effectiveness of the assets management by the trustee. The Italian client could have some problems in accepting the idea that a trust, for its proper functioning, should necessarily imply a separation of the assets management (art. 2 Hague Convention). In fact, the typical Italian client's dream would be the separation from its assets without losing its management, which would be in complete conflict with the essence of a trust.
>
> In conclusion, there is still much to do, both from a cultural and a legal point of view, in order to promote this essential legal tool at global level also in Italy and to overcome the unfounded suspicious attitude of the Italians about the trust.[16]

Also the Italian civil law notaries experience difficulties, especially with clients who have some problems in understanding the complexity of drafting an "internal trust."

> It is important to underline that the Italian clients rarely understand the effects of the lack of an Italian legislation on trusts. An important aspect to explain them is the necessity to study a foreign legal system and to have, for a long time, a legal professional based in the foreign country whose reference law is chosen. They need to have clear as soon as possible that the trust, the foreign legislation and the legal expertise provided will be part of their life for years. For this purpose, a reading of the autobiography of Tommy Berger, former Café Hag owner, "Onora il padre,"[17] could help in understanding this matter. It is an example of the troubles which an inaccurate trust can produce and it can help in making a correct choice. Apart from all these aspects, trusts are an opportunity to solve problems and to satisfy interests with a 'flexible' instrument. In the Italian civil law notaries' experience, trusts are used both in companies and family matters. We can imagine either a trust created among the shareholders to coordinate their activity in the general assembly or the one

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14. It is a distinct and separated group of assets constituted with the specific aim to satisfy the family needs. *See* C.c. art. 167 ff. (It.).

15. A "trust liquidatorio" is a trust adopted in order to wind-up a company and refund the creditors involved in the trust.

16. Contribution by Dr. Daniele Muritano (dmuritano@notariato.it), Civil Law Notary in Empoli (Italy). He is one of the most important experts as concerns the study and application of trust in Italy. He is a lecturer at Notarial School of Florence "Cino da Pistoia." He is author of the books *Le clausole dei trusts interni* (UTET 2008) [Internal Trust Clauses] and *Accordi patrimoniali tra conviventi e attività notarile*, (IPSOA 2009) [Cohabitants' Patrimonial Agreements and Notarial Activity], and of various articles and comments on the main National and International Law Reviews. He wrote essays on Collectaneas concerning trust law, company law and guardianship law.

17. TOMMY BERGER, ONORA IL PADRE: AUTOBIOGRAFIA DI UN IMPRENDITORE (2007) (It.).

created by the parents to help their disabled children for a long time, even if the marriage is dissolved by a divorce. Anyway in the civil law system the creation of a trust needs cooperation between many professionals and many years yet to consolidate best practices on it.[18]

6. TRUST LAW IN CHINA AND TRUST OF PUBLIC INTEREST

In this short section, I focus on a particular feature of the trust law of the People's Republic of China (PRC), a country that I follow with great interest for its unique economic and social characteristics.[19]

In fact, China is a civil law country with many peculiarities, which for its position in trade and for cultural interactions is often concerned with common law issues. Aware of the importance of the Trust potentialities, China adopted a trust law at the 21st session of the Standing Committee of the Ninth National People's Congress on April. 28, 2001 (into force on Oct.1, 2001).[20]

According to art. 1 of Order n. 50/2001 of the President of the People's Republic of China, the law was formulated in order to regulate the trust relationship, normalize trust acts, protect the lawful rights and interests of the parties to a trust and promote the healthy development of the trust business.[21]

The public trust seems to be an interesting feature of the Chinese law to be looked at closer. In fact, the culture and long tradition in collective interest and solidarity led China to encourage the development of trusts for public interest.

According to the Chinese Trust Law (chapter 6), any of the following purposes of public interests is considered a public trust: 1) helping poor people; 2) helping disaster victims; 3) assisting the disabled; 4) developing education,

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18. Contribution by Dr. Giovanni Liotta (gliotta@notariato.it; www.notaioliotta.it), Civil Law Notary in Spadafora-Messina (Italy). He is coordinator of the European Notarial Network (ENN) as concerns continuous training in European Law. He is a member of the Commission of International Studies at the National Board of Italian Notaries, General Councillor of UINL (International Union of Notaries) and member of its working group on "legal empowerment of the poor" (within the framework of UNDP programs). He is the author of many legal articles in Italian, English and Spanish.

19. For further readings on Chinese economic and legal aspects, see:

Malcolm Riddell & Antonio Cappiello, *Does the Rest of the World Need the "Civil Law Notary Model"? A Preliminary Answer from the Real Estate Crises in the United States and China*, STUDI E MATERIALI 77 (Supp. I 2008).

Antonio Cappiello, I diritti di proprietà in Cina un anno dopo l'entrata in vigore della nuova legge, 1 SIEDS ECON. & SOC. FOCUS (2009) (It.).

Antonio Cappiello, Legal Origins and Socio-economic Consequences: Can Legal Origins Really Explain the Main Differences in Economic and Juridical Performances?, 79 NORDIC J. OF INT'L L. 501 (2010).

Antonio Cappiello, *In Cina è in atto il più grande fenomeno di urbanizzazione della storia,* NEODEMOS: POPOLAZIONE, SOCIETÀ E POLITICHE (Sept. 24, 2008) (It.), http://www.neodemos.it/index.php?file=onenews&form_id_notizia=236.

20. Trust Law of People's Republic of China, Order of the President of the People's Republic of China, No. 50, (promulgated by the Standing Comm. of the Ninth Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001), *available at* http://english.gov.cn/laws/2005-09/12/content_31194.htm.

21. *Id.*

technology, culture, art and physical education undertakings; 5) developing medical and sanitation undertakings; 6) developing environmental protection undertakings and maintaining the environment; and 7) developing other public undertakings of the society.[22]

The trustee (art. 67) shall make at least one report on the handling of public trust affairs and the status of the property each year, and submit to the regulatory agency of public undertakings for approval after being recognized by the trust supervisor (and the trustee shall make public announcement of the report). After a public trust is established (art. 69), the regulatory agency of public undertakings may change relevant clauses of the trust documents on the basis of purposes of the trust if any of the circumstances that can't be anticipated when the trust is established happens. If the public trust terminates (art. 70), the trustee shall report the causes of termination and the date of termination to the regulatory agency of public undertakings within 15 days since the causes of termination happen. At the termination of a public trust (art. 71) the liquidation report on the handling of trust affairs made by the trustee shall be reported to the regulatory agency of public undertakings for ratification after the trust supervisor recognizes the termination and the trustee makes a public announcement of the termination. And, if there is not a person who has the right to own the trust property or it is the unspecified public that have the right to own the trust property when the public trust terminates, the trustee shall utilize the trust property for the former purposes of public interests or similar purposes, or transfer the trust property to the public organization that has similar purposes or other public trusts with the approval of the regulatory agency of public undertakings. The trustor, the trustee or the beneficiary has the right to raise an action at the people's court if the regulatory agency violates the provisions of the Law (art. 73).[23]

FURTHER READING

Blake Bromley, Relevance of England's Charity Trust Law to China's Charity Law, Sino-UK Charity Legislation Seminar (Suzhou, China, July 29-30, 2010).

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22. *Id.*
23. *Id.*

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The Rebirth of the *Civitas* According to Bartolus: A Legal Guide to Medieval Europe in the Image of the Eternal City

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Introduction

Bartolus of Sassoferrato (1313-1357), one of the most heralded jurists in medieval history, is remembered chiefly for his doctrine *civitas sibi princeps.* Most of his work centered on the application of the newly revived Roman law to his own particular socio-political landscape, the basis of which was the city or *civitas.* This essay addresses how and why it was so important for the city to be its own prince. Bartolus stated that a city without a superior could be a prince unto itself, but this only raises the bar for deeper prodding, since orthodox medieval political theory places all polities under the *imperium* of the Holy Roman Emperor. Furthermore, how were these free cities with no superior to interact with other cities, kingdoms, the Empire and specifically how did the infusion of Roman law speak to this on both a practical and theoretical plane?

Through the use of public and private Roman law, Bartolus endeavored to recreate ancient grandeur by reclassifying each Christian European polity as a neo-Rome unto itself. The democratic governance of a city as its own prince was merely the first step, according to Bartolus' comprehension of Roman history, in developing into an imperial power. Without the novel creativity the civil law afforded, Bartolus would have found this a problematic legal framework to justify.

This paper has four sections. The first introduces Bartolus through the backdrop of his dynamic legal climate. The jurist belonged to a group of civil lawyers known in legal history as the commentators. Understanding their civic, secular approach to the law is vital in recognizing how Bartolus presented *civitas sibi princeps,* and gives preliminary indications as to what he aspired to accomplish with it – namely a collective order of European polities based on the will of men. The second section introduces his famous maxim and then provides a brief sampling as to how it has been interpreted in recent history. In separating the doctrine from much of his other writing on the *civitas,* many scholars have shifted Bartolus' notion of the place of the independent *civitas* in the larger medieval European context. *Civitas sibi princeps* was meant to provide a greater inter-European order based on Roman principles, as opposed to simply eroding the *imperium* of the Holy Roman Empire. The third section builds on *civitas sibi princeps* by demonstrating how *Trecento* cities sorted their

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legislative conundrums using the revived Roman jurisdictional concept of territoriality, and how linking themselves with individuals through citizenship provided a further means of connecting these cities with one another. This section also builds on the parallel thesis of the civil law as a new creative force in medieval Europe. Bartolus shows how the legal construct of citizenship is an embodiment of the collective will of men. The last section presents Bartolus' inter-European notion of order through an analysis of two of his writings, *De Regimine Civitatis,* and his commentary on the law of postliminy. Bartolus shows that the free city's form of government changes as it expands, in essence, mirroring a stage in Rome's evolution from city to Empire. Each European city is characterized as more of a Rome unto itself than a prince.

Many have explored Bartolus' work on the *civitas*, but this paper avoids a common framework, which is to focus on a particular facet of his writing, such as governance, and then compare and contrast with a modern equivalent. Though particularly adept at identifying the roots of a particular institution (i.e. public law) for the purposes, *inter alia*, of narrating a progressive history, that approach tends to color Bartolus' surroundings and his underlying motivation. This is not to lambaste the invaluable work of many medieval historians who have made sense of much legal mire. It is to say, however, that this is not the only way to make sense of the past. One of the offshoots of this approach is that discerning Bartolus' broad conception of the inner and outer workings of the *civitas* becomes more important than contrasting his ideas about the city with our modern notions of the state.

I. BARTOLUS AND HIS LEGAL *LOCUS*

Bartolus was born in Sassoferrato, a small town in the *contado* of Urbino, in 1313. Towns like his were increasingly coming under the direct legislative and physical force of the larger cities closest to them.[1] It also became very common for individuals to migrate to these centers in search of a steady income, and for the more ambitious among them, wealth and fame. Bartolus' father was most probably a man of modest means. Thus, it would seem that Bartolus' early move was not altogether necessary. Nonetheless, as an adolescent he demonstrated exceptional academic potential and at the tender age of fourteen was sent

1. In Europe this phenomenon was most widespread in the cities of modern France (particularly the south) and Italy (north and central). The situation was much different in northern and central Europe. In Germany, for example, a city's power did not extend beyond its walls and in northern Europe there were very few cities with hardly any economic or military clout. For a pan-European survey, see Heinrich Mitteis, *The Decline of Feudalism, in* THE STATE IN THE MIDDLE AGES: A COMPARATIVE CONSTITUTIONAL HISTORY OF FEUDAL EUROPE 321-89 (H.F. Orton trans., 1975).

off to study under Cino da Pistoia, a prominent law professor (also a friend of Dante) at the University of Perugia.[2]

Legal historians consider Cino to be one of the first postglossators, the group of jurists who succeeded the glossators. The latter endeavored to flesh out the recently discovered compilations of Justinian (the Digests, Institutes and the Code), the sixth century Roman emperor.[3] From the beginning of the eleventh to about the end of the thirteenth century jurists such as Bonillo, Pepo and Irnerius, attempted to understand these ancient laws and juridical opinions and extrapolated their meanings and potential applications in the margins of the text or in between its lines. Eventually, an extremely meticulous and diligent individual, Accursius, compiled all of these in his *Glossa Magna* in the middle of the thirteenth century. The *Accursian gloss*, as it was called, became a standard textbook in the medieval law schools of the Italian peninsula.[4] It was taught alongside the *Corpus Juris Civilis.*

What distinguished the glossators from the postglossators was the manner in which they approached the newly discovered Roman law. The former sought mainly to understand it whereas the latter were largely preoccupied with contemplating its usages in the modern context. According to legal historian Manlio Bellomo, the early beginnings of this intellectual swerve occurred sometime during the second half of the eleventh century, between two schools, the *antiqui* and *moderni,* more or less at odds with one another. The *moderni,* unlike the *antiqui*, advocated the use of Roman law to bridge inconsistencies in medieval European law. Bellomo explains:

> The *antiqui* held that a norm could be interpreted only by comparing it to the other norms in the same collection . . . . As a consequence, they held that where no norm was provided or where the norm was dubious one should turn to the context of the dispositions in question and draw from them – and only from them – the needed norm or the most likely indication. The *moderni,* on the other hand, thought it possible and proper to return to Roman law either to

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2. This factual account of Bartolus' life is based on the first chapter entitled "Life and Writings of Bartolus," in ANNA SHEEDY, BARTOLUS ON SOCIAL CONDITIONS IN THE FOURTEENTH CENTURY 11-49 (1967). It is to my knowledge the most thorough summary of its sort available in English.

3. Justinian is known for having attempted to reconquer much of the western portion of the Roman Empire which had been lost to various barbarian groups throughout the fifth century. As both a symbolic and organizational tool, Justinian ordered a thorough compilation of existing Roman law which included the edicts of many emperors and the opinions of a number of famous jurists. Copies of this compilation, though stored in the numerous monasteries of Western Europe for four centuries after his death, were hardly ever studied. Roman law had simply crumbled along with the Empire in the West. In approximately 1070 CE copies of the manuscript began circulating again. This was due, in part, to the increasing number of jurists both trained and employed in the many cities scattered across the peninsula. For a summary on the particular methods employed by the glossators, see ULRICO AGNATI, IL COMMENTO DI BARTOLO DA SASSOFERRATO ALLA LEX QUOD NERVA (D. 16, 3, 32), INTRODUZIONE, TESTI E ANNOTAZIONI 15-19 (2004) (It.).

4. For a systematic account of the medieval law school curriculum, see MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE, 1000-1800 126-48 (Lydia G. Cochrane trans., 1995).

> understand Lombard edicts or Carolingian capitularies better or to fill in their eventual lacunae.[5]

The postglossators, Cino among them, increasingly sought to apply the Roman law in solving contemporary legal conundrums – and these were numerous indeed during the fourteenth century. Jurists were forced to ponder the ramifications of an increasingly peripatetic Europe. Individuals like Bartolus were constantly on the move and so were especially the merchants who reaped immense profits from pan-European commerce and trade with the recently accessible East (i.e. China and the Levant.) Thus, one main issue involved discerning which polity held jurisdiction amidst all of this travel. When problems arose, such as the breach of a contract, this new merchant class increasingly turned to the courts. Much legal analysis was spent deciding which court could try an interjurisdictional issue. And as these conundrums grew, so did the demand for lawyers and notaries.

As it turned out, Roman law was particularly adept at solving problems of the sort as much of it was created to treat many of the same difficulties associated with border-crossing commerce. It enhanced lex mercatoria. Feudal law was too static and depended too heavily on a lack of cross jurisdictional interaction. In continental Europe, people traveled and traded too often and too quickly for it to retain its efficacy. Some postglossators may have recognized this, but were not particularly forthcoming with this type of justification – one that rested solely on contemporary necessity. Most simply defended its application on the basis that it was a body of law common to all Europeans which had existed for centuries.[6] The past, for a medieval jurist, retained a normative quality that would not be as highly regarded just a century later. An argument based on tradition would be much more difficult to refute, than one that was not. Nonetheless, it would be mistaken to conclude that the postglossators were chained to the past. It was a tool, but it was often repudiated. Throughout Bartolus' texts there are many instances in which he states plainly that the *gloss* or the *corpus* is wrong.[7] The past persuaded, but it did not possess a monopoly on persuasion. This is perhaps due to the pervading notion that through a Roman revival they (the postglossators) could make a better world – one which mirrored the glory of ancient Rome.[8]

Cino introduced a young Bartolus to Roman law, canon law, civil law, feudal law, and customary law. His education was a veritable melee of *ius proprium* and *ius commune*.[9] One, however, could not become a certified feudal or cus-

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5. *Id.* at 53.
6. *Id.* at 57.
7. SHEEDY, *supra* note 2, at 29.
8. *See* James Whitman, *The Lawyers Discover the Fall of Rome*, 9 LAW & HIST. REV. 191 (1991).
9. Ius commune refers to both civil and canon law. *Ius Proprium* is local law (e.g. a Florentine statute).

tomary jurist. The only two official law school curriculums available were canon law and civil law, each requiring a student to attend university for about half a decade. Bartolus chose the latter, probably due in part, to the higher level of creativity afforded to *civilians.* The civilian was much freer, in a sense, to put his stamp of approval on a certain trans-jurisdictional custom.[10] By contrast, the canonist was primarily concerned with decrees of the top-down variety. True, there was a move to codification in the thirteenth century, approximately during the same time the *Accursian Gloss* was compiled.[11] The main difference is that the canonist toolkit was limited to scripture, decretum, canonical texts of church fathers and recent theologians, whereas the civilian's range was necessarily broader. He was forced to include the canonist's principles because Western European society was inextricably faith-based. But in certain instances he could choose to ignore it. A discussion on contracts, for example, would include only Roman law and customary law, whereas the overwhelmingly moralistic basis of a delict would readily lend itself to at least some level of religious justification.[12] The civil law was secular in form, but most civilians, Bartolus among them, truly believed that its underlying principles were in the utmost accordance with Christian doctrine.

Bartolus became a doctor of civil law at Bologna in his mid-twenties, and like many of his contemporaries, sought employment as an assessor. Assessors worked under the tutelage of a judge or local official and were required to draft legal opinions on matters of a broad variety.[13] Often, a wealthy individual would approach the assessor for legal advice, a service for which the client would pay a sizeable sum. As professors of law, postglossators like Bartolus would draw heavily from their extra-academic experience and remain highly involved in life outside the university. The *moderni* approach, discussed above, became the foundation of what legal historians later coined the *mos italicus.* Essentially, it was legal culture of endemic question and debate which hinged on numerous juristic opinions, rather than royal decrees or edicts. Law professor H. Patrick Glenn refers to it as one where questions seem more important

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10. Since the canonist worked directly for the papacy, the sources of law did not extend to judicial commentary. For the civilian it did, since no one jurisdiction controlled that body of law.

11. This refers to both Gratian's *Decretum* and the codification ordered by Gregory IX and supervised by St. Raymond of Pennafort which included *Decretum* but also added to it. The latter was called *Decretales* and for the first time in the history of canon law, the Catholic Church promulgated an exclusionary legal document. If a Papal law or edict was not found within *Decretales,* then it was not considered authentic. This is but one example of the constrictive culture Bartolus the civilian would have probably disliked. For a discussion on *Decretales,* see BELLOMO, *supra* note 4, at 71-74.

12. This is a recurrent practice in Bartolus' writing on the conflict of laws. Because of the intentional nature of a delict it would have been characterized as sinful, whereas much of his discussion on the law of contracts deals with overlapping jurisdiction – a question of confusion rather than intentional malevolence.

13. This occupation proliferated during the twelfth century. *See* SHEEDY, *supra* note 2, at 17.

than answers.[14] In *The Universities of the Italian Renaissance*, historian Paul F. Grendler explains why law schools proliferated so widely and with such success as to attract a body of students from across the continent:

> *Mos Italicus* worked because the commentators were eminently practical men who took great care when applying principles from ancient Roman law to contemporary life. Law professors kept in close touch with practicing lawyers and judges. They served as legal advisors to communes, cities, and guilds; they wrote innumerable *consilia* (advisory opinions) on current cases . . . . Students came to study with them because Europe's common legal tradition was strongest in Italy and links to ancient Rome the closest.[15]

Further reasons for the prevalent use of Roman law were both its worldly and nostalgic qualities. The preceding centuries had opened up Western Europe to the rest of the world due, in large part, to the crusades. This new influx of wealth and ideas encouraged a more outward looking attitude – it opened up a world beyond the city walls.[16] Thus, the *Trecento* can be viewed a century encapsulating the expansive ambitions of the recent European past.[17] Roman law not only worked well, but it called to mind the ancient amphitheaters, baths, roads, aqueducts and bridges; all of which were monuments of a past glory. In fact, Denys Hay, among others, credits the postglossatorial school with sparking a renewed interest in antiquity, a spark which would later develop into the Renaissance proper.[18] Long before Lorenzo de Medici housed neo-classical artists in his Roman style villa, figures like Cola di Rienzo and Petrarch were hatching plans to restore Rome to its ancient glory. And even more numerous were the petty tyrants, popes, and Germanic princes who aspired to exercise *imperium* just as Caesar had. These aspects of the revival of Roman law are not to be underestimated. They played a large part in Bartolus' notion of how a city should rule. For Bartolus, the cities of medieval Europe were to look outward, to expand, and to bring larger swaths of territory within their control. They were justified in doing so as inheritors of Roman *imperium.*

In medieval political theory the Holy Roman Emperor was the inheritor of Augustus's Empire and as such held *imperium* (total jurisdiction) over the totality of the temporal Christian sphere. This doctrine was challenged throughout the high medieval period by the papacy – a budding temporal superpower in contemporary terms. By the fourteenth century, however, both the Empire and the papacy were embroiled in respective internal conflicts. Charlemagne's pro-

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14. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 133 (2d ed. 2004).

15. PAUL F. GRENDLER, THE UNIVERSITIES OF THE ITALIAN RENAISSANCE 434 (2002).

16. In Italian cities, visible markers of the outside world abounded. One such example is the drastic change in textile prints. New designs were influenced by Chinese and Arabic trade. *See* Eleanor B. Saxe, *Notes on Mediaeval Textiles*, 20 METROPOLITAN MUSEUM OF ART BULLETIN 220 (1925).

17. The crusades occurred between the eleventh and thirteenth centuries.

18. DENYS HAY, THE ITALIAN RENAISSANCE IN ITS HISTORICAL BACKGROUND 68-69 (1966).

ject of neo-imperial domination failed all but in name with the fall of the Hohenstaufen in 1250.[19] The collapse of this dynasty was followed by a period of interregnum spanning some four decades. Furthermore, at the onset of the fourteenth century, the papacy set up headquarters at Avignon – a temporary move from Rome which would last more than half a century.[20] This turmoil left many burgeoning European cities with a degree of political latitude previously unimaginable. Perugia was one such city, and in 1343 Bartolus accepted an offer of professorship from the city's university. He spent the rest of his life there, teaching and writing at a fervent pace. In 1353, four years before his death, he was made a Perugian citizen. His writings aspired to ensure, among other things, that the city could legally exercise the *imperium* that had been inherited by the Holy Roman Empire. The city, in fact, was the perfect candidate since it was the political root of Roman law. Justinian's compilation of laws and juridical opinions were not only those of an empire, but included the early beginnings of Roman history in which the city, like those of the *Trecento*, was a free one.

II. FREEING *CIVITAS SIBI PRINCEPS*

Bartolus did not consider a city to be free unless it was without a superior. A free city therefore, became its own prince (*civitas sibi princeps*). This adage has attracted the interest of numerous legal historians who have pondered the concept's purpose and place in the *Trecento* and beyond. Perhaps the allure of *civitas sibi princeps* lies in its ostensible likeness to the modern day. Isolated from the rest of his writing, this maxim seems revolutionary.[21] From a twenty-first century perspective one can identify in it the rough beginnings of democracy, state sovereignty and international law. The many elected officials who take turns ruling the city call democracy to mind. The theory that a territorial unit, such as a city, can become its own sovereign is suggestive of state sovereignty. And this territorial unit's ability to deal with other sovereigns resembles modern international law. It is probable that Bartolus contributed in at least a minor way to the development of these ideas. However, his comprehension of the world either outside or among cities was very different than the orthodox Grotian concept of equal European sovereign states based on absolute, territo-

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19. For Jacob Burckhardt this date coincides with the birth of the Renaissance in Italy precisely because it solidified the political freedom, via *de facto* independence, that the Italian city-states had been pursuing for at least the past two centuries. *See* Jacob Burckhardt, *The Renaissance in Italy* 3-7 (S.G.C. Middlemore trans., 1997). This view is corroborated by Bartolus himself in *On Guelphs and Ghibellines* as he discussed the various meanings the terms had during the period. *See* Bartolus of Sassoferrato, *On Guelphs and Ghibellines, in* HUMANISM AND TYRANNY: STUDIES IN THE ITALIAN TRECENTO 273-84 (Ephraim Emerton trans., 1964).

20. The Avignon Papacy ran from 1309-77.

21. Much like the opening of the courts under English common law during the nineteenth century. *See* GLENN, *supra* note 14, at 240-44.

rial jurisdiction.[22] The main components of *civitas sibi princeps* discussed below are followed by a general survey of twentieth century commentary on that doctrine. This section thus presents an introduction to Bartolus' *civitas sibi princeps* and demonstrates how modern interpretations of the latter are generally a bit narrower in focus.

Under Roman legal theory, the emperor was the only individual capable of exercising overarching legislative and administrative powers. Those of a purely local nature were devolved to provinces and cities. More important matters, however, such as coinage and citizenship, fell under imperial jurisdiction. The Roman legal terms used to describe such power were *imperium* (largely military) and *jurisdictio* (legislative/judicial).[23] *Imperium* was further divided into two categories: *merum* (mostly public law) and *mixtum* (a mix of public and private law). Bartolus attempted to legalize the wide-ranging *de* facto legislative powers of these cities by characterizing them as a devolution or transfer of *merum* and *mixtum* imperium.[24] This was no simple task since matching legislative categories was an imperfect endeavor at best. Nonetheless, the idea of *imperium* remained pervasive among medieval Roman lawyers. Bellomo explains:

> The ancient laws of Justinian had little or nothing in common with the new constitutional structure of the Holy Roman Empire. The old magistracies had disappeared. The new magistracies, both central and peripheral, were different. All that was left – and it was immensely alive – was a central conceptual nucleus once incorporated into the constitutions of ancient Rome and now revived and reinterpreted in the *figura* of the Holy Roman Empire. This nucleus was the very idea of *imperium. Imperium* was different and distinct from *dominium*; moreover, it was a notion that permitted no neutral and intermediate areas such as the idea of seigniory.[25]

To justify the cities' possession of *merum and mixtum imperium,* Bartolus fashioned the polity in that same *figura*. The city became its own prince and according to Bartolus there were four ways in which this newfound abstraction,

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22. The definition of the Grotian orthodox account is borrowed. *See* EDWARD KEENE, BEYOND ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 40-59 (2002).

23. CONSTANTIN FASOLT, THE LIMITS OF HISTORY 181-82 (2004).

24. *Merum Imperium* was the highest form of power which included the right to legislate on virtually all matters of the most serious nature such as war and imperial fiscal policy. An example of *mixtum imperium* could include, for example, the administration of justice for civil matters. *Iurisdictio simplex* involved anything of a less important more private nature and was based on the will of the parties. Interestingly, Bartolus referred *merum* as having to do with any important matter of a public nature, while *mixtum* pertained to both private and public spheres. Historian David Johnston notes that this was a small step in the direction of the development of distinct spheres of public and private law. *See* David Johnston, *The General Influence of Roman Institutions of State and Public Law*, *in* THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS 87-101 (D.L. Carey Miller & R. Zimmerman eds., 1997).

25. BELLOMO, *supra* note 4, at 74-75.

the city-prince, could exercise *imperium.*[26] It could do so via imperial concession, the characterization of the city as a Roman province, prescription, and finally, usurpation.

The idea of imperial concession is quasi-contractual and deals with a direct and documented devolution from the Holy Roman Emperor himself. Once handed over, like citizenship to a city, it should not be retracted.[27] A number of cities, Perugia included, had been granted concession by traveling Emperors.[28] In fact, during a hasty trip to Rome for his coronation, Charles IV performed such ceremonies in a few northern Italian cities.[29] Concession, according to Bartolus, was the ideal manner in which to exercise *imperium*, for it clearly kept the peace and maintained the fruitful legal fiction of the existence of the Holy Roman Empire.

The second way in which the city-prince could exercise *imperium* was through conceptualizing the city as a quasi-Roman province. The latter were allowed a brand of *imperium* that was broad, but not all-encompassing (*mixtum imperium).*[30] This form of abstraction worked well for territories such as England and France, the rulers of which had no intention of negotiating a concession with their less powerful Germanic Emperor.[31] It was thus an abstraction that benefited the students of law schools in Italy, but made very little headway in the jurisdictions for which it was actually designed.

The third method, prescription, was borrowed directly from the Roman law of property.[32] If a city was not claimed by a superior for at least fifty years, then it could claim independence. This number is particularly interesting since it had been just over fifty years since the fall of the Hohenstaufen – that is, the last time any physical threats to communal independence had been present. Prescription, a Roman tool designed to force owners to tend to their property, was

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26. For a thorough summary and commentary, see CECIL N. SIDNEY WOOLF, BARTOLUS OF SASSOFERRATO: HIS POSITION IN THE HISTORY OF MEDIEVAL POLITICAL THOUGHT (1913).

27. According to Bartolus, *imperium* can indeed be retracted at will by the Emperor, though he could not do so without good reason.

28. SHEEDY, *supra* note 2, at 26-27.

29. *Id.*

30. Johnston, *supra* note 24.

31. Bartolus admits that these monarchs do not admit that the Emperor is their superior in his commentary on postliminy. *See On Captives and Postliminy, in* THE ETHICS OF WAR 206 (Robert Andrews & Peter Haggenmacher trans., Gregory M Reichberg et al. eds., 2006).

32. Interestingly, "praescriptio" was incorporated into the Roman law of property from the *ius gentium* in the latter years of the Roman Empire it protected non-Roman citizens. The old term for it, "usucapio," applied solely to Romans. By the time of Justinian's compilation, however, all differences between the two had eroded. An immovable would be prescribed after ten or twenty years depending on the place of residence of the owner. Since the Germanic emperors lived very far away, it seems that a longer time period is more justified. The fifty year period also speaks to Bartolus' sensitivity regarding the seriousness of such a claim. For an interesting discussion on the Roman law of property, see WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 298-385 (1989).

applied fittingly to Trecento governance since territorial jurisdiction had recently become the norm.

The last method of claiming *imperium* was via usurpation. This idea may have been used to justify papal claims over certain lands since discordance still existed between the papacy and the Germanic princes.[33] Usurpation may also have been related to vociferous claims by the nobility domiciled in the *castelli* surrounding the cities. Sheedy's account about Bartolus' general silence regarding the Perugian nobility raises some suspicion. Consider the following:

> Excluded from participation were both the lowest class and the nobles, the latter group having been disqualified by the publication of the *Libro Rosso* in 1333. While Bartolus refers to the political exclusion of the nobles, he does not discuss it. He indicates only that the reason for exclusion was to prevent the exercise of a preponderance of power by this class. Unlike Baldus, he gives no evidence of any personal animosity against the nobles; nor does he speak of the several attempts on the part of the unreconciled nobles to upset the status quo by a revolt against the restrictions which had been imposed upon them.[34]

Thus, it is also possible that usurpation was meant as a kind of preemptive advance against any future action by a local noble. Local nobles posed a much greater threat than the distant Germanic prince who happened to occupy the imperial throne at any given time. Nonetheless, usurpation for Bartolus was a last resort. It would only serve to magnify political strife on a peninsula besought with conflict.

Not all contemporary legal historians have overlooked the notion of *imperium* in connection with *civitas sibi princeps.* Throughout his monograph on Bartolus' political ideas, Woolf centers on the theme of unity.[35] He argues that *civitas sibi princeps* ought not to be extracted from the Holy Roman Empire. Instead, it should provide but one piece, an important one nonetheless, of the Empire's *imperium.* Thus, for Woolf, the city represents a new facet of imperial power – it is not a power unto itself. The metaphor of the *princeps* rightly draws one's attention to the Holy Roman Emperor. In the history of political theory, Woolf conceptualizes it as more of a revival than a novelty. This approach is very similar to those of Italian legal historians such as Francesco Calasso and Manlio Bellomo who are both apt to pay closer attention to the concept of Ro-

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33. The Papacy had employed Cardinal Albornoz to visit all of the lands to which they had laid claim. Most had been usurped by petty tyrants. Cardinal Albornoz legitimated many of these on the condition that they answer to the Pope. Most of these territories were also claimed by the Holy Roman Empire. Usurpation would have helped the Cardinal reclaim lands for the Pope. Albornoz is also said to have consulted Bartolus in drafting his *constitutiones egidianes.* For an interesting discussion, see EPHRAIM EMERTON, HUMANISM AND TYRANNY: STUDIES IN THE ITALIAN TRECENTO 195-251 (1964).

34. SHEEDY, *supra* note 2, at 87.

35. *See* WOOLF, *supra* note 26.

man *imperium* than to the city's independence.[36] According to these interpretations, independence is a *de facto* reality that Bartolus cannot ignore. His overarching imperial theory is thus divorced from the local application of *civitas sibi princeps.* These accounts tend to provide too stark a contrast between *de facto* and *de jure.*

Others have focused their analyses on isolating a particular facet of the doctrine or one of its motivations, while largely undermining the imperial aspect altogether. Walter Ullman, for example, penned two articles that were presented at the sixth centenary of Bartolus' death, a colloquium that attracted a number of European and North American academics. His first piece traced Bartolus' influence on English jurisprudence. Focusing on *civitas sibi princeps,* he demonstrated how a succeeding Bartolist, Albericus Gentilis, helped lay down the foundations for modern international law. Consider the following:

> Sovereignty was the passport which allowed entry into the *societas.* What we are here in substance confronted with, is the application of another Bartolist formula, namely the *civitas sibi princeps* which was the Romanist's terminology for the publicist's sovereignty. Gentilis' exposition of International Law rested securely on Bartolist premises. Hence it is that Gentilis can count among the members of the *societas gentium* also *gentes* which were not Christian, were infidels or even barbarian. The sole criterion was whether the *gens* possessed sovereignty.[37]

Though this type of analysis can be interesting, it tends to sweep aside the problems that Bartolus would have had with what Gentilis had done to his doctrine. Non-Christian *gens* would not have been able to possess that 'sovereignty' since it was *imperium* that drew its source from a Christian empire. Without a central authority such as the Holy Roman Emperor, Bartolus would have probably referred to international law as a "monstrous tyranny."[38]

In his second article, *De Bartoli Sententia: Concilum Rapraesentat Mentem Populi,* Ullman begins his analysis of Bartolus' concept of the source of legislative authority in a similar vein.[39] Here, he launches into a discussion about the legislative supremacy of the populace without carefully distinguishing the aims of both medieval and modern theories of popular sovereignty. According to his argument, the city with no superior is allowed to be a *civitas sibi princeps*. He then links the Latin word for "superior" with both Italian (soverano) and French (souvrain) versions to demonstrate that *civitas sibi princeps* transferred sover-

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36. *See* Francesco Calasso*, L'Eredita di Bartolo, in* 1 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 1 (Giuffrè Ed., 1962) (It.); BELLOMO, *supra* note 4, at 190-95.

37. Walter Ullman, *Bartolus and English Jurisprudence, in* 1 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 66-67 (Giuffrè Ed., 1962) (It.).

38. This is the name he gave to the seventh type of government in his *Tractatus de Regimine Civitatis*. It is discussed below.

39. Walter Ullman, *De Bartoli Sententia: Concilum Rapraesentat Mentem Populi, in* 2 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 705 (Giuffrè Ed., 1962) (It.).

eignty from the royal figure to the populace.[40] He states that *civitas sibi princeps*, for the first time since ancient Rome, placed a stamp of approval on ascending law – that is law which grows out of popular custom. Once recognized by a high ranking official (i.e. a judge) of the polity, it becomes law. This is a version of legislative creation, which quite conveniently mimics the law making process of English common law. Unfortunately, his opening premise is unsteady at best. He writes:

> Who has *merum imperium*? In the terminology of modern political science this question is identical with where political sovereignty resides. In late Roman times as well as throughout the medieval period the significant notion of *jurisdictio* demonstrates the character and nature of this sovereignty which therefore was exclusively legal.[41]

The two questions are far from identical. The first is enmeshed with the newly revived question of Roman imperial power whereas the latter does not consider this in the slightest. Moreover, *jurisdictio* was not exclusively legal, no matter how hard the jurists of the *mos italicus* endeavored to make it so. Though thought-provoking, Ullman's analysis, much like the former article, seems to replicate what he claims Gentilis did to Bartolus' *societas gentium*. In separating an idea from its inherent context, much doubt remains as to the influence and value of the earlier thought in relation to the latter. The progressive narrative renders it difficult to extricate *civitas sibi princeps* from the march of history.

III. ROMAN LAW COMES TO TOWN

During Bartolus' life, the city became the cornerstone upon which the rules regarding most human activity were constructed. It possessed the power to regulate marriages, wills, contracts, and criminal punishment. There were ecclesiastical courts, for strictly religious matters, but it is beyond doubt that the city came to lead in the regulation of social, economic and political life. Bartolus' thoughts on both conflicting legislation and citizenship, discussed below, illustrate the *de facto* legislative scope of the city, the Roman legal concepts used to describe those powers, and the jurist's underlying views about the normative force of civil law (*ius civile*). Bartolus' infusion of Roman law proves that he aspired to provide a new order both within and among cities. Above all, he was concerned with fostering unity within the *moenia*.

With the fall of the Roman Empire, the overarching political system in Western Europe was gradually replaced with feudalism. In legal terms, daily activity was governed by an extremely varied brand of private law – relationships were between individuals or individuals and their groups, rather than their polities.

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40. *Id.* at 723.
41. *Id.* at 707.

The basis of this private law was the relationship between the individual and his kin. A typical example of the fact that feudalism saw no need for the distinction between public and private was the succession of kingdoms. Public property was virtually non-existent and large swaths of land were simply passed down from king to first-born with all of the existing rights and obligations between existing tenants remaining perfectly intact.[42] By contrast, the Roman ruler inherited the office with the right to tax the land. He did not own the land. The 'barbarian,' as legal historian William Rattigan pointed out, "acknowledged no law but that of the folk-right of his own tribe, which he had brought with him."[43] The increasing domination of the city over its surrounding territory began to transform that relationship. The domiciled individual came to live under the legislative stamp of his own city as did newcomers and traveling merchants. Over a long period of time the jurisdiction of the kin was replaced by that of the territory. Indeed, historian Angelo Piero Sereni states that this new phenomenon was in need of a different principle of organization. It was found in the Roman law. He writes:

> The reason . . . is obvious. The international community as it first developed in Italy during the thirteenth and fourteenth centuries was the opposite of the feudal organization. Therefore its juridical organization could not possibly be based on the principles of feudal law, but had to deduce its rules from a different system of law that would contain principles in better agreement with the nascent conception of territorial sovereignty.[44]

The new onus on territoriality presented the jurist with endemic legislative overlap between cities. Since contracts, for example, were being drafted and performed in different cities, there were questions as to which city's rules regarding formation and performance should be tantamount. In numerous commentaries Bartolus fleshed out many of these inter-jurisdictional issues. At the turn of the twentieth century, law professor Joseph Henry Beale translated and collected much of this work into a single volume entitled *Bartolus on the Conflict of the Laws.*[45] The title anachronistically gives the impression that Bartolus was acutely conscious of the creation of a branch of legal study so profuse

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42. Bartolus underscores the importance of election over succession regarding empires, or cities of the largest sort in BARTOLUS OF SASSOFERRATO, TRACTATUS DE REGIMINE CIVITATIS (Steve Lane trans.) (It.), *available at* http://www.fordham.edu/halsall/source/bartolus.html.

43. William Rattigan, *The Great Jurists of the World: III. Bartolus (1313-1357 A.D.)*, 5 J. SOC'Y COMP. LEGIS. (n.s.) 230, 231 (1904).

44. ANGELO PIERO SERENI, THE ITALIAN CONCEPTION OF INTERNATIONAL LAW 56 (1943). Sereni is perhaps a shade too liberal in his application of modern international legal terms to medieval Europe. For example, the use of the term "territorial sovereignty" is somewhat suspect due to the fact that many scholars would challenge the notion that sovereignty, in the modern sense, existed before the sixteenth century. Nonetheless, what is important to glean from that passage is that jurisdictional issues were increasingly coming under the organizational principle of territoriality.

45. BARTOLUS OF SASSOFERRATO, BARTOLUS ON THE CONFLICT OF LAWS (Joseph Henry Beale trans., 1914).

today. Historians such as Samuel Edmond Thorne are quick to indicate that Bartolus did not invent the notion of territorial sovereignty, but simply plucked out common rules based on the increasingly territorial system in which he lived.[46] Nonetheless, many of the principles he elucidated seven centuries ago are easily identified in modern texts on the same subject.

The underlying issue in Beale's collection is that of territorial jurisdiction. At the very outset, Bartolus ponders whether the legislator may make laws that have effect beyond his territory.[47] Just as one looks to the city-statute where the breach occurred in passing judgment over the collapse of a trans-jurisdictional contract, one looks to the territory in which the matter occurred. But the foreign defendant can generally only be tried under the *ius commune* and not the particular statute of a city-state because, very broadly speaking, a legislator cannot legislate beyond his territorial boundaries. Here, two points are noteworthy. The first is Bartolus' use of the term *common law*. Not to be mistaken with the legal system taking root in England under Norman rule, the *ius commune* refers to the total sum of legal culture in continental Europe. The two highest bodies of law within this mix were civil and canon law. Contemporaries used the expression *utrumque ius* when they converged.[48] The concept of a common law of Europe was not something that Bartolus or Grotius invented, but one that a new class of jurists had been fleshing out for almost three centuries before the birth of Bartolus. Thus, though the jurist seemed to be treading in foreign territory, so to speak, the conflict of laws already contained a diverse body of literature. The second point is that one finds embossed in the query about whether a legislator could make law beyond his boundaries, the notion that civil law is something made by men to apportion authority. But rather than use the kin or tribe, Trecento lawyers linked individual pursuits with the governing authority of a very definite piece of *terra firma.* What distinguished this organizational principle from its counterpart in the feudal legal system was the nature of the agreement. Feudalism revolved around a set of obligations between men and lords, lords and kings.[49] The new territorial theory coupled with Bartolus' notion of the city

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46. Samuel Edmond Thorne, *Sovereignty and the Conflict of Laws, in* 2 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 673 (Giuffrè Ed., 1962). For more on Bartolus' contribution to the development of international private law see Bruno Breschi, *Alcune osservazioni sul contributo recato da Bartolo alla teoria degli statuti, in* 2 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 49 (Giuffrè Ed., 1962) (It.); Aldo Checchini, *Presupposti giuridici dell'evoluzione storica dalla <bartoliana> teoria degli statuti al moderno diritto internazionale privato*, *in* 2 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 61 (Giuffrè Ed., 1962) (It.); Fritz Schwind, *L'influsso di Bartolo sulla evoluzione del diritto internazionale privato*, *in* 2 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 503 (Giuffrè Ed., 1962) (It.).

47. BARTOLUS, *supra* note 45, at 7.

48. BELLOMO, *supra* note 4, at 74.

49. Consider the *Magna Carta* for example. Though the document is championed as a critical step in the creation of inalienable individual rights, it was essentially an agreement (signed under duress by one party) between a king and his lords.

as its own prince presented something a bit more abstract. It was feudal in the sense that the sum total of the *civitas* constituted a royal figure – the prince. It was ancient in the sense that the source of its governing authority rested in the citizenry (i.e. Roman Republic.) But it was very novel because concentrated pockets of societies throughout Europe could now legally make laws for themselves that would operate primarily within a geographically defined perimeter. The city was being transformed into a new and complex relationship between the individual, the group and the domain.

There were boundaries of course to the content of this new legislation, including the customary *ius commune*.[50] For instance, a pirate could be judged by any jurisdiction regardless of where he committed his crime.[51] But a citizen of X could not be tried by a judge in *civitas* Y if the citizen of X committed a crime against a citizen of Y outside of Y. This would be beyond the scope of the *imperium* of *civitas* Y.[52] By and large, most of the powers within the realm of the legislator pertained to contractual formalities, delicts and crimes relative to that city. If a Perugian contract, for instance, provided that a certain formality be incorporated to render it valid, then a foreign citizen contracting there was obliged to abide by it.[53] If a breach in performance of that very same contract then occurred at Florence, one would need to look at Florentine laws on breach. But, if the breaching party were to attempt to excuse himself on the grounds that the Perugian formalities of contract formation were invalid under Florentine law, his case would be thrown out.[54] Formation was Perugia's prerogative. Breach belonged to the Florentine statute.

As the territorial orbit of the city grew, a new legal tool was needed to foster a link with the individual and to express its authority over inhabitants of the *contado*, which included both nobles and peasants alike. Birth within territorial boundaries did not suffice, for there were far too many newcomers and foreigners in the city of Perugia, for example, at any given moment. The conundrum was solved by drawing from Roman private law when Bartolus conceptualized citizenship as a contract.

According to Bartolus, since citizenship is a contract, the terms of the agreement were bound solely by the will of the contracting parties.[55] Therefore, the

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50. *See* Thorne, *supra* note 46, at 684-85.

51. Indubitably this rule provided a solid foundation for the universality principle regarding a state's jurisdiction over individuals. *See* HUGH M. KINDRED *et al.*, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA at 559-60 (2006).

52. BARTOLUS, *supra* note 45, at 17-21.

53. This, of course, is a basic rule in the conflict of laws. Consider art. 3109 of the Civil Code of Québec, which states, "The form of a juridical act is governed by the law of the place where it is made."

54. BARTOLUS, *supra* note 45, at 22.

55. Bartolus alludes to the general contractual rule whereby both parties are bound primarily by their collective will. *Id.* at 17-22.

civitas possessed the freedom to delineate its terms and conditions.[56] Nonetheless, if accepted by the individual, the *civitas* could not back out at a later and more politically perilous point in time. Citizenship as contract thus protected both parties in the face of instability.[57] It also drastically undermined the notion of birthright.[58] Whether one was born in a particular territory was less important, legally at least, than what one contributed to the government of that territorial jurisdiction. In a sense, this idea is reminiscent of Locke's justification of the right to private property - the one who mixes his labor with the land is justified in claiming it as his own.[59] Both ideas valued merit over simple entitlement by virtue of living on a certain piece of land. The *Trecento* citizen had to contribute something to his city in order to benefit from it, just as the property owner had to improve his land before acquiring all of its benefits through ownership.

The contractual characterization did not, however, completely do away with feudal notions of legal personality (i.e. law as a set of relationships between people alone), which pervaded the peninsula for some eight centuries after the fall of Rome. Citizenship remained a special contract in that it was inheritable. In a sense, the 'barbarian,' as Rattigan calls him, did not lose the natural connection with the tribe so easily.[60] Nonetheless, this new contractual characterization did significantly modify the relationship between the individual and the group. The late medieval citizen was free to leave the group and join a new one so long as he met the requirements set by the government of his new domicile. The *Trecento* individual could be a dual citizen, equally loyal to both his former and newfound *civitas.* On the question of dual citizenship, later Commentators, such as Baldus, stressed that the original attachment did hold more weight.[61] Bartolus, however, upheld the equality of both brands of citizenship. Here he stressed how important it was for a *civitas* to honor all of its citizenship contracts, no matter how politically turbulent a situation might arise. These contracts varied. For example, a university professor could acquire citizenship so long as he promised not to teach elsewhere.[62] A wealthy merchant might be granted citizenship on the basis that he pay a certain percentage of his annual profits as a tax. As long as the new citizen remained faithful to the contract, citizenship could not legally be revoked.[63] In reality, the situation was quite

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56. In fact, for Bartolus the city of Perugia lifted the general condition which required citizens not to take salaried positions at universities.

57. Julius Kirshner, *Civitas Sibi Faciat Civem: Bartolus of Sassoferrato's Doctrine on the Making of a Citizen*, 48 SPECULUM 694 (1973).

58. Bartolus also explicitly rejected the notion that birth was sufficient to prove citizenship. *Id*. at 700.

59. BRUCE ZIFF, PRINCIPLES OF PROPERTY LAW 28-30 (3d ed. 2000).

60. Rattigan, *supra* note 43, at 231.

61. Kirshner, *supra* note 57, at 709.

62. *Id.* at 710

63. *Id.*

different. A *civitas* undergoing a political crisis would often revoke or modify contracts of citizenship at will. Juxtaposed against this setting, Bartolus' views are rightly characterized as a project of social and political change through legal reform. The ultimate goal was a type of confederate arrangement among cities in which allegiance mattered less than social fluidity. Cities would both be free and partially united through a nexus of individual contracts. The practical offshoot would have been a convergence of local law into an ever growing central or common law of Europe. This did not happen in Italy. In fact, it became increasingly balkanized up until the nineteenth century.

Bartolus' work on citizenship also presents the scholar with a very fundamental shift in legal history – one in which law becomes a tool of reform based more on human will than on natural principles. Men are citizens, he states, by civil law and not natural law. This is so because the *civitas* is not rooted in nature, but is rather the collective will of men expressed through civil law.[64] This perspective challenges the notion that politics were chained to principles of natural law. It demonstrates a marked shift from the nature-based theories of Thomas Aquinas and other contemporary canon lawyers.[65] The postglossators, as stated above, were well-aware that theirs was a project of reform. Civil law in general was something that was as malleable as the collective will. This creative approach to the law increasingly dominated legal circles as human agency undertook a larger role in the ideological march of history. For Bartolus, man-made civil law was a good thing because it forced men to come to agreements and abide by them. Civil law was the ultimate unifier, and as such could be characterized as something quasi-holy. Bartolus refers to the civil law of the city as closer to the rule of God than of men.[66] The religious element would be extirpated by later generations, such as the humanists, but the importance of this creative sentiment in the study of legal history should not be understated.

IV. EUROPE'S NEW ROMAN CITIES

Having explored some of the ideas which aided in framing the city as its own prince within city walls, I turn now to ponder its relationship with the outside world – with other towns, cities, peoples and kings. Though this paper has focused mainly on the *civitas*, the prevalent political unit of the Italian peninsula during the fourteenth century, Bartolus did indeed broach the subject of international politics. The terms *international* and *politics*, however, are very clumsy anachronisms. And as such, I begin this section by searching for a more suitable moniker – one that Bartolus would have been more likely to accept. Following

64. *Id.* at 699.

65. For Thomas Aquinas the state was rooted in nature. For an interesting discussion see GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100-1322 497 (1964).

66. BARTOLUS, *supra* note 42, at ¶ 18.

that, a few of his writings on the subject are probed for better clues as to how the jurist understood the *totus mundi* in which he lived and labored.

Inter is actually not a bad place to begin since Bartolus' world was governed by a series of complexly intertwined relationships *between* people, places and things.[67] To the modern viewer looking back at medieval political history, the forum writ larges seems like an obfuscated compendium of competing claims. How can it be, we wonder, that three rulers along with an independent populace all legally claim jurisdiction over the same or overlapping territories? The first thing to note is that medieval jurists, Bartolus chief among them, solved such conundrums by separating the particular from totality. Put differently, a polity or an empire taken in its entirety constituted something very different from the sum of its parts.[68] Thus, the Holy Roman Emperor is the undisputed ruler of the world while the King of England remains the undisputed ruler of England. There is no contradiction here. Each ruler is looking after different things.[69]

Inter also provides an excellent entry point for a discussion about relations between cities. According to Bartolus, it is normal for a city to take control of an ever increasing amount of territory during its course of growth.[70] This is justified by two main factors. First, it would seem that small populaces are in constant need of protection and guidance. He writes, "[m]uch as a small and weak human body cannot govern itself without the air of a caretaker and guardian, [these] small peoples can in no way be ruled in themselves, unless they are subjected or bound to another."[71] The second basis of justification is founded on a macro view of Roman history. The trajectory from kingdom to republic to empire is expressly approved and applied by the jurist. Thus, Roman law is not the only source of political theory – so too is history.[72] Though Bartolus never explicitly pondered as to whether a large and powerful city like Florence or Venice could or should develop into an empire (or *the* empire) proper, there does seem to be some support for the notion viewed through the lens of ancient history.

National is where the first major problem arises. During the *Trecento* there were Perugians, Florentines, and the like who were much more apt to identify as members of their particular city than with a larger community based on shared language, ethnicity or religion with well-defined borders. Fourteenth century Europe, of course, was not yet divided into units of the sort (nation-

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67. Constantin Fasolt mentions this concept as being of prime importance when reading Bartolus or any of his contemporaries. FASOLT, *supra* note 23, at 195.

68. For an introduction to the medieval study of mereology, *see* ANDREW ARLIG, MEDIEVAL MEREOLOGY, *available at* http://plato.stanford.edu/entries/mereology-medieval.

69. FASOLT, *supra* note 23, at 188.

70. BARTOLUS, *supra* note 42, at ¶ 22.

71. *Id.* at ¶ 26.

72. One recalls that history did have normative force. However, the postglossators were in no way chained to the past. For more on this discussion, *see supra* text accompanying notes 6-8.

states).[73] True, territoriality, as discussed above, was gaining in importance.[74] But it had not yet assumed total dominance as the point of departure in European politics. Words like "French" and "Italian" were used by the jurist and he did in fact consider the *French* and the *Italians* to be nations of a sort - albeit in a different sense than when contrasted with the modern equivalent. In *De Regimine Civitatis* he differentiates between a "nation" and a "people," stating that the Roman Empire grew weaker once "separated from the Italians."[75] The protection and administration of the Empire, for Bartolus, could be transferred among nations (ethnic groups based loosely on language), but not between different peoples. But he uses the word "people," referring simultaneously to the *civitas* and empire. This is one reason which seems to convey the notion that, for Bartolus, each city is molded in the same form as the overarching Holy Roman Empire.[76] It also provides a stark example of what Denys Hay is referring to when highlighting the seduction of Roman grandeur in the mind of the medieval Italian jurist.[77]

A good amount of scholarship over the past century has been produced in attempts to grasp what in fact this jurist meant when he referred both to *people* and *empire*. Woolf's analysis[78] is by far the most extensive and methodical, and he paints a clear picture of the complex web of medieval relationships referred to above. The work comes very close to understanding the author within his historical context, but is undertaken with a premature infusion of sovereignty (both popular and regal). Recently (almost a century after Woolf's publication) Fasolt presented a study of Bartolus' ideas on empire which places him quite rigidly within *Trecento* confines. His focus is on the project of harmonization between Roman law and feudal society.[79] Though both authors are absolutely spot-on in much of their analysis, there is a key element vis-à-vis Bartolus' take on empire that is glossed over. Both authors did well in describing the city in relation to empire, but very poorly in imagining the empire within and among cities. There are probably two contributing factors to this unwillingness. First, since *civitas sibi princeps* closely resembles the idea of democratic sovereignty from a modern perspective, the link is made, albeit with an embryonic qualification. Secondly, it is considered bad history to push an author away from his historical cohort. In the case of Bartolus, we reason, he cannot have ventured too far from the limits of the scholastic method – from outside the postglos-

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73. For a recent discussion on how the city-states of Italy differed from modern nation-states, see HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 146-49 (John L. Gaddis, Jack L. Snyder & Richard H. Ullman eds., 1994).

74. SERENI, *supra* note 44.

75. BARTOLUS, *supra* note 42, at ¶ 25.

76. *Id.*

77. HAY, *supra* note 18.

78. WOOLF, *supra* note 26.

79. This is one of the defining features of the postglossatorial school.

satorial ambit. Thus, history, to borrow from Fasolt, has its limits. I think it is not inconceivable that in a period of such stark competition between Italian city-states, curious onlookers (students of Roman law) would correlate their polity's development with the imperial aspirations of ancient Rome. Indeed, the Renaissance in Italy is full of such blatant emulations.[80]

Politics provides another complication since it did not yet constitute a branch of knowledge that was distinct from law, religion or morality. For the ancient Roman, *imperium* was distinct from *jurisdiction*.[81] The former was essentially military in nature and referred to the power of a general to command. Jurisdiction, on the other hand, referred to legal matters – the authority of a judge to render a decision or give an opinion. For the postglossator, as Fasolt rightly points out, both categories had been subsumed by the term *jurisdictio.*[82] To complicate matters even further, European feudal society had retained the term *dominium*, which in the ancient world was akin to full or total ownership. Bartolus used the term to refer to a lord's private property, but used *jurisdiction* to refer to lands or towns the lord ruled. However, he also used *dominium* to refer to the Emperor's power over the world. Thus, it is of utmost importance to bear in mind that what modern readers take for granted as distinct categories, the medieval thinker would lump together as facets of a greater whole. Law and politics were lumped together. Public law and private law were as well. And this is no great shocker since the rigid compartmentalization of academic disciplines comes about in unison with the doctrine of sovereignty - when the power of a sovereign entity is clearly identified in both space and time. In other words, the advent of distinctly defined geographical and temporal borders goes hand in hand with that of border creation in the human intellectual realm.

One could then replace *international politics* with something like *interjurisdictional relations.* Bartolus used *jurisdictio* as a catch-all (political, legal, administrative, private and public law). *Relations* because according to Fasolt, Bartolus believed that "the nature of all things depend[ed] on their relationship to other things."[83] And *inter* meaning the study between these relationships.

Bartolus took the Holy Roman Emperor to be the lord of world.[84] Such a statement seems peculiar for a number of reasons. First, the elected Germanic princes who wore the crown in the fourteenth century had very little military and fiscal might. Theirs was almost laughable when compared with a city like

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80. The most blatant attempt at restoring Rome's former glory was undertaken by Cola di Rienzo who in 1347, a decade before Bartolus' death, succeeded in expelling the nobility from the city and claiming the title *Tribune of Rome*. Quite interestingly, Petrarch and the emerging humanistic school embraced such attempts. *See* FRANCESCO PETRARCA, THE REVOLUTION OF COLA DI RIENZO (Mario Emilio Cosenza ed., 2d ed. 1986).

81. FASOLT, *supra* note 23, at 181-82.

82. *Id.*

83. *Id.* at 195.

84. Reichberg, *supra* note 31, at 206.

Florence or Perugia. Secondly, since most polities were well aware of this inefficacy – they actually retracted their allegiance, preferring instead to ally with a new contender for temporal power on the political scene (the papacy) or simply declared their independence. This made it the job of the jurist to marry *de jure* and *de facto* situations. Bartolus achieved this goal through the separation of the particular from the universal. Ruling the whole world was very different from ruling a part of it. He also noted that the Emperor was more concerned with protection and administration.[85] And here one witnesses the ease with which the medieval jurist divided concepts that were absolutes in the ancient world.[86] *Dominium*, for example, was an all or nothing relationship in ancient Rome. You either had it or did not. For Bartolus, an absolutist interpretation was simply not viable. There was too much gray, too many factors. One must recall that this was a world in flux – a world wherein a shift was occurring from a legal system based on personality to one in which territoriality was moving front and center – from an agrarian based society to a commercial one. As such, some recasting was in order. So jurisdiction is reconfigured and split up into various levels. From the broadest view, the Emperor reigned over the entire empire, but the *civitas* or king reigned over its entire *dominium* without any interference from the Emperor in affairs concerning the totality of this *dominium*. The *civitas* was thus part of the empire, but also a quasi mirror-like image of it.

Bartolus needed a linking mechanism, however, with which to cement the assertion that the Holy Roman Emperor was the lord of the whole world. His answer was religion and all those who adhered to the Catholic Church were automatically included as members of the Empire. This may seem pedestrian to the modern reader, but the link was quite a clever one as it forced an unlikely interdependence. The tradition that bound medieval Europe to ancient Rome was Christianity and this was the reason Roman *imperium* could be transferred and disseminated across medieval European polities.[87] Bartolus is extremely clear on the fact that this *imperium* cannot be transferred to a non-Christian ruler or populace and uses the *Gloss* to justify this idea.[88] This constituted one of the reasons that church could not be separated from state. It was intrinsic to the idea of *imperium* in the medieval context. Though civil law was secular, Bartolus could not have applied Roman law without the religious element. This provides yet another reason that he is so apt to allow the Papacy to usurp territory in the temporal realm.

Another reason why his commentary on the *Digest* about the law of postliminy is so enthralling is that the application of Roman *imperium*, one discovers, is meant to provide order *within* the Christian world – an arrangement that was

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85. BARTOLUS, *supra* note 42.
86. Another classic example of the medieval division of ancient absolutes is the common law trust.
87. Reichberg, *supra* note 31, at 206.
88. *Id.*

particularly turbulent during the *Trecento.* The commentary can be viewed as an effort to diminish pan-European strife (at least in the legal context) through the creation of a larger community based on Rome.[89] He refers to the Roman law of nations (*ius gentium)*[90] to determine which polities may legally wage public war – one of the highest powers associated with *imperium*.[91] Interestingly, he decides that though many within the empire are at war, they cannot be declared public wars. Therefore, technically there can be no international public war within Western European boundaries. In Roman law a war was considered to be public only when the attack was directed at the Emperor by a foreign polity or vice versa. All other wars or skirmishes that did not directly threaten the Emperor were private.[92] Thus, full-fledged battle between the monarchs of France and England, for example, are not to be classified as public wars because both sovereigns achieved their independence somehow from the Germanic emperor. He writes:

> And I say the same about those other kings and princes who deny that they are subordinate to the king of the Romans – such as the king of France, of England and others . . . even though they remove themselves from that universal dominion because of a privilege, or by prescription, or the like, they do not cease to be Roman citizens . . . and according to this almost all peoples who obey the holy mother Church belong to the Roman people.[93]

The inability of Western European sovereigns to declare public war with other Western European sovereigns (i.e. monarchs or city-states) fostered pan-European identity – in both conceptual and concrete senses of the term. Any given soldier, be he a mercenary or a patriot, could go into battle knowing he would not lose any juridical rights at home were he to be captured. Furthermore, this undermined the supreme authority of European powers. Indeed, they could wage wars in order to usurp more territory, but they would never be able to assume the level of authority granted to sovereigns in the Grotian era of sovereignty. The limits on sovereign powers were put in place to benefit the larger community.[94]

His commentary on postliminy also underscores the importance of custom, another integral element of Roman law, which foreshadows the efforts of French jurists in the sixteenth and seventeenth centuries.[95] Bartolus faithfully

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89. *Id.*

90. Note that the Roman word for 'nation' is 'people' (*gentes*). Most of Europe, according to Bartolus, is still one people, though there are many 'nations.'

91. Johnston, *supra* note 24.

92. Reichberg, *supra* note 31, at 206.

93. *Id*. at 207.

94. This again brings about the notion of dual or multiple citizenship. *See supra* text accompanying note 61.

95. *See* Sarah Hanley, *The Jurisprudence of the Arrêts: Marital Union, Civil Society and State Formation in France, 1550-1650,* 21 LAW & HIST. REV. 1 (2003).

applies the medieval legal fiction of the Holy Roman Emperor's title over the lands of Western Christendom, and as a result of the Investiture struggles of previous centuries, this title is ambiguously correlated with Papal claims over temporal jurisdiction. Nonetheless, the major break with medieval legal tradition occurs when discussing the Italian city-states that recognize no superior – and that are actually nominal enemies of the HRE. Then "under the law of nations introduced by old custom, the law of captivity and postliminy ought to apply . . . ."[96] It is possible for independent city-states to wage public wars, and as such, public international laws should apply. The only reason they are not, according to Bartolus, is that international European custom has modified the Roman law. Among Christians, he says, the law of captivity and postliminy does not apply to persons, but it does operate with respect to things. Interestingly, here one is presented with one of the first instances of *opinio juris* in an increasingly interconnected Europe.

Bartolus makes every effort to keep cities with no superior within the realm of the Empire. As discussed above, even if the city publicly states that it does not obey the Emperor, it still remains within it. The only way it can leave the Empire is if it publicly declares war against it. But even in this situation Bartolus adds an important qualification. The disobedient city cannot simply rebel against an imperial agent (e.g. an official), but must actually attack the Empire. Thus, if the Germanic Emperor were to have sent an official to oversee the rule of a particular *Civitatis*, resistance to his rule would not amount to public war against the Empire. He writes:

> If someone should rebel against a governor on account of an action of that governor, because he treats them badly, as do the ducal and marquisate cities, then these cities should not be called enemies of the emperor and supreme pontiff, but of that governor. . . .[97]

Public war, then, is reserved primarily for battles against "foreigners." Yet, even some of these peoples, he states, enjoy "confederate" status with the Empire, such as the Greeks with whom "we are allied against the Turks."[98] Also, since many "foreigner" groups lived within the "Empire," though technically possible, it remained highly unlikely that there would ever be any public war against foreigners living inside the "empire." Admittedly, this categorization of "foreigners" is superficial. It seems to obfuscate Bartolus' conception of the word "people," since many of these groups shared the same religion. Historian Jan Baszkiewicz explains:

> Ses preoccupations, ce sont les problèmes juridiques des *città* italiennes et leurs relations réciproques. C'est dans cette sphere de la vie communale qu'il

96. Reichberg, *supra* note 31, at 209.
97. *Id*. at 208.
98. *Id.*

> vit et agit . . . . Les grandes problèmes politiques du monde Bartolus met consciemment de côté.[99]

Bartolus was indeed heavily preoccupied with legal problems within and among Italian cities. His doctrine, however, did extend beyond the Italian peninsula and into many other jurisdictions within continental Europe. The cities and royal houses of modern day Spain, France, England, and Germany were all included in his Roman characterization. His theory of relative governance united Europe in the sense that it revitalized the image of Rome in the larger context. All polities were legally bestowed with Roman *imperium.* Yet, this theory was also divisive in the sense that all polities should come to swallow increasing amounts of territory in their quest to emulate Roman imperialism. Essentially, every European city was refashioned as the city of Rome, each at a different juncture in history. As to the question of which city was best placed to eventually recreate the grandeur of Roman imperialism, Bartolus offered no opinion. It is safe to conclude, however, that during the Renaissance many of these cities certainly tried.

I turn back now to Bartolus' central preoccupation, as Baszkiewicz noted above, the *civitas.* And in *De Regimine Civitatis* (*On City Government*) the jurist explains how each city can be legally reconstructed in the image of ancient Rome. He begins the treatise by summarizing Aristotle's classifications of governance.[100] He uses the name that he believes Aristotle used and then adds his *Trecento* equivalent. This section is followed by a hierarchical summary of Aristotle's classifications by Aegidius Romanus, a thirteenth century archbishop. He defends his use of Aegidius over Aristotle by claiming that most jurists are not familiar with the latter's work.[101] This is interesting in light of the fact that his new system of *imperium* relies heavily on Christianity. It may also be that Bartolus drew from Aegidius, as well as Augustine, to appeal to his canonist colleagues.[102] By that point Aristotle's works had been adapted to Christian doctrine by scholars such as Thomas Aquinas.[103] The use of Aegidius' summary of Aristotle's work would have satiated the Papacy as well as the

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99. Jan Baszkiewicz, *La Conception de Dominium Mundi dans L'Oeuvre de Bartolus, in* 1 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 24 (Giuffrè Ed., 1962) (It.). Ryan noticed something similar and stated that, "[t]he tensions in Bartolus' ideas about the interaction between free cities and wider sovereign bodies such as the empire are real and important, but they are only so crassly obvious because these matters were not Bartolus' primary concern." Magnus Ryan, *Bartolus of Sassoferrato and Free Cities,* 10 TRANSACTIONS OF THE ROYAL HIST. SOC'Y (6th s.) 84 (1999).

100. BARTOLUS, *supra* note 42, at ¶ 1.

101. *Id.* at ¶ 7.

102. For an interesting discussion*, see* Giuseppe Forchielli, *Bartolo Canonista?, in* 2 BARTOLO DA SASSOFERRATO. STUDI E DOCUMENTI PER IL VI CENTENARIO 234 (Giuffrè Ed., 1962) (It.).

103. *Politics* was translated into Latin in 1260 by William of Moerboke, sixty-three years before Bartolus was born. For an interesting discussion about the Aristotelian adoption of the natural lawyers, see POST, *supra* note 65, at 494-98.

religious civilian. This new outlook on city governance was thus rendered more shielded from religious criticism.

Another noteworthy facet of this Aristotelian incorporation is that the Greek philosopher lived in a world in which the city was the center of political activity. Bartolus may have found *Politics* so fitting a text because the cities of the Italian peninsula in the fourteenth century had come to acquire a similar prominence. It was the same organizational tool, in the words of Hannah Arendt, which "[testified] to the presence of other human beings."[104]

Bartolus converts the Aristotelian terms and hierarchies of governance to those of the *Trecento.* He adds to it a negative seventh form of government with no accompanying positive opposite, branding it a "monstrous government." The following table summarizes sections one through eight of his tract.[105]

Government	Best Form	Worst Form
Of one	(1) Aristotle: Kingship or Monarchy Medieval: Monarchy, Imperium	(6) Aristotle: Tyranny Medieval: Tyranny, Tyranny of one person
Of a few	(2) Aristotle: Government of Elders Medieval: Government of the Good	(5) Aristotle: Oligarchy Medieval: Lordship of the Rich or Government of the Bad or Tyranny of certain people
Of many	(3) Aristotle: *Policratia* Medieval name: Government for the people	(4) Aristotle: *Democratia* Medieval name: Perverse Populace, Tyranny of the people
Of many tyrants	-	(7) Aristotle: did not treat it Medieval: Monstrous government.

According to Bartolus the new seventh form of government is so monstrous that it can hardly be fashioned a government at all. He writes:

> [The seventh form of government] now exists in the city of Rome; where there are many tyrants in different areas, so strong that none can overcome the others. There is also a common government over the whole city; so weak that it can do nothing against any of those tyrants, nor against any of their adherents except insofar as they are willing to suffer it.[106]

His new form of government is not only the *de facto* state of Rome, but of many other Italian cities. In *De Tyrannia* he laments a very similar political scene.[107] It would then seem that for fear of digressing into that perilous state of government, that no city should be ruled by one. However, such is not the case, for Bartolus modifies these political categories by relativizing them – denoting dif-

104. HANNAH ARENDT, THE HUMAN CONDITION 22 (1958).

105. The numbers in brackets represent the Aristotelian hierarchy.

106. BARTOLUS, *supra* note 42, at ¶ 5.

107. *See* Bartolus of Sassoferrato, *De Tyrannia, in* HUMANISM AND TYRANNY: STUDIES IN THE ITALIAN TRECENTO 126-55 (Ephraim Emerton trans., 1964).

ferent types of governments for cities of different sizes. Monarchy and imperium remain the best form of government. He uses *Kings* and *Deuteronomy* to support this notion. It is also possible that he is drawing from Dante's *Monarchia*, which relies heavily Aristotle's work, since Bartolus' very first law teacher was a friend of the famous poet.[108] This new order is summarized by the following chart:

Type of Polity	Best Form of Government
Cities of the Largest Sort (e.g. Holy Roman Empire, Rome)	Monarchy, Imperium
Cities of the Second Largest Sort (e.g. Venice, Florence, Sienna)	Government of the Good (or of the few)
Cities of the Third Largest Sort (e.g. Perugia, Urbino)	Government of the People
Smaller units, towns, villages, etc. . . . (e.g. Sassoferrato)	Always under the protection of a city

For Bartolus the size of a given city, and thus its form of government, was not static. If Perugia swallowed up more and more of its surrounding *contado* then the next logical step would be the adoption of a *government of the good*. If the city grew even larger, it would then be wise to have a king rule, the selection of whom should be carried out through election.[109] Bartolus justifies this theory of relative governance on the basis that Rome's government changed throughout history. Rome expelled the kings when it was a large city of the third magnitude, chose senators as it grew and then finally elected one ruler among them as it grew into an Empire.[110] By vesting imperium in each one of these forms of government, Bartolus establishes a competitive intra-European system in which each free city exercises *imperium* over its own affairs and is molded in the image of Rome during one of its periods in history. It is possible that Bartolus envisages an eventual *de facto* recreation of ancient Rome as the larger cities subsume an ever increasing amount of territory.[111] The important thing, for the time being, is that the sum total of Roman *imperium* continues to be exercised, albeit in a fragmented fashion.

Of this relative theory of governance, John Neville Figgis offers up some interesting commentary:

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108. SHEEDY, *supra* note 2.

109. BARTOLUS, *supra* note 42, at ¶ 23. "A government by election is more divine than one which comes about by succession."

110. *Id.* at ¶¶ 16-22.

111. No Italian city was even remotely as populous as imperial Rome. The largest cities of the *Trecento* were about one tenth the size with about 100,000 citizens. Nonetheless, these cities were the true metropolises of Western Europe. By comparison, the largest French or German cities were home to less than half of that number. *See* SPRUYT, *supra* note 73, at 132-34.

> It has been said that in this doctrine of the relativity of political theories Bartolus was in advance of his time and had little influence, and that Montesquieu was the first who took up the same notion. But I think that Savonarola had it, for he argues that while monarchy is the best form of government, as is proved by the Papacy, for Florence a democracy is the only way to secure justice; nor are there wanting other writers who are by no means exclusive in favouring one form of government . . . . At the same time, it is doubtless true that Bartolus differed from most writers (like St. Thomas) of his own or succeeding days in regarding circumstance, history, and size as of more importance in fixing the form of government than abstract reasoning and ideal perfection.[112]

The allowance of relativity does seem to protrude somewhat oddly in the context of medieval political thought. According to Ryan, this is what endears the modern reader to Bartolus' ideas – his propensity to argue from the *de facto.*[113] Bartolus warns that should a city grow in magnitude, it does not necessarily follow that it ought to change its form of government because custom can be so ingrained that adherence to the ideal forms would cause chaos.[114] He is well aware of the force of tradition, and does not advocate implementing the ideal at all costs. This would simply do more damage than good. One must recall that the civilian worked in the realm of collective *human* will. Creating harmony among men through the law was what it was to be in tune with God. A civilian did not deduce nature's rules alone in a monastery and then proceed to impose them on earth. On the contrary, all of his work was done in the city – amidst the turbulence and strife of the *Trecento.*

CONCLUSION

This essay has explored some of the ways in which Bartolus changed the conception of the *civitas* through the use of Roman law. By examining Bartolus' work from the perspective of the *Trecento*, as opposed to searching for links in the historical chain of territorial sovereignty or international law, his sophisticated application becomes all the more apparent. Justinian's codification was not simply the law of an empire, but that of a republic, a kingdom and a free city. Bartolus combined all of these ideas and blended them into a system which fit quite well when applied to the extremely turbulent and horizontal world he inhabited.

His application of Roman *imperium* in the context of the *civitas* prospered because it considered the *de facto*. This particular aspect of his writing does

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112. John Neville Figgis, *Bartolus and the Development of European Political Ideas*, 19 TRANSACTIONS OF THE ROYAL HIST. SOC'Y (n.s.) 147, 161 (1905).

113. Ryan, *supra* note 99, at 88.

114. Bartolus writes, "It is possible for a populace or a people to become so accustomed to a certain form of government that it becomes a sort of nature to them, and they do not know how to live otherwise: then the old form of government is to be preserved." BARTOLUS, *supra* note 42, at ¶ 21.

distance him from contemporary legists. More importantly he provided a means for reform via civil law. For Bartolus, Roman law seems to have imbued a novel mode of conceptualizing the underlying foundation of his own legal system. Civil law became a *modus operandi* that was bound solely by the collective imagination of men. This was how one became closer to God, not by turning religious doctrine into earthly rules.

In *Legal Traditions of the World,* H. Patrick Glenn sheds light on the fact that civil law does have a history deeply mired in imperialism.[115] Bartolus certainly did reintroduce that aspect of civil law into the medieval European context. But his imperialistic vision was distinctive in the sense that it lived and breathed alongside all other forms of governance throughout Roman history. The ubiquity of this theory lent itself well to adaptation, transmutation, and transformation. And this is perhaps one of the reasons why the "roots" of so many branches of legal study can be traced back to Bartolus.

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115. GLENN, *supra* note 14, at 165-66.

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From *Brüstle* to *Myriad Genetics*: Legal Protection of Biotechnological Inventions in an EU/US Comparative Perspective

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I. INTRODUCTION

More than thirty years after the decision in *Diamond v. Chakrabarty*,[1] the content and extension of protection of biotechnological inventions continues to be very controversial. Following the landmark Supreme Court judgment, the abstract patentability of genetically modified microorganisms has been stated. Nevertheless, the boundaries and limits of the principle affirmed at that time – i.e., the distinction between what can and cannot be patented is "not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions" – are still not clearly defined.[2]

There are many reasons for this. In part they relate to the biotechnology sector and in part they reflect the common problems of the entire patent system, especially the relationship between innovation and ownership. In fact, there is no doubt that the innovation-appropriation relationship has historically represented the financial justification of the industrial patent system. Problems have developed with this relationship just at the time when the doors have been opened to protectability of living creatures and software. Biotechnologies and information technology are milestones in the modern history of the patent system and the main source in what is described as a patent flood.[3] If *Diamond v. Chakrabarty* opened the doors to the patentability of living creatures, then the *Diamond v. Diehr* judgment is equally significant as software also became patentable subject matter: these judgments share the historic formula referred to by the Supreme Court according to which "anything under the sun that is made by man" is patentable.[4]

They are the first signs of a patent revolution born of progressive changes in the traditional aims of protection. Intellectual property rights were originally meant to promote technical innovations and artistic expression. But, in their current configuration, they mainly protect information and are effective instru-

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1. Diamond v. Chakrabarty, 447 U.S. 303 (1980).

2. *Id.* at 313.

3. Rebecca Eisenberg, *The Story of Diamond v. Chakrabarty: Technological Change and the Subject Matter Boundaries of the Patent System*, *in* INTELLECTUAL PROPERTY STORIES 327 (J.C. Ginsburg & R.C. Dreyfuss, eds., 2006).

4. Diamond v. Diehr, 450 U.S. 175, 182 (1981).

ments of subjection to ownership in areas of pure knowledge rather than in its application.[5] The tendency to extend ownership rights to knowledge by commodification of the information has materialized in the progressive expansion of patentability both vertically and horizontally and in the consequent risk of anticommons arising out of the proprietary fragmentation and creation of miniature monopolies.[6] The most eloquent doctrinal example is biomedical research in which, rather than stimulating research and innovation, the proliferation of fragmented and overlapping patents risks stagnation.[7] This is the background to the tragedy of anticommons that highlights a deep division between physical property and intangible property, that is the preservation of a public domain; in other words, an area of non-appropriation of ideas and expressions. This justifies the presence of time limits and limitations on the purpose and use of intellectual property rights, which does not apply to material goods and becomes crucially relevant given the cumulative and incremental nature of intellectual property. One of the main objections to the issuing of patents for biotechnology inventions is the specific risk that the public domain might be deprived of sources of essential research. This is particularly the case for patents based on genetic information.

In addition, with regards to biotechnology, the framework is complicated by a series of peculiarities. There is an open debate about the patentability of biotechnologies in terms of both philosophical-ethical questions and compatibility with the principles of patent right. Application of technical knowledge to modify and manipulate living material has become widespread and diffused transversally (protein engineering, medical genomics, environmental biotechnologies, recombinant DNA technology, and bioinformation technology) affecting various sectors (first and foremost pharmaceuticals and foodstuffs) so as to become fundamental instruments in industrial development. Products such as pharmaceutical medicines, vaccines, transgenic bacteria, organs, and tissue for xenotransplantion, as well as transgenic animals and plants, can be derived from biotechnological applications, without forgetting their use in diagnosing

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5. Keith Maskus & Jerome Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 20-22 (Keith Maskus & Jerome Reichman, eds., 2005).

6. Rebecca Eisenberg, *Patents on DNA Sequences: Molecules and Information*, *in* THE COMMODIFICATION OF INFORMATION, 415 (Nina Elkin-Koren & Neil Weinstock Netanel, eds., 2002); Jerome Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743, 1752 (2000).

7. Rebecca Eisenberg, *Noncompliance, Nonenforcement, Nonproblem? Rethinking the Anticommons in Biomedical Research*, 45 HOU. L. REV. 1059 (2008); Michael Heller & Rebecca Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

infectious diseases, in artificial insemination, in screening genetic alterations, and in cloning animals.[8]

With the role of biotechnology growing in a wide range of industrial sectors, it is easy to understand the need to provide regulatory protection of research results that take a long time to obtain, are costly, and uncertain.[9] These reasons are clearly expressed in the initial recitals of Directive 98/44 in which reference is made to the importance of protecting biotechnological inventions for the development of industry in the European Union and to the fact that research and development need a great deal of high-risk investment that only appropriate legal protection can make profitable. This is also motivated as always by the need to avoid the heterogeneous development of the legal protection of biotechnological inventions in the national legislation of each Member State since it disincentivizes commercial exchange at the expense of industrial development. In recital 8, the Directive emphasizes that the protection of biotechnological inventions does not need a specific right to be created in place of the national patent right. Moreover, the latter remains the fundamental reference that "must be adapted or added to in certain specific respects in order to take adequate account of technological developments involving biological material."[10]

In most countries, legal protection for biotechnological innovation is provided in the form of patents for inventions. Although internationally, Article 27 of Trips provides for the opportunity to exclude plants and animals from patentability as well as pure biological processes in the production of plants and animals.[11] After prohibiting discrimination against technological sectors – pointing out the need for the patent regulations to be open to all sectors in the signatory states – Article 27 allows Member States to opt for a *sui generis* system of protection or a combination of these and patent protection.[12]

The protection offered by the patent for invention in terms of technological innovation results in significant problems of compatibility with the principles that regulate the patent system and with the requirements for novelty and originality in particular as well as in respecting the limit of non-patentability of discoveries. One reason is that biological materials are generally already present in

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8. Vincenzo Di Cataldo, *Biotecnologie e diritto. Verso un nuovo diritto, e verso un nuovo diritto dei brevetti*, 19 CONTRATTO E IMPRESA 319 (2003) (It.).

9. Giuseppe Sena, *L'importanza della protezione giuridica delle invenzioni biotecnologiche*, 1 RIV. DIR. IND. 65 (2000) (It.). *See also* Hubert Markl, *Who Owns the Human Genome? What Can Ownership Mean with Respect to Genes?*, 10 EUR. REV. 513 (2002); Paolo Spada, *Liceità dell'invenzione brevettabile ed esorcismo dell'innovazione*, RIV. DIR. PRIV. 5 (2000) (It.).

10. Directive 1998/44/EC of the European Parliament and of the Council on the Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213) 13 (EC)., recital 8, 1998 O.J. (L 213/13) (EC) [hereinafter Parliament and Council Directive on the Legal Protection of Biotechnological Inventions].

11. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

12. *Id.*

nature and can be included in technical matters making it difficult to hypothesize the totally artificial production of biological material. In fact, the most frequent case is represented by a pre-existing product of nature whose structure is modified by genetic engineering. Given the above-mentioned peculiarities, with respect to the requirement for novelty the European Directive states that pre-existence of a biological material in nature does not prevent its patentability. Furthermore, with respect to the requirement for originality – the question of whether or not it contains an inventive step that is technically evident according to an expert in the field – the Directive confirms that isolation leads to invention. It holds, notwithstanding the predictability of the result, if there is no reasonable prospect of success from the moment that the regulatory solution responds to the need for protection and incentivizes the substantial investment required for the research. In fact, it is impossible to obtain a patent in biotech sectors whenever the judgment of originality relates to a flash of genius.

It remains to be understood how the prohibition of patentability of discoveries, put in place to impede the formation of monopolies on the base knowledge, can be respected. The European answer between mere discovery (non-patentable) and invention that associates a natural element with a technical process that isolates it or produces it for industrial purposes. Pre-existing biological material in a natural condition is distinguished from biological material isolated from its natural environment as the product of a technical procedure. Isolation is the traditional technique that extracts the product from more complex natural materials that already contain it, and production is the biotechnological technical procedure that uses living organisms aiming to produce a material.

As is well known, in addition to the themes belonging to the patent right, discipline of biotechnological inventions are at the crossroads of the essential aspects of various religions and philosophies, science, and economic and financial needs.[13] These needs and requirements have played a role in the planning of the European Directive and have been echoed in requests to annul the same from the Netherlands (also supported by other Member States). Among other things the reason for this is a presumed instrumentalization of living human material, damaging the dignity of the human being.[14] Consequently, the Court

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13. Di Cataldo, *supra* note 8, at 322.

14. Case C-377/98, Neth. v. Parliament & Council, 2001 E.C.R. I-7079. As highlighted by the Advocate General Jacobs, "[d]evelopments in genetic engineering have caused concern in many quarters. Clearly technology which enables the genetic make-up of animals and humans to be modified and which has the potential to create human clones calls for careful regulation. Much of the understandable anxiety about the consequences of insufficiently regulated research in the field has been directed against legislation - such as the Directive - which governs the patentability of such inventions. Many commentators start from the assumption that such legislation means that any gene or gene sequence, or even the entire human genome, can now automatically be patented. That assumption is incorrect. The Directive leaves untouched the classic requirements for a patent of novelty, inventive step and industrial application. The mere discovery of a gene or gene sequence is no more patentable under the Directive than it was before." *Id.* at § 39.

of Justice had to remind how the Directive delimits the patent right sufficiently rigorously so that the human body effectively remains unavailable and inalienable. Respect of human dignity is guaranteed by Article 5, no. 1, which prohibits the human body in all of the various stages in its development and composition from being a patentable invention.[15] Even the elements of the human body are not patentable and their discovery cannot be subject to protection. Only inventions that associate a natural element with a technical process that isolates or produces it for its industrial exploitation are patentable from the moment they are subject to an application for a patent. A part of the human body may form part of a product protectable by patent but may not be subject to any appropriation in its natural environment. This distinction applies to research work on the sequence or partial sequence of the human gene pool and the results of this research may only lead to the granting of a patent if on the one hand the application is accompanied by a description of the original mapping method that led to the invention, and on the other, an indication of the industrial application the research is aimed at, as stated in Article 5, no. 3 of the Directive.[16] In fact, should such an application not be made, this would not be an invention but the discovery of a sequence that as such is not patentable. The protection provided by the Directive only covers the result of technical, scientific, or inventive work and only includes existing biological data on the natural condition of the human being as far as it is required to exploit a specific industrial application.[17]

The recent judgment on the definition of the human embryo by the Court of Justice in the *Brüstle* case has reopened the Pandora's Box, and is also an opportunity to analyze the American experience that is also affected by a controversial recent and potentially unsettling and disruptive case concerning Myriad Genetics.[18] Consequently, at a distance of some time since *Chakrabarty* and just a year after the much discussed *Bilski* case concerning business methods, notwithstanding the fascinating expression "anything under the sun made by man," what is effectively patentable continues to be discussed.[19]

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15. Parliament and Council Directive on the Legal Protection of Biotechnological Inventions, *supra* note 10, at art. 5, § 1.

16. *Id.* at art. 5, § 3.

17. *See* Case C-377/98, Neth. v. Parliament & Council, 2001 E.C.R. I-7079 at § 70: "The notion of a patent on life furthermore appears to me to be unhelpful and unclear . . . . a patent does not give rights of ownership or unfettered rights to exploit. It merely entitles the patent-holder to prevent others manufacturing, using or selling the invention without his consent. The patent-holder however is not absolved from compliance with national regulatory requirements in areas such as public health, safety, animal welfare and compliance with ethical standards."

18. Case C-34/10, Oliver Brüstle v. Greenpeace eV, 2011 E.C.R. I-09821.

19. Bilski v. Kappos, 130 S. Ct. 3218, 3247 (2010).

II. EU FRAMEWORK

The much anticipated decision in the *Brüstle* case represented the first time the Court of Justice, on the occasion of the composition of the Great Chamber, has been called upon to pronounce judgment on the definition of the human embryo for the purposes of protecting biotechnological inventions and, more in particular, on the notion of "uses of human embryos for industrial or commercial purposes," a reason for exclusion from patentable inventions according to Article 6, no. 2, letter c) of Directive 98/44.[20] In fact, after excluding inventions whose commercial exploitation contravenes public order or public morality from patentability, Article 6 expressly provides for the use of human embryos for industrial or commercial purposes.[21]

In the case in question the invention whose patentability was contested revolved around the use of pluripotent human stem cells taken at a determined stage in evolution of the fertilization of an ovum by a spermatozoon. The question is whether or not the result (embryo) has to be legally qualified as such from the moment of conception or from a subsequent state that needs to be determined. In detail, Oliver Brüstle, Director of the Institute of Neurobiological Reconstruction at the University of Bonn, is the holder of a German patent for isolated and purified neural precursor cells, processes for their production from embryonic stem cells and the use of neural precursor cells for the treatment of neural defects. The patent folder deposited states that the transplant of cerebral cells in the nervous systems can cure several neurological diseases (the initial clinical applications were on patients suffering from Parkinson's disease). In particular, the invention of Brüstle provides a solution to the technical problem of a practically unlimited production of cleansed and isolated progenitor cells with glial or neurological properties extracted from embryonic stem cells.

German patent law (*Patentgesetz*) refers to the 1990 national regulations on the protection of embryo (*Embryonenschutzgesetz*) for the notion of human embryo. Article 8, no. 1 defines human embryo as the fertilized human ovum able to grow from the fusion of the nuclei as well as another cell extracted from an embryo that is totipotent, that is to say, can divide itself and grow into an individual if the conditions for this are right.[22] These conditions are distinguished by the pluripotent cells: stem cells which, although they can grow into any type of cell, cannot become a complete individual and moreover are not considered to be human embryos.

Following the appeal made by Greenpeace aimed at getting the patent revoked on the basis that certain claims focus on the progenitor cell extracted

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20. Parliament and Council Directive on the Legal Protection of Biotechnological Inventions, *supra* note 10, at art. 6, § 2(c).

21. *Id.*

22. Gesetz zum Schutz von Embryonen [Act on the Protection of Embryos] Dec. 13, 1990, Bundesgesetzblatt [BGBL. I] at art. 8, § 1(Ger.).

from the human embryonic stem cells, the *Bundespatentgericht* (Federal patent court) revoked the patent of Brüstle. In considering the outcome of the dispute depending on the interpretation of certain legal provisions in Directive 98/44, the appeal judge asked the Court the following questions: 1) What is meant by the term "human embryos" in Article 6(2)(c) of Directive 98/44?[23] In particular, a) whether all of the stages of development of the human life starting from fertilization of the ovum are included or whether or not other conditions must be respected such as a certain stage of development being reached; b) whether unfertilized human ovum in which a nucleus from a mature human cell in which unfertilized human ovum have been transplanted, stimulated by the parthenogenesis to separate and grow, are included in this notion; c) whether human embryonic stem cells in the blastocyst stage are included; 2) what does the notion "uses of human embryos for industrial or commercial purposes" mean? Whether any commercial exploitation is included in the meaning of Article 6, no. 1 of the Directive especially use in scientific research; 3) whether according to Article 6, no. 2, letter c) of the Directive a specific inventive step is excluded from patentability including whenever the use of human embryos is involved in the step claimed by the patent but constitutes the premise required for the same to be used a) because the patent concerns a product whose creation involves the prior destruction of human embryos, or b) because the patent concerns a procedure that requires such a product as a starting material.[24]

In fact, according to the national judge, the referral made by the *Patentgesetz* to the *Embryonenschutzgesetz* concerning the definition of embryo cannot be interpreted in that the competence of giving concrete activation to Article 6 no. 2 letter c) of the Directive is deferred to the Member States in spite of the Directive not expressly stating the notion of embryo.[25] In other words, the interpretation of the notion of human embryo has to be European and unitary, and Article 6 no. 2 letter c) of the Directive does not leave the Member States any discretion in the matter. This assumption is shared by the European judges: the Directive does not provide a definition of what a human embryo is, nor does it contain any reference to national laws as regards the meaning to be applied to those terms. The result is that for the purposes of applying the Directive, consideration must be given to how to designate an autonomous notion of law for the Union that will then be interpreted uniformly throughout the EU. The lack of a uniform definition of the notion of a human embryo, among other things, results in the risk that the authors of any biotechnological invention will be tempted to apply for patenting in the Member State that conceives the notion of human embryo in the most restrictive way and so be the most liberal in patent-

23. Case C-34/10, Oliver Brüstle v. Greenpeace eV, 2011 E.C.R. I-09821 at § 62.

24. *Id.* at § 62 ff.

25. *Id.* at § 51.

ing these inventions because the patentability of the same will be excluded in the other Member States.

The Court also showed that it was aware of the fact that the definition of the human embryo constitutes a particularly delicate social theme in several Member States, distinguished by the differences in values and traditions they have. The point was particularly emphasized by Advocate General Bot in his opinion (§§ 39 – 43): "It is on the question of the definition of an embryo that the main points of different philosophies and religions and the continual questioning of science meet. I do not intend to decide between beliefs or to impose them. I am also aware of the importance of the economic and financial issues connected with the questions put to the Court. These were also mentioned at the hearing when the applicant claimed that a possible refusal of patentability would be liable to jeopardize research and the retention of researchers in Europe so as to prevent them going to the United States or Japan . . . . Nor will I hide the expectations of those who are hoping for scientific progress to relieve their illnesses."[26] Although the question initially raised in the Court involves all of these aspects, it remains an exclusively legal question that must moreover be resolved by being limited to a legal interpretation of the legal provisions of the Directive.[27] So the European judges highlight how the preamble to the Directive shows that the exploitation of the biological material of human origin must be consistent with regard for fundamental rights and, in particular, human dignity. For this reason Article 5 no. 1 of the Directive prohibits the human body in the various stages of its development and composition from being a patentable invention, and Article 6 states how the processes of cloning human beings, processes of germinal genetic identity of the human being, and the use of human embryos for industrial or commercial purposes are contrary to public order and public morality, and consequently excluded from patentability.[28]

Therefore, if the purpose and context of the Directive show that the legislator of the Union means to exclude almost all possibility of obtaining a patent when respect of human dignity may be prejudiced, the notion of human embryo must be understood in its widest sense. Any human ovum must be considered to be a human embryo from the moment its fertilization triggers the process of devel-

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26. *Id.* at §§ 39-43.

27. *See* Case C-377/98, Neth. v. Parliament & Council, 2001 E.C.R. I-7079 at §§ 72-74: "What should be defined? The appearance of life? The amazing moment when, *in utero*, what was perhaps only a group of cells changes in nature and becomes, whilst not yet a human being, an object, or even a subject of law? Not at all. This is not the question which follows from the wording and the approach taken by the directive which, through the wise wording it uses, leads us to define not life, but the human body. It is 'the human body, at the various stages of its formation and development' for which it demands protection when it declares it expressly unpatentable. The body exists, is formed and develops independently of the person who occupies it. In short, the question asked is what form, what stage of development of the human body, must be given the legal categorisation of 'embryo.'"

28. Parliament and Council Directive on the Legal Protection of Biotechnological Inventions, *supra* note 10, at art. 5, § 1 & art. 6.

opment of a human being. This qualification also applies to the unfertilized human ovum in which the nucleus of a mature human cell has been transplanted and to the unfertilized human ovum induced to divide and develop through parthenogenesis.[29] Even if these organs have not been strictly subject to fertilization, due to the technique used to obtain them, they are able to start the development process of a human being in the same way as the embryo created by fertilizing an ovum. With regard to stem cells obtained from a human embryo in the blastocyst stage and considering the development of science, it is the responsibility of the national judge to establish whether they are going to start the development process for a human being and consequently they come under the notion of human embryo.[30]

The same reasons for which the notion of human embryo is considered in its widest meaning force the Court to resolve the third question by stating that Article 6(2)(c) of Directive 98/44 excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos. The fact that this destruction may, if necessary, take place in a phase well before the activation of the invention as in the hypothetical case - and precisely in the case in question of the production of embryonic stem cells taken from a stem cell line whose creation in itself has involved the destruction of human embryos - is considered to be irrelevant. "Not to include in the scope of the exclusion from patentability set out in Article 6(2)(c) of the Directive technical teaching

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29. *See* Case C-377/98, Neth. v. Parliament & Council, 2001 E.C.R. I-7079 at §§ 86-88: "The question whether that categorisation must be recognised from before or only after nidation is irrelevant here, in my view, even though I fully appreciate its utilitarian aspect. How can we justify the legal categorisation being different after this particular event? Because the future of the fertilised ovum is uncertain as long as nidation does not take place? Is it not also uncertain after that? Does all nidation result in a birth? It is clear that the answer is no. On the other hand, I cannot see why categorisation would be refused on the pretext of a possible dangerous event before nidation and would not be afterwards, when the same danger exists, but materialises less frequently. Would probability be a source of law in that case? For the sake of consistency, I also do not see why legal categorisation as an embryo would be refused in the case of *in vitro* fertilisation, unless it is to enable a couple to bring children into their family."

30. *See Id.* at §§ 94-95: "One of the first stages attained when the totipotent cells have given way to pluripotent cells is called the blastocyst. Does it also constitute an embryo from a legal point of view? A reminder of the development process, even if it is clumsy and partial like the one above, clearly shows that the thing to which the totipotent cells have given way is the product of their own special nature, the thing for which they exist. Whilst, in themselves, totipotent cells hold the capacity to develop a complete human body, the blastocyst is the product of this capacity for development at a certain moment. It is therefore one of the aspects of the development of the human body and constitutes one of the stages. Accordingly, it must itself be categorised as an embryo, like any stage before or after that development. It would otherwise be paradoxical to refuse legal categorisation as an embryo for the blastocyst, which it is the product of the normal growth of the initial cells. This would essentially diminish the protection of the human body at a more advanced stage in its development."

claimed, on the ground that it does not refer to the use, implying their prior destruction, of human embryos would make the provision concerned redundant by allowing a patent applicant to avoid its application by skillful drafting of the claim" (§ 50).[31]

The only exception to the prohibition on patentability is that in the forty-second recital of the Directive according to which the exclusion from patentability set out in Article 6, no. 2, letter c) does not affect inventions for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it.[32] This is the premise that brought the Court to resolve the second question – concerning the notion of using embryos for industrial or commercial purposes – in that to consider the use of human embryos subject to a patent application for scientific research cannot be different from industrial and commercial exploitation, and moreover avoid exclusion from patentability. Even if the aim of scientific research must be distinguished from industrial and commercial purposes, the use of human embryos for research purposes subject to the patent application cannot be separated from the patent itself and from the rights arising out of it.

III. US FRAMEWORK

In a comparative perspective, patentability of human genes has also been at the center of an equally controversial and anticipated case on the other side of the Atlantic.[33] In *Assotiation for Molecular Pathology v. Myriad Genetics, Inc.*,[34] the United States Supreme Court had to judge whether isolated DNA is a patentable subject matter.

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31. The Advocate General comes to the same solution. *See generally Id.* Bot shares the distinction made by the German regulation of pluripotent and totipotent stem cells in that only the first must be legally qualified as embryos: while the totipotent cells constitute the first stage of the human body, pluripotent cells taken separately cannot evolve into a complete human being alone. Case C-34/10, Oliver Brüstle v. Greenpeace eV, 2011 E.C.R. I-09821 at §§ 84, 85 & 93. However, Bot says, "it is not possible to ignore the origin of this pluripotent cell. It is not a problem, in itself, that it comes from some stage in the development of the human body, provided only that its removal does not result in the destruction of that human body at the stage of its development at which the removal is carried out." *Id.* at § 103. Inventions relating to pluripotent stem cells can be patentable only if they are not obtained to the detriment of an embryo, whether its destruction or its modification. *Id.* at § 109.

32. Parliament and Council Directive on the Legal Protection of Biotechnological Inventions, *supra* note 10, at art. 6, § 2(c).

33. *See* Rochelle Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 7 (Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 10-68, 2013); Rochelle Dreyfuss & James Evans, *From Bilski Back to Benson: Preemption, Inventing Around, and the Case of Genetic Diagnostics*, 63 STAN. L. REV. 1349 (2011); Robin Feldman, *Whose Body Is It Anyway? Human Cells and the Strange Effects of Property and Intellectual Property Law*, 63 STAN. L. REV. 1377 (2011); Jonah Jackson, *Something Like the Sun: Why Even "Isolated and Purified" Genes are Still Products of Nature*, 89 TEX. L. REV. 1453 (2011); Jacob Moore, *The Forgotten Victim in the Human Gene Patenting Debate: Pharmaceutical Companies*, 63 FLA. L. REV. 1277 (2011); Joshua Sarnoff, *Patent Eligible Medical and Biotechnology Inventions After Bilski, Prometheus, and Myriad,* 19 TEX. INTELL. PROP. L.J. 393 (2011).

34. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

In the 1990s scientists at Myriad Genetics were the first to identify the correlation between mutations of the BRCA gene and increase in ovarian and breast cancer risk and the first to provide a diagnostic test for BRCA gene mutation in women. Myriad Genetics applied for a series of patents in 1994 claiming the DNA sequences isolated that codify the proteins BRCA1 and BRCA2 as well as the methods for using these sequences to find the alterations and mutations in BRCA. In 2009 investigation of patent ineligible subject matter according to Section 101 of the United States Code was completed concerning fifteen claims in seven patents in that they had molecules of isolated DNA and complementary DNA (cDNA)[35] that codify the proteins BRCA1 and BRCA2.

In accordance with Section 101, four categories of invention are not subject to protection: processes; machines; manufactures; and compositions of matter. The Supreme Court case law has identified three exceptions from these, excluding patentability in the cases of laws of nature, physical phenomenon, and abstract ideas. As in the European context, Section 101 plays a role of mere gatekeeping identifying a protection threshold. However, patent-eligible inventions are never automatically granted unless they satisfy the requirements of novelty, non-obviousness, and disclosure.

Consequently, the previously mentioned opposition between discoveries and inventions, the distinction between knowledge of what already exists in nature and the step involving technical behavior that involves natural forces, arises again. Given that the biological materials are already existing in nature and included in the state of the art, a rigorous discrimination between discoveries and inventions would leave little margin for patentability in the biotechnology sector. As already stated, the EU solution consists in distinguishing pre-existing biological material in its natural state from that isolated from its natural environment, thus produced by a technical procedure. According to Article 3(2) of the Directive, "[b]iological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature."[36]

The interest devoted to the matter under discussion arises out of the fact that in March 2010 the District Court of the Southern District of New York repudiated the long-standing policy of the patent office, upholding the positions put forward by a coalition of scientists and interest groups against the patents of Myriad Genetics and stating that isolated DNA does not constitute patentable subject matter.[37] According to the Court, isolated DNA is a product of nature

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35. This is a type of DNA molecule generated by specific enzymes during a process known as reverse transcription or retrotranscription.

36. Parliament and Council Directive on the Legal Protection of Biotechnological Inventions, *supra* note 10, at art. 6, § 2(c).

37. Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 702 F.Supp.2d 181 (S.D.N.Y. 2010).

not "markedly different" from the genomic DNA (or native DNA) as expressly required by the Supreme Court in *Chakrabarty*.[38] In the words of Judge Sweet, the clear indication from the case law is that "purification of a product of nature, without more, cannot transform it into patentable subject matter."[39]

Among the twenty-three *amici* briefs presented in view of the appeal before the Federal Circuit, one from the Department of Justice stands out as it substantially embraced the change of direction initiated by the District Court. The Department of Justice proposed a distinction between "human-engineered DNA molecules" (patentable) and "isolated but otherwise unmodified genomic DNA" (non-patentable) therefore arguing that the chemical structure of human genes is a product found in nature.[40] The patentability of genes "crossing the threshold of section 101 . . . requires something more than identifying and isolating what has always existed in nature, no matter how difficult or useful that discovery may be."[41] Therefore, the District Court would have made a mistake in judging the claims exclusively directed at cDNA to be invalid, this being a molecule that is not present in nature but the fruit of human manipulation of the laws of genetics. On the other hand, it would have judged unpatentable the genomic DNA merely isolated from the human body without any manipulation or alteration ("common sense would suggest that a product of nature is not transformed into a human-made invention merely by isolating it. The very term 'isolated' suggests only that extraneous matter has been separated from the natural product of interest, not that the product itself has been transformed or altered into something man-made").[42]

In a two to one majority vote (Judges Lourie and Moore against Judge Bryson), the Federal Circuit overruled the decision of the District Court reaffirming the standard practice of the PTO expressed in the 2001 Utility Examination Guidelines and confirmed in the issuing of nearly three thousand patents for isolated DNA and over forty thousand DNA-related patents since then: "If the law is to be changed . . . the decision must come not from the courts, but from Congress."[43]

In forming the majority opinion, Judge Lourie drew different conclusions to the District Court and the Department of Justice by recalling the precedents set

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38. The exact words used by the Supreme Court on that occasion were, "the patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature's handiwork, but his own." *Chakrabarty*, 477 U.S. at 310.

39. *Ass'n for Molecular Pathology*, 702 F.Supp.2d at 227.

40. Brief for the United States as Amicus Curiae in Support of Neither Party at *1, Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 467 F. App'x 890 (Fed. Cir. 2012) (No. 2010-1406), 2010 WL 4853320.

41. *Id.* at *11.

42. *Id.* at *22.

43. Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 653 F.3d 1329, 1355 (Fed. Cir. 2011).

in the Supreme Court that provide a frame of reference with which to evaluate the patentability of isolated DNA molecules. All agreed that what typified the bacteria in *Chakrabarty,* and allowed the Supreme Court to distinguish the case from *Funk Brothers*,[44] were the circumstance that these bacteria presented, having "markedly different characteristics from any [bacterium] found in nature."[45] According to the Federal Circuit, for the purposes of Section 101, the distinction between a product of nature and an invention fruit of human intelligence is recognizable in the change of the composition of the molecules from what already exists in nature ("the Supreme Court has drawn a line between compositions that, even if combined or altered in a manner not found in nature, have similar characteristics as in nature, and compositions that human intervention has given 'markedly different,' or 'distinctive,' characteristics").[46] However, application of the above-mentioned test has led the Federal Circuit to consider claims about isolated DNA and cDNA at issue patentable precisely because they concern molecules that are "markedly different—have a distinctive chemical identity and nature—" compared to the molecules that exist in nature.[47]

These arguments did not convince Judge Bryson. In his dissenting opinion Bryson emphasized how isolated BRCA genes clearly fall on the non-patentable side of the dividing line drawn in *Chakrabarty*: "Myriad is claiming the genes themselves, which appear in nature on the chromosomes of living human beings. The only material change made to those genes from their natural state is the change that is necessarily incidental to the extraction of the genes from the environment in which they are found in nature. While the process of extraction is no doubt difficult, and may itself be patentable, the isolated genes are not materially different from the native genes."[48]

In anticipation of the Supreme Court's judgment, the pronouncement in *Mayo Collaborative Services v. Prometheus Laboratories* makes a reconsideration of the patentability of isolated DNA possible.[49] In a unanimous vote, in *Mayo* the Supreme Court overturned the previous decision of the Federal Circuit by excluding the patentability of a procedure for personalized dosage of the pharmaceutical drugs that is able to determine whether a dose of a specific drug

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44. Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948).

45. *Ass'n for Molecular Pathology*, 653 F.3d at 1351.

46. *Id.*

47. *Id.*

48. According to Bryson, "extracting a gene is akin to snapping a leaf from a tree. Like a gene, a leaf has a natural starting and stopping point. It buds during spring from the same place that it breaks off and falls during autumn. Yet prematurely plucking the leaf would not turn it into a human-made invention." Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 689 F.3d 1303, 1352 (Fed. Cir. 2012) (Bryson, J., dissenting). Bryson does not share the characterization made by his two other colleagues, of the genes isolated as new molecules: "there is no magic to a chemical bond that requires us to recognize a new product when a chemical bond is created or broken, but not when other atomic or molecular forces are altered." *Id.* at 1351.

49. Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S.Ct. 1289 (2012).

is ineffective or damaging. According to the Supreme Court, the correlation between the concentration of some metabolites in blood and the probability that the dosage of a determined drug will be ineffective or even damaging represents a law of nature as it is only the simple consequence of metabolization by the human body. The Court recalled the principles confirmed in *Diehr* and *Bilski* according to which on the one hand "an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection," on the other "the prohibition against patenting abstract ideas 'cannot be circumvented by' . . . adding 'insignificant post-solution activity.'"[50] Following the same line of argument, in *Myriad* the information contained in DNA might represent a law of nature, the DNA itself might be a natural phenomenon, and the isolation of DNA might constitute prior art. Consequently, the Supreme Court referred the question to the Court of Appeals requesting the re-examination of the *Myriad* judgment in the light of the principle stated in *Mayo.* The same judges reaffirmed the decision pronounced the year before, confirming the positions expressed and already examined by a majority vote (on the one hand Judges Lourie and Moore, and on the other Judge Bryson) about the patentability of the claims about isolated DNA in accordance with the technical problems concerning the isolation procedure.[51]

The judgment with which the Supreme Court concludes the matter is surprising. After taking up the arguments of Bryson again, the Court overruled the Federal Circuit in a unanimous vote and above all overruled the long-standing policy of the PTO, stating that "a naturally occurring DNA segment" is a product of nature and so is not patentable for the sole fact of having been isolated.[52]

In comparing *Chakrabarty* and *Funk Brothers*, the Supreme Court draws the conclusion that Myriad "did not create anything . . . . it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention."[53] However, the Court continues, "[g]roundbreaking, innovative, or even brilliant discovery does not by itself satisfy the §101 inquiry."[54] The judges stress how Myriad has neither created nor altered the genetic information contained in the proteins BRCA1 and BRCA2. The isolated BRCA genes contain the same sequence of nucleotides present in nature so the only contribution made by Myriad is to have identified the arrangement and

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50. To use the words of the Court in the case in question, "the claims inform a relevant audience about certain laws of nature; any additional steps consist of well-understood, routine, conventional activity already engaged in by the scientific community; and those steps, when viewed as a whole, add nothing significant." *Id.* at 1298. "[T]o transform an unpatentable law of nature into a patent-eligible application of such a law, one must do more than simply state the law of nature while adding the words 'apply it.'" *Id.* at 1294 (referencing Gottschalk v. Benson, 409 U.S. 63, 71–72 (1972)).

51. *Mayo Collaborative Servs.*, 132 S.Ct. 1289 (2012).

52. *Ass'n for Molecular Pathology*, 133 S.Ct. at 2111.

53. *Id.* at 2117.

54. *Id.*

genetic sequence of the BRCA1 and BRCA2 ("Myriad's claims are simply not expressed in terms of chemical composition, nor do they rely in any way on the chemical changes that result from the isolation of a particular section of DNA").[55] On the other hand, for the same reasons the Court considers complementary DNA (cDNA) to be patentable as, following the removal of the introns, it only contains the coded sequence, thus these are molecules that are not present in nature.

IV. CONCLUSION

It is not difficult to understand the reasons for the debate fuelled by *Brüstle* and *Myriad Genetics*. Although the judges were forced to show how the questions under examination are authentically legal, the implications of the decisions are undeniable. Putting ethical, philosophical, and religious concerns to one side, what above all characterizes and unites the cases are the financial consequences. From the moment that technical knowledge was applied to manipulate and modify a living material it has become one of the fundamental instruments in industrial development, affecting competition on the global markets and protection of the incentive to invest in research and development, thus the promotion of innovation in a wide variety of sectors. As indicated by Advocate General Bot, express reference was made to it in *Brüstle* when the petitioning party asserted in a hearing that any denial of patentability risked compromising scientific research in Europe, favoring the transfer of human and financial resources to the United States and Japan. The same happened in *Myriad Genetics* where the Federal Circuit applied the standard practice leading the USPTO to award thousands of patents concerning DNA.

However, the final decision of the Supreme Court states that "patent protection strikes a delicate balance between creating incentives that lead to creation, invention, and discovery and imped[ing] the flow of information that might permit, indeed spur, invention."[56] As the tragedy of the anticommons states, the incessant granting of exclusive rights impoverished the public domain, vital lymph in basic research, and feeds a knotted tangle of fragmented and overlapping patents ("patent thicket") with the potential to cause a significant obstacle to subsequent innovation. As Judge Bryson emphasizes in his dissenting opinion "in order to sequence an entire genome, a firm would have to license thousands of patents from many different licensors. Even if many of those patents include claims that are invalid for anticipation or obviousness, the costs involved in determining the scope of all of those patents could be prohibitive."[57] From the point of view of the correct balance of interests, if it is ac-

55. *Id.* at 2118.
56. *Id.* at 2116 (citation omitted).
57. *Ass'n for Molecular Pathology*, 689 F.3d at 1357 (Bryson, J., dissenting).

cepted that "anything under the sun that is made by man" is patentable, then it continues to be right and proper to ask how much is enough.[58]

58. *See Diamond*, 450 U.S. at 182.

From Fiscal Compact to the United States of Europe: Some Remarks on a Difficult Pathway

MARCO LO BUE*

1. INTRODUCTION

The purpose of this essay is to systematically describe the main economic policy choices made by the European Union (hereinafter also "E.U.") in order to curb the effects of the financial crisis that in 2008, after manifesting itself in the United States of America ("U.S."), spread to Europe.

As is common knowledge, in the first years subsequent to the standardization of the currency, from 1999 to 2008, Europe - albeit with some variations between Nordic and Mediterranean countries - experienced long-term growth, which had allowed its economic system to survive sporadic downward trends of the single countries.[1] In 2008, when the bursting of the American real estate bubble sent shock waves over stock markets and the global banking industry, the world became bitterly aware of the global diffusion of derivative financial instruments named "subprime mortgage-backed securities."[2] The market collapse was immediately followed, in September 2008, by the bankruptcy of Leh-

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1. For an in-depth report of the growth of the single currency, see the survey carried out by Deutsche Bank, Euro Riding High as an International Reserve Currency, Deutsche Bank (May 4, 2007), http://www.dbresearch.com/prod/dbr_internet_de-prod/prod0000000000209994.pdf. *See also* Emmanuel Mourlon-Druol, *The Euro Crisis: A Historical Perspective*, LSE STRATEGIC UPDATE (Kitchen & Nicholas eds., 2011), *available at* http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SU007.pdf.

2. The financial crisis of 2008 derived from the paradox of the simultaneous presence of a dynamic trend of consumption and stagnant real wages. The aforementioned anomaly was caused by the progressive increase of the workers' share of total debt which, in turn, was to be attributed to the ease of access to credit. Given the gap existing at the time, between interest rates applied in the credit market and growth rates of wages, it was immediately clear that the level of indebtedness was destined to become unsustainable. In a desperate attempt to buck the trend, market operators and policy makers progressively reduced interest rates, aiming to induce more and more workers to fall into debt through the creation of derivative financial instruments such as subprime securities. The subsequent bursting of the housing bubble depended on the fact that, due to the difficulties faced by citizens in meeting mortgage repayment obligations taken out thanks to the American Dream Downpayment Act, the value of real estate went down more quickly than the lowering of interest rates. The American Dream Downpayment Act is a law enacted in 2003 that allowed banks to finance loans for the full value of the property, without the buyers having to invest their money. For a deeper understanding of this trend see Robin Paul Malloy, *Mortgage Market Reform and the Fallacy of Self-Correcting Markets*, 30 PACE L. REV. 79 (2009), and Robin Paul Malloy, *U.S. Mortgages and Global Financial Markets: A Need for Better Authentication*, 19 DIGEST 13 (2011).

man Brothers, one of the largest investment banks in the world. After Lehman's failure, American financial institutions could no longer find equity capital, encountering substantial difficulties while trying to limit incalculable losses. The pessimism that arose in the network composed of consumers, companies and banks had, at a later stage, a major impact on consumption and caused a sharp contraction in the economy.[3]

European banks were reached by the crisis in a matter of days after the Lehman bankruptcy, as many of them had acquired toxic assets in the guise of financial products, which were now traded on the markets far below their face value.[4] The E.U. then faced the worst depression since the Wall Street crash of 1929 with inadequate decision-making tools.[5] Furthermore, the E.U. found itself in a position of evident weakness in its banking system, which is universally regarded, in the context of capitalist civilization, as the irreplaceable engine of credit and therefore always worth saving from failure, despite the moral hazard that such reasoning implies.[6]

Initially, European institutions did not take a clear position against the risk of a generalized failure of the main banks active on the old continent: in this context of uncertainty, each State felt entitled to evaluate the problem in an autonomous perspective and to adopt its own strategy, regardless of the ban on State aid under the Treaty on the Functioning of the European Union ("TFEU").[7] As an example of the dynamics triggered by the inertia of European bodies, it is worth remembering what happened in Ireland, a country whose banks were severely exposed to the U.S. market. On September 30, 2008, the Irish Government, without prior notice to the European Commission or to the Member States, granted an unlimited State guarantee on deposits at major domestic financial institutions. The adoption of this measure forced the British executive to

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3. For a thorough assessment of the causes that led the U.S. banking sector to the crisis, see Martin F. Hellwig, *Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis*, 157 DE ECONOMIST 129 (2009), *working paper version available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309442.

4. As is well-known, subprime mortgage-backed securities have become uncollectible due to the widespread insolvency of the borrowers. *Id.*

5. *See* Marek Dabrowski, *The Global Financial Crisis: Lessons for European Integration*, 34 ECON. SYS. 38, 39 (2010), *working paper version available at* http://ssrn.com/abstract=1436432.

6. Ivo Pezzuto, *Miraculous Financial Engineering or Toxic Finance? The Genesis of the U.S. Subprime Mortgage Loans Crisis and its Consequences on the Global Financial Markets and Real Economy* 12 (Swiss Mgmt. Ctr., Working Paper, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1332784.

7. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 107(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." In order to identify the categories of aid compatible with the common market, refer to Commission Regulation 800/2008, 2008 O.J. (214) (declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)).

act in the same way to prevent depositors from fearing a repeat of the crisis that had already led to the nationalization of Northern Rock and from withdrawing their money deposited in British banks.[8] Then, on October 7, 2008, a rescue and warranty plan was adopted by the Irish Government, which caused other European states and the Commission to react.

2. THE EU'S RESPONSE TO THE CRISIS IN THE BANKING SECTOR

Realizing that the protectionist measures of States could only activate a downward spiral, the E.U. Commission ("EUC") responded by adopting a series of anti-crisis measures. Therefore, "soft law" acts were enacted in order to clarify the policies that the European supervisory body would follow when assessing state aid granted to the banking sector.

According to the TFEU, as already seen, State aid is generally prohibited, except in a few exceptional circumstances when government intervention in the economy is allowed. Taking into account the severity of the crisis, the EUC decided to temporarily endorse a broad interpretation of the prohibition and the exceptions to it, favoring government initiatives to protect the financial stability of the banking sector.

Without the adoption of the anti-crisis measures, aid to banks disbursed by the European countries would have been assessed using the Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty[9] and on the basis of Article 107(3)(C), TFEU, mentioned therein.[10] This legal basis, however, was considered inadequate in order to combat the international financial crisis and would have needed countless and continuous exceptions causing constant uncertainty.[11] Therefore, the legal basis of the Communication of October 2008,[12] as well as the legal basis of subsequent Communications, is found

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8. Tanju Yorulmazer & Paul Goldsmith-Pinkham, *Liquidity, Bank Runs, and Bailouts: Spillover Effects during the Northern Rock Episode*, 37 J. OF FIN. SERVS. RES. 83, 97 (2010), *working paper version available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107570.

9. Commission Communication on Community Guidelines on State Aid For Rescuing and Restructuring Firms in Difficulty, 2004 O.J. (C 244) 2.

10. "The following may be considered to be compatible with the internal market: . . . (C) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest." TFEU, *supra* note 7, art. 107(3)(c), 2008 O.J. (C 115).

11. Marianne Ojo, *Liquidity Assistance and the Provision of State Aid to Financial Institutions*, 1 J. OF ADVANCED RES. IN L. & ECON. 137 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630895.

12. Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, 2008 O.J. (C 270) 2 [hereinafter Communication from the Commission].

in Article 107(3)(B), TFEU,[13] and precisely, in the need to "remedy a serious disturbance in the economy of a Member State."[14]

On October 25, 2008, the EUC issued the first official communication with the purpose of providing Member States with parameters to modulate and coordinate their response to the collapse of the market in accordance with applicable regulations.[15] Those guidelines were followed by a second communication, which further defined the contents of the previous one with reference to recapitalization measures.[16] On February 25, 2009, the EUC also adopted a Communication on the treatment of the financial institutions that had suffered a loss from impaired assets,[17] thereby offering Member States guidelines on how to treat so-called toxic assets.[18]

The EUC's choice to facilitate government intervention in the economy depended on a number of reasons. It was observed that due to the current size of the interbank loan market, the failure of a large bank could create a systemic risk of bankruptcies of financial institutions. Moreover, the collapse of a major financial institution could result in events such as a run on banks and the lack of liquidity, which would follow. These events occurred despite government interventions. Second, economic literature highlights the close ties that connect the financial sector and the real economy: in fact, if a bank is likely to disappear, it is highly probable that it will reduce spending, giving fewer loans to companies and households.[19]

Apart from any assessment concerning the desirability and usefulness of the financial interventions carried out by European States to prevent the disappearance of troubled banks, it seems clear that the international economic crisis has

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13. "The following may be considered to be compatible with the internal market: . . . (B) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State." TFEU, *supra* note 7, art. 107(3)(B), 2008 O.J. (C 115).

14. Before the bursting of the crisis in Europe, which took place in Sept. 2008, the Commission had appealed twice to the Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, using art. 107(3)(C) to save two large banks: Northern Rock and Bradford & Bingley. *See* Yorulmazer & Goldsmith-Pinkham, *supra* note 8; *see also* Roman Tomasic, *Corporate Rescue, Governance and Risk Taking - Northern Rock and Its International Context*, 29 COMPANY LAW. 297-303 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417953.

15. *See* Communication from the Commission, *supra* note 12.

16. Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, 2009 O.J. (C 210) 3.

17. Communication from the Commission on the treatment of impaired assets in the Community banking sector, 2009 O.J. (C 72) 1.

18. For a survey of the issue concerning the anti-crisis communications adopted by the E.U., see Marco Lo Bue, *Stato e Mercato, un nuovo assetto dopo la crisi*, 3 RIVISTA GIURIDICA DEL MEZZOGIORNO 979-1014 (2010) (It.).

19. Abel Mateus, *The current financial crisis and State Aid in the EU*, 5 EUR. COMPETITION J. 1, 10 (2009); *see* also Andrew W. Hartlage, *Europe's Failure to Prepare for the Next Financial Crisis Affects Us All*, 44 GEO. J. INT'L L. 847 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270893.

revealed some pathological aspects of a financially-overdriven capitalist system, which were initially concealed by booming production. Indeed, nowadays the market economy seems quite similar to a tyranny of the banking industry, in which the lenders stand at the center of economic dynamics as undisputed masters, able to impose their gravitational pull on the three main satellites: states, firms and households.[20] It is an anomalous system, capable of generating high levels of wealth in defined periods of time, but also of causing shocking recessions. In this context, banks can deploy an almost unlimited power to influence against political interlocutors, because if a credit institution fails, as evidenced by the Lehman case, the onset of panic among depositors may affect the liquidity of every bank as depositors rush to withdraw their cash. This would cause a disappearance of credit for firms and citizens. Indeed, the bursting of the housing bubble was followed in many states by the collapse of the banking system, whose financial problems were then solved by governments using public resources.[21]

The attempt to save the system has affected the stability of public finances of some of the traditional economic powers in the E.U., increasing the budget deficit and the level of public debt.[22] At the same time, despite the huge resources allocated to rescue its banks, the situation that has arisen in the U.S. proved to be less volatile than that of the E.U. In fact, the number of dollars circulating in currency markets is enough to purchase all existing U.S. government securities, which has so far made it easy for the U.S. to obtain the necessary liquidity to finance its public debt at reasonable interest rates.[23]

3. THREE DIFFERENT TYPES OF E.U. DEBT CRISES: IRELAND, GREECE, PORTUGAL

The public debt crises that have struck some E.U. Member States are very different one from the other. The Irish downturn, for example, is very similar to the Icelandic crisis, namely that of a country that turns into a mega investment bank and that uses a leverage disproportionate to its possibilities: a reckless gamble that thrives on the irrational deregulation of the financial system and overwhelms the GDP in its fall, pushing the deficit to GDP ratio to 30% in one night.[24] Concerning Greece, the reasons that led this country into the abyss were

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20. Hellwig, *supra* note 3.

21. For an exhaustive study of the issue, see LUCIANO GALLINO, FINANZCAPITALISMO. LA CIVILTÀ DEL DENARO IN CRISI (2011) (It.); *see also* Giovanni Pitruzzella, *Chi governa la finanza pubblica in Europa?*, 32 QUADERNI COSTITUZIONALI 9 (2012) (It.).

22. Guilio Napolitano, *From the Financial to the Sovereign Debt Crisis: New Trends in Public Law*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO, Jan.-Mar. 2012, at 81, 81-92, *available at* http://www.astrid-online.it/Dossier—d1/Studi—ric/Napolitano_Sovereign-debt-crisis-and-public-law_RTDP-.pdf.

23. *See* RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010).

24. Stephen Kinsella & K.P.V. O'Sullivan, *Financial and Regulatory Failure: The Case of Ireland*, 14 J. OF BANKING REG. 1, 1-15 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_

different from those of the Irish case, and are identifiable in a reckless management of public finances, carried out through financial tricks hidden at first and then publicly disclosed by the government of Papandreou in October of 2009.[25] Portugal, finally, was hit by a crisis caused by a lack of competitiveness of many sectors of the country's economy.[26] Let us consider more in detail the above mentioned crises, at least for their exemplary power.

As regards Ireland, between 1997 and 2007, the Irish economy grew rapidly thanks to a low corporate tax rate and to the low interest rate set by the ECB. Income growth, however, led to the creation of a housing bubble, whose collapse in 2007 put pressure on the domestic banking system, which was heavily exposed in this area. In 2008, after a number of years spent getting into foreign debt on a large scale, Irish banks were badly exposed and had to face a decline in global markets. The beginning of the international crisis further aggravated the condition of the Irish banks, which were the first in Europe to be infected by the financial downturn which occurred in the U.S. housing market in 2007 and subsequently spread to the rest of the world.[27] The Government adopted radical measures to deal with the problems of the banking sector, granting deposit guarantees, proceeding to the nationalization of some banks and implementing a risky recapitalization program at taxpayers' expense. The costs of the bank bailouts carried out by executive decree, even with the help of an *ad hoc* structure, the National Asset Management Agency, however, led to a disproportionate growth of public debt. In 2010, the measures in favor of banks, which were essential in averting the failure of the country, had cost fifty billion euro, raising the deficit to GDP ratio to an all-time high of 32%.[28] The difficult situation of Ireland's public accounts persuaded them to ask for financial support from the European Union, the Eurozone countries and the International Monetary Fund (IMF) in November of 2010.[29]

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id=1969887. On the Icelandic case, see Andrew Morriss & Birgir Petursson, *Global Economies, Regulatory Failure, & Loose Money: Lessons for Regulating the Finance Sector from Iceland's Financial Crisis*, 63 ALA. L. REV. 691 (2012).

25. Piero Ghezzi & Antonio Garcia Pascual, *The Greek Crisis: Causes and Consequences* 5 (CESifo, Working Paper No. 3663, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968873.

26. Ricardo Reis, *The Portuguese Slump and Crash and the Euro Crisis*, BROOKINGS PAPERS ON ECON. ACTIVITY, 143, 143-44 (2013), *available at* http://www.brookings.edu/~/media/Projects/BPEA/Spring%202013/2013a_reis.pdf.

27. *See* Kinsella & O'Sullivan, *supra* note 24.

28. Tom Kennedy & K.P.V. O'Sullivan, *What Caused the Irish Banking Crisis?*, 18 J. OF FIN. REG. & COMPLIANCE 224, 224-42 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888342.

29. For a detailed understanding of later evolution of the Irish crisis, see Michael M. Dowling & Brian M. Lucey, *From Hubris to Nemesis: Irish Banks, Behavioral Biases, and the Crisis*, 7 J. OF RISK AND MGMT. IN FIN. INSTITUTIONS (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331185.

When we move to Greece, we notice that after over a decade of steady growth, in the fall of 2009 the economic trend of Greece came to an abrupt reversal: the GDP decreased from a growth rate of 3% in 2008 to a decline of 1.2% in 2009, with public debt exceeding 113%. Now, an interesting issue at stake here is that for many years rating agencies believed, mistakenly, that the debt of Member States of the European single currency was protected by an implicit guarantee of the ECB, in fact non-existent because the latter could not directly buy government bonds on the market:[30] this presumption led market operators to a systematic underestimation of risk, with the result that the interest rates of government bonds adjusted themselves at lower levels than the real reliability of the countries. The Greek government bond market represents perhaps the most significant example to help us understand the effects produced by this error of assessment.[31] Following the victory of the socialist Pasok party in the elections of October 4, 2009, unexpected differences emerged between the budget estimates of the outgoing government and the reality of public accounts. Seven days after the vote, the new Prime Minister Papandreou informed the European Union that the deficit/GDP ratio amounted to over 12%, which was twice the expected 6.7%. The negative appraisal by the main rating agencies on the progressive deterioration of Greek finances had an immediate effect on the government bond market, prompting the Government to implement severe budget cuts for 2010.[32] Only in February 2010 did Europe recognize the risk of contagion of the Greek financial crisis to financial institutions based in other European countries, as Greek bonds could not find any more market confidence, even at very high interest rates. After identifying the existence of the risk of a "domino effect" descending from a possible Greek default, Eurozone countries did not, however, decide immediately to provide financial assistance to Greece. It took about three months of debate within E.U. institutions and several intergovernmental meetings to put in the balance the desire to avoid the risk of a failure of the single currency with the need to avoid the occurrence of moral hazard arising from a bail-out of Greece, especially after the derogation adopted in 2008 in relation to state aid in order to cope with the collapse of financial markets.[33] On April 22, 2010 Greek Prime Minister George Papandreou asked publicly, for the first time, for the activation of an aid plan on which the E.U. and the IMF had been working for months with the support of the White House. The internationalization of the Greek crisis pushed finance

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30. Paul De Grauwe, *The European Central Bank as Lender of Last Resort in the Government Bond Markets*, 59 CESIFO ECON. STUD. 520, 520 (2013), *working paper version available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1927783.

31. *See* Julien Idier & Valère Fourel, *Risk Aversion and Uncertainty in European Sovereign Bond Markets* (Banque de France, Working Paper No. 349, 2011), *available at* http://ssrn.com/abstract=1955933.

32. *See* Pascual & Ghezzi, *supra* note 25.

33. *Id.*

ministers of the Eurogroup to give the green light to a first support project on May 2: EUR 110 billion in three years, 30 of which were allocated by the IMF and 80 to be paid by Greece's partners in the euro area.[34]

Finally, the crisis that hit Portugal was caused by the economy's lack of competitiveness. The problem of Lisbon has been growth, or rather the lack of growth of GDP caused by a gradual erosion of competitiveness. In fact, Portugal is a peripheral region because over the years its model of development became inefficient and was unable to keep up with Germany, the leading economy in the continent. Insufficient infrastructure, an inadequate education system and excessively high public wages in relation to productivity has made the few products once produced by Portuguese industry uncompetitive. The weak economy has affected tax revenues, making it impossible for the country to honor the payment of its bonds at maturity.[35] Since the advent of democracy, completed in 1974, several governments have favored the creation of economic bubbles and a progressive increase in public spending, implementing controversial partnerships between public and private entities, paying for numerous unnecessary and inefficient external consultants, allowing significant delays in public works managed by the State, inflating bonuses and salaries of public managers and encouraging a persistent recruitment policy that boosted the number of public employees. To implement the above mentioned policies, the various executives had extensive recourse to borrowing on the bond market, using also a large part of the Structural Funds and Cohesion Funds from the European Union which were intended, in theory, to encourage the development of the country. The financial situation faced by Portugal became critical on March 23, 2011, when Prime Minister Socrates resigned following the rejection by Parliament of the recovery plan drawn up by the Socialist Government in order to avoid the need for a bailout by the European Union. The political crisis was followed by a negative reaction in the financial markets, which resulted in an increase in yields on ten-year, five-year and two-year bonds and the downgrading of the financial ratings of Lisbon. On April 6, 2011, because of the negative evaluations expressed by the ratings agencies about the sustainability of the debt situation, Portugal requested financial aid from the European Union, recognizing it had no chance of returning its ratings to acceptable levels and that there was a total absence of buyers of its bonds on the market, with the exception of the European Central Bank.[36]

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34. For a survey of the European response to the Greek downturn, see Marco Lo Bue, *La crisi del debito greco e la reazione dell'Unione*, 31 QUADERNI COSTITUZIONALI 175, 175-78 (2011) (It.); for a deeper analysis of the situation currently experienced by Greek economy, see Serge L. Wind, *Eurozone Sovereign Debt Crisis*, (Working Paper, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966315.

35. *See* Reis, *supra* note 26.

36. *Id.*

4. THE EU'S RESPONSE TO THE PUBLIC DEBT CRISIS

A) EUROPEAN FINANCIAL STABILITY FACILITY (EFSF) AND EUROPEAN FINANCIAL STABILITY MECHANISM (EFSM)

The 110 billion euro loan was the first step taken by European countries in an attempt to help Greece meet its obligations to investors. The implementation of this package, however, did not alleviate the pressures of financial markets, and investors' concerns came to a head with increasing insistence and effects far beyond Greece.[37]

On May 10, 2010, The Economic and Financial Affairs Council ("ECOFIN"), in order to cope with the worsening economic context, adopted a stabilization mechanism of 750 billion euros to guarantee the financial strength of Europe. The package included the European Financial Stabilisation Mechanism ("EFSM"), which was supported by all the E.U. Member States of the Union and the European Financial Stability Facility ("EFSF") for the mobilization of additional resources, the latter financed by the Eurozone countries and the International Monetary Fund ("IMF").[38]

The articulation of the package on three levels (E.U., Eurozone, IMF) was mainly determined by the position of Great Britain, unwilling to support Euro area Member States facing difficulties. The United Kingdom subsequently took a step back from this hard line, joining the EFSM, like all other E.U. Member States.[39] The political foundation of the financial mechanism in question is to be found in an intergovernmental agreement concluded among the Euro area Member States, while its legal basis is found in the second paragraph of Article 122 TFEU.[40]

The EFSF was set up along the lines of a limited liability company under the jurisdiction of the State of Luxembourg. This fund was endowed with financial resources amounting to 440 billion euros, the burden of which was distributed among the states on the basis of the shares they held in the capital of the ECB. Even the IMF joined the fund with an investment of 220 billion euros, equal to

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37. Sotiria Theodoropoulou & Andrew Watt, *What Did They Expect? Lessons for Europe from a Retrospective Ex-Ante Evaluation of the First Greek Bail-Out Programme* 16 (Eur. Trade Union Inst.,Working Paper No. 2012.10, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202733.

38. *See* Pascual & Ghezzi, *supra* note 25.

39. Ansgar Belke, *The Euro Area Crisis Management Framework: Consequences for Convergence and Institutional Follow-ups*, 26 J. OF ECON. INTEGRATION 672, 677 (2011), *working paper version available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707995.

40. TFEU art. 122(2) states, "where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken." TFEU, *supra* note 7, art. 122(2), 2008 O.J. (C 115).

half of that of the European contribution. This boosted the total sum spent to limit the consequences of the sovereign debt crisis to 720 billion euros.[41]

B) THE EUROPEAN STABILITY MECHANISM (ESM)

At the time of the creation of the EFSF and the EFSM, the E.U. was focusing exclusively on the need to bail out Greece and to achieve this goal as soon as possible. Given the aforementioned urgent situation, the Community institutions were not able to quickly change the text of the TFEU. In fact, the procedure to revise the Treaty would have required more time than the rapid worsening of the Hellenic crisis allowed.[42]

However, considering the lack of a proper legal basis within the TFEU, the large-scale rescue operations carried out by the Member States and the ECB to support countries in trouble gave rise to a potential attack against one of the cardinal principles of the Treaty of Maastricht, the rule that assigns the jurisdiction of each State's fiscal policy to itself.[43] For this reason, a few months after the disbursement of the first tranche of aid to Greece, the E.U. introduced a definitive legal basis in the Treaty for the adoption of the so-called European Stability Mechanism ("ESM"): this was due to the fact that Germany, the prominent E.U. Member State and even more prominent E.U. economic giant, frequently prospected the risk that its Constitutional Court may consider illegitimate any measures taken in the absence of a precise legal basis within the Treaty. Thus, Germany imposed to the other Member States the revision of Art. 136 TFEU in order to establish a legal basis for the introduction of the European Stability Mechanism.[44] ESM replaced the EFSF and the EFSM and aimed, as was the intention of the European legislator, to provide a framework which would prevent the need for emergency solutions not covered by the legal system. Hence, the European Council, at its meeting on March 24-25, 2011, adopted a decision which modified the TFEU in accordance with the simplified procedure set out in Article 48, paragraph 6, of the TFEU. More specifically, the European Council decided to add the following paragraph to Article 136 of the TFEU: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of

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41. Antonis Antoniadis, *Debt Crisis as a Global Emergency: The European Economic Constitution and Other Greek Fables*, *in* THE EUROPEAN UNION AND GLOBAL EMERGENCIES: A LAW AND POLICY ANALYSIS 167, 174 (Antonis Antoniadis, Robert Schütze & Eleanor Spaventa eds., 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699082.

42. Christophe Degryse, *The New European Economic Governance* 25 (Eur. Trade Union Inst.,Working Paper No. 2012.14, 2012), *available at* http://ssrn.com/abstract=2202702.

43. Alicia Hinarejos, *The Euro Area Crisis and Constitutional Limits to Fiscal Integration*, 14 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 243 (2012), *available at* http://ssrn.com/abstract=2146141.

44. Elaine Fahey & Samo Bardutzky, *Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in EU Courts, Plural - A Casestudy of the European Stability Mechanism*, 1 MICH. J. OF INT'L L. EMERGING SCHOLARSHIP PROJECT 101, 103-04 (2013), *available at* http://ssrn.com/abstract=2287917.

the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."[45] The ESM was subsequently established by a treaty signed by all Monetary Union Member States, as an intergovernmental organization under international public law with headquarters in Luxembourg. The discipline regulating the ESM is similar to those of the EFSM and ESFS. The ESM has an effective lending capacity of 650 billion euros.

When discussing the crisis management mechanisms introduced by the E.U., it is impossible not to mention the points of view of the German Constitutional Court (Bundesverfassungsgericht, "BVG") and of the European Court of Justice, which evaluated the compatibility of rescue mechanisms respectively with the constitutional principles in force in Germany and with the general principles applicable in the E.U. More specifically, in September 2011 the BVG stated that the "Währungsunion-Finanzstabilisierungsgesetz" (the legislative provision which legitimized aid to Greece) and the "Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus" (Relative to the mechanism for the states facing financial distress) did not violate the financial autonomy granted to the German Parliament by the Grundgesetz.[46] Furthermore, in September 2012, in an interim order, the BVG recognized the compatibility of the European Stability Mechanism and of the "Fiscal Compact" with the fundamental principles enunciated by the Constitution.[47]

Even without examining in detail the economic effects caused by the E.U.'s enforcement of austerity policies, it seems obvious that the most immediate consequence of incorporating the balanced budget principle into the constitution (occurred after the enactment of the Fiscal Compact that we will analyze in

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45. 2011 O.J. (L 91) 2.

46. *See* Bundesverfassungsgericht, [BVERFG] [Federal Constitutaional Court] Sept. 7, 2011, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERWGE] 987/10 (Ger.), *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20110907_2bvr098710.html. Actually, what at first reading might seem like a political success for Europeanists should not be considered as such. In fact, the BVG has held that the German Government cannot accept, without the prior approval of Parliament, permanent mechanisms that lead to the onset of a lasting debt to other countries if these liabilities are very large or indeterminate, and if foreign governments, through their actions, can trigger the payment of collateral. The BVG has not prevented Bundestag from disbursing funds to states in trouble, but it inhibited the Parliament from delegating this power permanently. Therefore, the Government of Germany, given the content of the decisions in question, can no longer limit itself to informing the Budget Committee of the Bundestag in the name of a generic transparency, but it must obtain the approval of the Commission on any single aid plan. So, the Bundestag has taken to itself some sort of veto power over European bailout plans insofar as a legal basis within the TFEU does not exist. The problem posed by the BVG was then resolved, with reference to the ESM, through the reform of art. 136 of the TFEU, which required ratification by national Parliaments.

47. *See* Bundesverfassungsgericht, [BVERFG] [Federal Constitutaional Court] Sept. 12, 2012, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERWGE] 1390/12 (Ger.). For an in depth analysis of the judgment refer to Valerio Lemma & Ulrike Haider, *The Difficult Journey Towards European Political Union: Germany's Strategic Role*, 1 L. & ECON. YEARLY REV. 390 (2012), *available at* http://ssrn.com/abstract=2244330.

more detail in the further paragraphs) is represented by the attribution to the national Constitutional Courts of a leading role in determining domestic economic policies. The Supreme Courts, as autonomous and independent guardians of national constitutions, have risen to the role of guarantor of last resort of the constraints stemming from the Fiscal Compact Treaty and incorporated into the Constitutions. The Courts are now able to declare illegal budget acts and financial laws of Member States when such measures fail to comply with the balanced budget principle.[48]

Finally, in November 2012, the European Court of Justice judged that the decision of the European Council which had amended article 136 of TFEU was legitimate, and recognized that the establishment of the ESM was compatible with E.U. law.[49]

C) THE FISCAL COMPACT

The perverse dynamics triggered by the collapse of the banking system and the subsequent sovereign debt crisis persuaded the governments of the major European states not only of the need to create mechanisms to help in the rescue of countries in financial distress, but also to introduce effective tools to coordinate national economic policies. To further this, E.U. Member States implemented more stringent constraints in order to control the progress of public spending and introduced automatic sanctions when violations of the new strict parameters were identified.[50] It was in this spirit that on March 2, 2012, the E.U. Member States, except for Britain and the Czech Republic,[51] signed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also known as the "Fiscal Compact."[52]

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48. For an assessment of the recent BVG's jurisprudence on the legality of the European practices of crisis management, see Michelle Everson & Christian Joerges, *Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, 63/2013 LSE EUR. IN QUESTION DISCUSSION PAPER SERIES (2013), *available at* http://ssrn.com/abstract=2287111.

49. *See* Case C-370/12, Pringle v. Ireland. 2012 E.C.R. I-000.

50. Paul Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 EUR. L. REV. 231, 233-34 (2012), *available at* http://ssrn.com/abstract=2115538; *see* also Edoardo Chiti & Pedro G. Teixeira, *The constitutional implications of the European responses to the financial and public debt crisis*, 50 COMMON MKT. L. REV., 683 (2013); *see also* Fabian Amtenbrink & Jakob de Haan, *Economic Governance in the European Union - Fiscal Policy Discipline versus Flexibility*, 40 COMMON MKT. L. REV., 1057 (2003), *available at* http://ssrn.com/abstract=1349103.

51. For more details about the recent address of the British Government regarding the European political affairs, see M.P. Chiti, *Il tramonto della sovranazionalità europea? Il caso esemplare dell'European Union Act 2011 britannico*, 17 GIORNALE DI DIRITTO AMMINISTRATIVO 1228 (2011) (It.).

52. The use of the legal instrument of an intergovernmental treaty is justified in the light of the refusal of British Prime Minister David Cameron to accept the obligation to transpose at a constitutional level the balanced budget principle. The disagreement of Britain showed how crippling this could be making the Community legislative instruments unusable. The position taken by Cameron was later shared by the Czech Prime Minister Petr Necas. It should however be recalled that art. 15 of the Treaty says that the Member States which do not sign the agreement shall have the right to join it at any time.

The Fiscal Compact has introduced two new rules into the European legal framework in an effort to correct and strengthen the aspects that had shown major flaws in the Stability and Growth Pact as it was then implemented.[53] The first is the so-called "golden rule," i.e. the balanced budget principle, according to which the structural deficit must not exceed 0.5% of GDP during the budget cycle. The second innovation introduced by the Treaty is the duty, placed on the contracting states, to follow a virtuous path of debt reduction, to the extent of one twentieth per year of the distance between its actual level and the threshold of 60% set earlier by the Maastricht Treaty. The keystone of the legislation introduced by the Fiscal Compact is the obligation accepted by the signatory states to incorporate in their national Constitutions the balanced budget principle within one year after the entry into force of the Treaty.[54]

The purpose of the balanced budget principle's constitutionalization seems clear: it mirrors the will of the stronger E.U. countries to make other Member States feel responsible for a greater respect of budgetary constraints. Concretely, it is a choice that reflects a strong re-emergence of the intergovernmental dimension to the detriment of the Community method, determined by Germany's desire to push the other countries to implement austerity-oriented economic strategies.[55] In fact, it is disappointing to observe that after sixty years of common experience, such radical changes to the institutional European framework have been introduced through intergovernmental agreements, and not, as one might have imagined, using the Community method.[56] A combination of devices and instruments related to international law and European Union

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See Anna Kocharov, *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty* (Eur. Univ. Inst., Working Paper No. 2012/9, 2012), *available at* http://ssrn.com/abstract=2068674.

53. The Stability and Growth Pact (SGP) is a rule-based framework for the coordination of national fiscal policies in the European Union. It was established to safeguard sound public finances, based on the principle that economic policies are a matter of shared concern for all Member States. Articles 121 and 126 of the TFEU provide the legal basis of the Stability and Growth Pact. While art. 121 outlines the preventive arm of the SGP, art. 126 of the Treaty forms the basis for the corrective arm and the Excessive Deficit Procedure. Protocol 12 defines the reference values of 3% of GDP for public deficit and 60% of GDP for public debt. Secondary legislation governing the Stability and Growth Pact was initially approved in 1997, with significant reforms enacted in 2005 and 2011. The 2011 reforms, referred to as the "six-pack," tried to address gaps and weaknesses in the framework identified during the recent economic financial crisis. Finally, the Fiscal Compact contained within the inter-governmental Treaty on Stability, Coordination and Governance complements, and in some areas enhances further, key provisions of the SGP.

54. This obligation was carried out by all of the contracting parties, including Italy, which transposed the Treaty through the approval of the Constitutional Law 20 April 2012, n. 1 (Art. 81 ¶¶ 1 & 2 Costituzione [Cost.] (It.)).

55. Federico Fabbrini, *The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism*, 36 B.C. INT'L & COMP. L. REV. 1, 10 (2013), *available at* http://ssrn.com/abstract=2096227.

56. For a better understanding of the relationship between the Community method and the intergovernmental method, see Kenneth Armstrong, *The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance*, 64 CURRENT LEGAL PROBS. 179 (2011), *available at* http://ssrn.com/abstract=2067317.

law, which was the chosen path, is not necessarily the wrong one: however, it seems to miss the necessary propensity toward a real political unification of the old continent, which, regardless of the techniques used, stands as the vital innovation for the sustainability of the E.U. in the long run.[57]

5. THE DEBATE ON EUROBONDS

The absence of a true federal budget and of a central bank with the power to act as a lender of last resort is one of the E.U.'s institutional anomalies. This is the circumstance that, in recent years, has exposed some E.U. states to the pressure of financial markets. In order to find a solution to the problem under consideration, a doctrinal and political debate has been underway for some time. So far the scientific dispute has not produced the desired results.[58]

A proposal that was discussed for a long time was the one formulated by the former President of the Eurogroup, Jean-Claude Juncker, and the former Italian Minister of Economy, Giulio Tremonti, on the creation of so-called "eurobonds." The project included the development of European bonds issuable by a hypothetical European Debt Agency ("EDA") to the extent of 40% of the European Monetary Union's GDP in order to establish a market of similar size to that of U.S. securities. In this way the EDA, whose solvency would have been guaranteed jointly by the Eurozone countries, could have bought the bonds issued by Member States both in the primary and secondary market, taking the place of the market players as a creditor and reducing the pressure on troubled countries.[59]

The above-mentioned proposal was not accepted by the E.U. institutions because of German hostility, which was motivated by the fear of seeing a deterioration in interest rates related to its debt. However, the publication of a Green Paper on Stability Bonds by the EUC in 2011 reopened the debate regarding the introduction of the European debt securities, and the reform of the Treaties.[60]

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57. For an ambitious comparison between the U.S. federal model and the European and the new constitutional architecture of the EU, see Fabbrini, *supra* note 55; *see also* C. Randall Henning & Martin Kessler, *Fiscal Federalism: US History for Architects of Europe's Fiscal Union* (Peterson Inst. for Int'l Econ., Working Paper No. 12-1, 2012), *available at* http://ssrn.com/abstract=1982709.

58. *See* Frederic Allemand, *La faisabilité juridique des projets d'euro-obligations*, 48 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 553 (2012) (Fr.).

59. Of extreme interest is a document issued by the European Parliament, which describes two of the main proposals; *see* Charles Wyplosz, *Eurobonds: Concepts and applications. Briefing Note*, IP/A/Econ./NT/2011-01 (Mar. 2011), *available at* http://www.europarl.europa.eu/document/activities/cont/201103/20110316ATT15710/20110316ATT15710EN.pdf.

60. *European Commission Green Paper on the Feasibility of Introducing Stability Bonds*, COM (2011) 818 final (Nov. 2011). The paper analyses the potential benefits and challenges of three approaches to the joint issuance of debt in the euro area. It sets out the likely effects of each of these approaches on Member States' funding costs, European financial integration, financial market stability and the global attractiveness of E.U. financial markets. It also considers the risks of moral hazard posed by each approach, as well as its implications in terms of Treaty change.

Now, leaving aside the critical profiles related to the financial instrument in question, it should be noted that, from a strictly legal standpoint, eurobonds are likely to be regarded as unlawful even before their eventual adoption. Indeed, the German BVG hinted that the implementation of the European debt securities could result in a clear democratic deficit. More specifically, German judges pointed out that while, on the one hand, the spending policies of a country in financial distress would be conducted by the executive of the same State, elected by its citizens, on the other hand, the people of a State with a sound budgetary situation would be forced to contribute to the financing of those expenditures without the right to elect representatives of the State in crisis. In short, Europe risks violating the principle of "no taxation without representation."[61] As a result of the hypothetical issuance of eurobonds amounting to about 40% of European GDP, Germany would be heavily exposed to the financial markets, having provided guarantees exceeding 100 percent of its GDP. The German Constitutional Court does not take into consideration that the weight of such large guarantees would be imposed on other countries as well, but the judges know that Germany is the only country that would move from a solid financial situation to a highly unstable one. This latter consideration probably led them to throw a lifeline to the government, in deference to obvious reasons so that it can operate in its self-defense.[62]

Beyond the understandable differences of points of view among E.U. Member States on the issue of eurobonds, it is worth noting that not even in literature is there unequivocal acceptance of the financial instrument in question. Among the detractors of the idea of issuing common debt securities, the most common argument used to challenge the reliability of eurobonds is the moral hazard which underlies such measures.[63]

Some authors, argue that the issuance of eurobonds, given Europe's institutional structure today, would result in a weakening of European democracies and in serious harm from a strictly economic point of view. The creation of eurobonds would help those states that today find themselves in trouble because they have not implemented forward-looking investments and strict fiscal policies and they would put off adopting these reforms as long as they could afford to. At present, a strategy geared to the introduction of eurobonds might lay the groundwork for a debt spiral out of control throughout the European area. For

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61. In the judgment pronounced on Sept. 12, 2012, the German Constitutional Court (BVG) examined the possible matters of constitutionality descending from the increase in public spending to support countries in distress. S*ee* 2 BVERWGE 1390/12 (¶¶ 207-29) (Ger.), *available at* http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html. The reasoning in question, carried out with reference to the ESM, seems extensible to the eurobonds in case they will be established.

62. S*ee Id.*

63. Thomas Philippon & Christian Hellwig, *Eurobills, not Eurobonds*, VOX (Dec. 2, 2011), *available at* http://www.voxeu.org/article/eurobills-not-euro-bonds.

eurobonds to be effective, a change in the E.U.'s institutional framework is required, and therefore the Treaty amending procedures that have been in effect for a long time would have to be amended.[64] Nevertheless, eurobonds, from a purely technical point of view and putting aside the legitimate criticism of the moral hazard that their emission would cause, could lead to a clear improvement of public finance conditions in many European states over the short run. In brief, such a development would allow one to start discussing the eventual foundation of a United States of Europe, which was the target set by the fathers of the European Community.[65] Hence, eurobonds could represent a mere rite of passage leading to a real fiscal and political union that goes beyond the single currency.

6. NEW EUROPEAN ECONOMIC GOVERNANCE

The difficulties encountered by the E.U. in dealing with the economic and financial crisis seem to have some clear reasons. In fact, the Union's slow reaction to the banking sector downturn and to the sharp increase in the public debt experienced by some Member States was mainly due to the difficulty in reaching political agreements in the absence of economic governance adequate to the needs of today's enlarged Europe. Only in 2011, nearly sixty years after the start of the Community experience, did all the Member States realize the importance of preparing a set of rules aimed at facilitating the functioning of national economic systems, coordinating fiscal policies and avoiding the spread of uncertainty in financial markets. The E.U. has therefore begun to define a complex set of crisis management tools. Initially, it introduced legal instruments designed as *ex-post* mechanisms, non-permanent and developed to handle crises only after their impact. Subsequently, the aforementioned mechanisms were replaced by *ex-ante* instruments void of time restrictions.

Indeed, the E.U. has enhanced the coordination of economic policies through the development of regulatory tools culminating in the signing of the Fiscal Compact under the form of an international treaty. The adopted measures have highlighted the successful undertaking of collective political responsibility by

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64. Kenneth N. Matziorinis, *Is the 'Euro Bond' the Answer to the Euro Sovereign Debt Crisis? What Outcome Can Investors Expect Out of Europe?*, 14 J. OF WEALTH MANAGEMENT Spring 2012, at 11, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999518.

65. Henning & Kessler, *supra* note 57, at 29-30. In particular, it is interesting to notice that, different from EU, where debt brakes are mandated by the Union and enforced by the European Commission and the E.U. Court of Justice, the U.S. states adopted balanced budget rules autonomously from the federal government in the nineteenth century. However, the federal government's relationship with the states must be seen within the context of a broader fiscal union, in which the federal government has a macroeconomic stabilization role, so that "the rigidity brought on by balanced budget provisions at the state level is facilitated by fiscal flexibility at the federal level." *Id.* at 20. Indeed, "since the 1930s, the federal budget has helped to stabilize the national economy in countercyclical fashion. Without this, state-level restrictions would have been difficult or impossible to sustain." *Id.*

E.U. Member States, which has deepened the interstate solidarity principle and has contributed to eliminating some of the conditions which favored the onset of the crisis. However, these commitments seem still to be insufficient to remove the problems that affect today's institutional framework. In this regard it should be remembered that the redefinition of the relationship between monetary and fiscal policy represents a central theme of the debate around the new economic order in Europe.[66]

Traditionally, one of the unresolved issues of economic law is whether a monetary union can survive without any form of fiscal federalism: recent events seem to suggest a negative answer to this question.[67] In fact, all the bonds issued by E.U. countries and sold on the financial market had, before the burst of the debt crisis, the same interest rate. At a later stage, as is well-known, they turned out anything but equivalent to each other. For this reason, it seems necessary to reflect on Europe taking a step towards political unification. This would strengthen the euro, making the financial situation of the countries participating in the single currency more homogeneous and developing an appropriate institutional shield designed to protect state budgets from speculation carried out on financial markets.

In the U.S., the central government has a budget amounting to 20% of national GDP, and its macroeconomic role is to carry out anti-cyclical fiscal and spending policy.[68] When a state experiences a downturn in a key sector of its economy, Washington collects less federal taxes but increases or keeps constant the local expenditure in order to cushion the reduction in local tax revenue. Such a concept of solidarity and fiscal federalism – apart from possible "annoying" drawbacks, as the shutdown experienced in October 2013 – would hardly be importable into the reality of the E.U., whose budget amounts to 1% of continental GDP and 2.5% of total government spending. Numbers like these would not allow European institutions to play a significant macroeconomic role.

The creation of a federal system at the European level would require a brave choice by the political class, a transfer of sovereignty in a sector as important as the management of tax revenue from national states to the E.U. It is very likely that the main players of the old continent are not ready to sacrifice these prerogatives. However, the risk hidden behind a wait-and-see attitude is a significant

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66. Paul De Grauwe, *Only a More Active ECB Can Solve the Euro Crisis*, 250 CENTRE FOR EURO. POL'Y STUD. POL'Y BRIEF 250 (Aug. 4, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945766.

67. Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy*, 36/2011 LSE EUR. IN QUESTION DISCUSSION PAPER SERIES at 36-37 (2011), *available at* http://ssrn.com/abstract=1852316.

68. Henning & Kessler, *supra* note 57, at 20. *See also* William W. Bratton & Joseph A. McCahery, *Fiscal Federalism, Jurisdictional Competition and Tax Coordination: Translating Theory to Policy in the European Union*, (Geo. Wash. Univ. L. Sch., Pub. L. & Legal Theory Working Paper No. 006, 2000), *available at* http://ssrn.com/abstract=205410.

downsizing of the economic project of the Union, with the consequent emergence of doubts about the overall meaning and the underlying reasons for European integration.[69] Putting aside the future decisions of the Member States, it is worth highlighting once again how, in the current institutional structure of the E.U., there is a lack of mechanisms designed to combat the speculation of financial operators against the Government bonds or the single currency.[70]

To make a long story short, it is possible to say that today there is a market democracy in Europe which is the result of a new constitutional order created by the governments to react to the impulses of finance, whose consent has substantially replaced that of the citizens. The current European framework represents a system in which the legitimacy of those who wield power does not stem from the people but from an alleged system's economic efficiency. In this sense, a reflection by the Heads of state of the old continent on the reasons behind the crisis would be opportune. Indeed, the creation of a true European political union appears the only option that can favor the emergence of a real partnership with the U.S., that is to say an axis designed to cope with the economic challenges launched by rising powers and financial markets. A preamble to the establishment of an efficient political union could be the introduction of eurobonds or other similar financial instruments. However, Germany has declared on several occasions that it is not prepared to tolerate any form of negoti-

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69. A significant position on this issue had been taken by Viviane Reding, the current European Commissioner for Justice, Fundamental Rights and Citizenship, who published an article in the Wall Street Journal. Viviane Reding, *A Vision for Post-Crisis Europe: Toward a Political Union*, WALL ST. J. (Feb. 8, 2012), *available at* http://online.wsj.com/news/articles/SB10001424052970204136404577208523717211582. This article was followed by another one from the same author, calling for the establishment of the United States of Europe. Viviane Reding, *Why we now need a United States of Europe*, LUREMBURGER WORT, (Nov. 26, 2012), *available at* http://www.wort.lu/en/view/why-we-now-need-a-united-states-of-europe-50b39a58e4b0b800168c0a86. After the Reding initiative, a group of foreign affairs ministers of the European Union put together a discussion group on the future of Europe, animated by the German foreign minister Guido Westerwelle; *Foreign Ministers' group on the Future of Europe Chairman's Statement for an Interim Report*, (June 15, 2012), *available at* http://www.auswaertiges-amt.de/cae/servlet/contentblob/620574/publicationFile/169576/120630_Zwischenbericht_Zukunftsgruppe.pdf.

70. More specifically, at its meeting in Brussels on June 28 and 29, 2012, the European Council decided that the countries that comply with rules, recommendations, and shared calendars, in the context of the European Semester, the Stability and Growth Pact and procedures for excessive imbalance, should be able to use the ESM. The procedure states that after the signature by a requesting State of a "memorandum of understanding" with the European Commission, the ESM would be able to intervene directly in the primary and secondary market debt, favoring an increase in the demand for government securities in order to reduce the spread between the rate of interest applied to bonds purchased and the rate of German bonds. Although the resolution adopted by the European summit represents a solution to the sovereign debt crisis, it is certainly different from the content of the proposal originally put forward by the Italian Government, which suggested the automatic activation of the intervention when spreads exceed a certain threshold. In this regard, it should be emphasized that the ESM is deprived of the power to borrow from the ECB or to act without a State applying for action. This is an onerous limit to the implementation of an effective strategy against spread. Therefore, in light of persistent mandatory negotiations and of the required signing of a memorandum, no new features have come out from the above-mentioned European Council meeting.

ation on the introduction of such securities.[71] While waiting for further developments of the political and doctrinal debate, it seems that the basis for a public debate around the development of a sustainable European economic system has been imposed. States are now expected to take the necessary decisions to establish a new form of government able to prevent the decline of Europe.

71. Recently, German Chancellor Angela Merkel reaffirmed that "mutualization of debt or sovereign bonds is the wrong approach." Andrea Thomas, *Germany's Merkel Stays Firm Against Euro Bonds, Debt Mutualization,* WALL ST. J. (Sept. 21, 2013, 6:37 AM), *available at* http://online.wsj.com/article/BT-CO-20130921-700682.html.

The Return of Children to Their Non-Taking Parents after Their Kidnapping by the Taking Parents: The Legal Remedies Under the 1980 Hague Convention and a Comparison of Its Implementation and Enforcement in the United States and Italy

VALERIA CAMBONI MILLER*

I. INTRODUCTION

In 2009, the story of nine year old Sean Goldman captivated America. He was at the center of an international custody battle when his mother Bruna took him to her native Brazil to visit family for two weeks and never returned to American soil. Sean's father, David, tried for years to have Sean returned to the United States after he and Bruna ended their marriage. Once the divorce was finalized, Bruna remarried. When Sean was eight years old, his mother died from complications after childbirth; his Brazilian stepfather tried to adopt him. After a long and costly custody battle, Sean was returned to his father in December 2009; he now lives with him in New Jersey.[1] Unfortunately, Sean's story is not unusual: it occurs more often than most people think, and not just in the United States.

In Europe, since the signing of the Lisbon Treaty on October 22, 2007, it has become easier to relocate from one Member State of the European Union (EU) to another under Art. 45 TFEU and 46 TFEU (freedom of movement for workers within the territory of Member States) and the right to move and reside freely within the territory of the Member States enumerated in Art. 20(2)(a) TFEU. In addition, the Schengen Agreement facilitates traveling from one member state to another by not requiring the use of a passport.[2]

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1. Scott Stump, *'I Wasn't Angry': Boy at Center of Brazilian Abduction Case Speaks Out*, TODAY (Apr. 24, 2012, 9:53 PM), http://today.msnbc.msn.com/id/47162109/ns/today-today_news/t/i-wasnt-angry-boy-center-brazilian-custody-battle-speaks-out/#.T5cUX45ishx.

2. The Schengen Agreement is a treaty signed on June 14, 1985 in Schengen in Luxembourg. The Schengen rules were integrated into European Union law by the Amsterdam Treaty in 1999. Together these treaties created Europe's borderless (passport free) Schengen Area, which operates like a single state for international travel with border controls for those travelling in and out of the area, but with no

For the reasons stated above, among others, mixed marriages have slightly increased in 2011; during 2011, Italian officials celebrated twenty-seven thousand marriages in which one spouse was a foreigner (thirteen percent of all marriages).[3] Usually, the medium duration of a marriage among Italians is fourteen years, while the medium duration of a marriage among mixed couples is nine years.[4] Similarly, in the United States, fifteen percent of all new marriages celebrated in 2010 were between couples of a difference race or ethnic group, up from seven percent in 1980.[5] The divorce rate in the United States currently is "3.6 per 1,000 population."[6]

When a marriage eventually ends, it is common for both parents to share custody of their child. Sometimes, one parent obtains custody and the other has the parenting time. The problem arises when one parent takes the child permanently out the country in which the child resides against the wishes of the other parent.

This paper focuses on the legal resources available to the non-taking parents to regain custody of their children under The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the 2003 Brussels IIa Regulation, which applies to all EU Member States, except Denmark, and it will compare its implementation and enforcement in the United States and Italy.

Part II of this paper explains what custody means in the United States (Minnesota in particular) and in Europe to lay a foundation for child kidnapping, and it reviews child kidnapping statistics to demonstrate that the problem of child abduction by a parent is not an extraordinary event. Part III discusses, in detail, The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Brussels IIa Regulation. Part IV discusses the "habitual residence" of the child component of the Convention, as it is an important part of the Convention and the reason for decisions by courts. Part V discusses the exceptions to the return of the children to their habitual residence and determine which jurisdiction (the United States or Italy) comes closer to the

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internal border controls. Under the current deal, only a serious threat to public order or internal security can be used by the signatory nations to re-impose internal border checks.

3. *Il Matrimonio in Italia: Statistiche Istat*, MIOLEGALE.IT (Nov. 22, 2012), http://www.miolegale.it/notizia/Matrimonio-statistiche-istat.html. The reason why the number of mixed marriages is not higher is due to the passage of art. 1, para. 15 of law n. 94/2009, which imposes on foreigners who want to marry in Italy the requirement to obtain a certificate to attest the legality of the residency in Italy in addition to the "nullaosta" (or certificate of capacity to marry).

4. Rosario Mastrosimone, *Crescono le Coppie Miste: tra Matrimoni di Comodo e Storie a Lieto Fine*, SOLDIBLOG (Feb. 18, 2011, 12:44 PM), http://sostenibile.blogosfere.it/2011/02/crescono-le-coppie-miste-tra-matrimoni-di-comodo-e-storie-a-lieto-fine.html.

5. *Interracial Marriage at New US High*, BBC, (last updated Feb. 16, 2012, 9:40 PM), http://www.bbc.co.uk/news/world-us-canada-17070731.

6. *Marriage and Divorce*, CENTER FOR DISEASE CONTROL AND PREVENTION, (Jan. 18, 2013) http://www.cdc.gov/nchs/fastats/divorce.htm.

"best interest of the child" standard applied in the United States to all child custody decisions, keeping in mind that courts that enforce the 1980 Hague Convention do not issue child custody determinations. Part VI focuses on the United States: the implementation statute and court enforcement of the 1980 Hague Convention. Part VII focuses on Italy: the implementation statute and court enforcement of 1980 The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part VIII compares the implementation statutes of Italy and the United States to determine which one is better and the reasons for it. Part IX discusses the Acceptance of Accession since not every country recognizes the accession to the Convention of every country; therefore, one country only collaborates with the countries it recognizes.

II. CUSTODY OF A CHILD AND CHILD KIDNAPPING STATISTICS

When a marriage fails, in most countries, legal and physical custody of the child are determined according to the best interest of the child. Part A describes what legal and physical custody are in the United States (Minnesota in particular) and in Europe, giving a starting point for the discussion that follows. Part B discusses child kidnapping by a parent and includes statistics to understand the practical operation of the 1980 Hague Convention.

A. LEGAL CUSTODY V. PHYSICAL CUSTODY IN THE UNITED STATES AND IN EUROPE

During a divorce proceeding, the court must determine which parent the child will reside with and which parent will have the right to make major decisions regarding the child's upbringing. In the United States, Minnesota in particular, legal custody means "the right to determine the child's upbringing, including education, health care and religious training."[7] A presumption exists towards joint legal custody in Minnesota, as in most other states, because it would be beneficial to the child if both parents cooperated and were involved in making major decisions regarding the child.

Physical custody means "the routine daily care and control and the residence of the child."[8] Based on the best interests of the child standards, the court decides where the child should reside and which parent is in control of the child's daily care.[9] In most cases, physical custody is joint, even if no presumption exists. Sometimes, one parent gets physical custody of the child, and the other parent gets parenting time, which unlike physical custody, only applies to time spent with the child, regardless of which parent has physical or legal custody.

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7. Murray v. Murray, 367 N.W.2d 561, 563 (Minn. Ct. App. 1985).

8. *Id.* at 563.

9. For factors the courts consider in determining the "best interest of the child," please *see* MINN. STAT. §518.17 (2010).

Similarly, under Article 5 of The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, a parent who has custody of the child has "rights of custody." The rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. The 1980 Hague Convention ceases to apply when a child reaches the age of sixteen.[10] In most situations (in the United States and in Europe), parents have joint custody of their children and both are custodial parents.

B. CHILD KIDNAPPING BY THE "TAKING" PARENT AND STATISTICS

Sometimes, when the parents have joint custody of the child, it is possible for one of them to refuse to share the custody. Other times, when the parents have temporary physical custody of their children, they decide not to return the child at the end of their parenting time. The issue arises when the parents who are not citizens of the country in which their children reside, flee with their children to return to their native countries. The non-taking parents, usually, contact the police to have their children returned, but once the taking parents leave the jurisdiction, the police have no power to pursue the case. At this point, an international case has arisen that can only be resolved through the use of the courts of the country in which the child resided and in the country where the child was taken.

Statistically speaking, it is more common for mothers than fathers to take their children: in 2008 the global average of taking persons was 69% mothers and 28% fathers (3% grandparents and/or other relatives). The figures change in regard to Mexico where 49% of taking persons are fathers and 47% are mothers. The global age of the child taken is 6.4 years old with an even split between girls and boys. Unfortunately, since 2003, the number of return applications made by non-taking persons has increased steadily.[11] These statistics are important to understand the practical operation of the 1980 Hague Convention. They include data from Belgium, Canada, France, Germany, Mexico, Poland, Spain, Turkey, United Kingdom, and United States, and statistics for each country are compared to the global average. In the United States, for example, 59% of taking persons are mothers and 38% are fathers, which vary slightly from the global average. The average age of a child involved in a return application received by the United States in 2008 was 7.2 years, which is slightly higher than the global average of 6.4 years.

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10. The Hague Convention on the Civil Aspects of International Child Abduction [hereinafter Hague Convention] art. 4, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

11. Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction PART III - National Reports*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (May 2011), *available at* http://www.hcch.net/upload/wop/abduct2011pd08c.pdf.

In regard to the Brussels IIa Regulation, the statistics show that when the return application came from a Brussels IIa State there were proportionately more returns from Belgium, Germany, United Kingdom, France and Poland and less refusals or rejections. In addition, the applications received by Spain and France in 2008 in which the Brussels IIa Regulation applied were resolved more quickly than those received from non-Brussels IIa States.[12]

III. THE 1980 HAGUE CONVENTION

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction was drafted and signed in response to the taking of children to other countries where a local law does not reach and courts have no jurisdiction. The Ministry of Foreign Affairs of the Kingdom of the Netherlands is the depositary for the 1980 Hague Convention.[13] Currently, the 1980 Hague Convention on Civil Aspects of International Child Abduction counts 87 contracting states, including all EU Member States, the United States, Brazil, Canada, China, Mexico, South Africa, Sri Lanka and Iceland among others.

The purpose of the 1980 Hague Convention is twofold: "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[14] To that end, Article 3 is straightforward in detailing when the removal or retention of a child from his/her country is wrongful:

> *a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.[15]

Therefore, if a parent has full legal and physical custody or joint custody with another parent (no matter how the right to custody was acquired) and that parent has been exercising his/her rights to custody at the time of the taking, that parent has a right to have the child returned to him/her.

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12. *Id.* at 34, 74, 113, 143, 165, 192.

13. *Who is the Depository of the Hague Conventions?*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=faq.details&fid=39&zoek=depositary.

14. Hague Convention, *supra* note 10, at art. 1.

15. *Id.* at art. 3.

When a child is removed or retained from his/her country, the non-taking parents, who want the child returned, have to contact the Central Authority (the primary contact for cases of abducted children) of the State in which the child was taken. The 1980 Hague Convention requires that each "Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention."[16] The Central Authority for Italy is the Ministero della Giustizia (Department of Justice), Dipartimento per la Giustizia Minorile (Department of Justice for Minors) located in Roma. The Central Authority for the Unites States is the U.S. Department of State, Office of Children's Issues located in Washington, D.C.[17]

Under Article 8, to have a child returned, the non-taking parent has to file a return application "either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State." The application has to include the following data:

> a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
> b) where available, the date of birth of the child;
> c) the grounds on which the applicant's claim for return of the child is based;
> d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
>
> The application may be accompanied or supplemented by -
> e) an authenticated copy of any relevant decision or agreement;
> f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
> g) any other relevant document.[18]

Once the application has been filed, "The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."[19] If the child is not voluntarily returned, the authority concerned shall order the return of the child if a period of less than one year has elapsed from the date of the wrongful removal or retention.[20] However, the child may remain in the State where he/she was taken if "the judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."[21]

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16. *Id.* at art. 6.
17. *United States of America – Central Authority*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?actauthorities.details&aid=133.
18. Hague Convention, *supra* note 10, at art. 8.
19. *Id.* at art. 10.
20. *Id.* at art. 12.
21. *Id.*

Article 13 of the 1980 Hague Convention may aid the taking parents in keeping their children where they took them:

> The judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.[22]

The child may prefer to stay with the taking parent, especially when the non-taking parent poses a risk of harm to the child. The courts have a duty, in light of the evidence, to keep a child safe and away from a harmful situation. To ensure the safety of the child, the courts of a Contracting State may look into a custody order from the State in which the child resided prior to his/her removal since that court is in a better position to determine questions of custody. In fact, the 1980 Hague Convention requires it.[23]

BRUSSELS IIA REGULATION

The Council of Ministers passed Council Regulation (EC) No. 2201/2003,[24] commonly known as Brussels IIa Regulation, in 2003. The Regulation seeks the recognition and enforcement of judgments among Member States, especially with regard to matrimonial and parental responsibility matters. It also complements the 1980 Hague Convention. If a parent has a judgment in a Member State which requires the return of a child, this Regulation allows the return of said child to "take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained."

Article 11 of Brussels IIa Regulation explains the duties of national courts in matters regarding the return of a child under the 1980 Hague Convention. In

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22. *Id.* at art. 13.

23. *See Id.* at art. 15, which states: "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention . . . ."

24. Council Regulation 2201/2003, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML.

particular, it provides for the opportunity to the child to be heard (if the child is mature enough) and to the person who requested the return of the child to be heard.

Article 11 (6) also adds a timeline:

> If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.[25]

In regard to jurisdiction, the Brussels IIa Regulation adds to the 1980 Hague Convention by explicitly giving jurisdiction to the "the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."[26]

IV. THE "HABITUAL RESIDENCE" OF THE CHILD

Under Article 3 (a) of the 1980 Hague Convention, as seen above, removal of a child is wrongful if a child is taken from a State "in which the child was habitually resident."[27] In addition, Article 8 requires that an application for the return of a child be made to the Central Authority of the "State of the child's habitual residence."[28]

Despite mentioning "child's habitual residence" several times within its text, the 1980 Convention does not explain what the phrase means. In her Explanatory Report, Ms. Elisa Perez-Vera in defining the Convention's subject matter stated,

> we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed.[29]

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25. *Id.* at art. 11.

26. *Id.* at art. 10.

27. Hague Convention, *supra* note 10, art. 3.

28. *Id.* at art. 8.

29. Eliza Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 1982, at para. 11, *available at* http://www.hcch.net/index_en.php?actpublications.details&pid=2779.

Ms. Perez-Vera's Explanatory Report had two aims: to show the main aspects of the 1980 Convention and to provide a detailed commentary on the Convention's provisions.[30] However, since her Report did not really define "habitual residence," most jurisdictions had to coin their own definitions in determining 1980 Convention cases.

In Italy, the juvenile court of Rome held in two separate decisions that a child's "habitual residence" is not the one contained in the registry office, but the one that coincides with the center of the child's life.[31] The European Court of Justice's definition of "habitual residence" as it applies to the 1980 Hague Convention and the Brussels IIa regulation was more detailed.[32] The Court of Justice, in response to a preliminary reference by the Court of Appeal of England and Wales, Civil Division, noted that "the concept of habitual residence within the meaning of Regulation N. 2201/2003 is thus a European Union concept, which must be given an autonomous and uniform interpretation throughout the European Union." The Court noted:

> In addition to the physical presence of the child in a Member State, other factors must be considered which are capable of showing that the presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in social and family environment.[33]

Although this definition may be helpful in determining whether the country from which a child is taken is the child's "habitual residence" confirming that the laws regarding the rights of custody of that specific country pertain, it fails to apply on a broader scale.

Outside the European Union, the term "child's habitual residence" must find a definition that allows courts to properly enforce the 1980 Convention. Although no United States cases provide guidance on the construction of "habitual residence,"[34] three standards for determining "habitual residence" are currently used in the U.S.:[35]

A. PARENTAL INTENT

Some U.S. courts have analyzed habitual residence with particular focus on the parents' shared intent. An influential case in this line was *Mozes v. Mozes*,[36] in which the center of the court's analysis was shared intent to leave a

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30. *Id.* at paras. 5-6.

31. T. Min. 7.1.1999 (It.) and T. Min. 11.9.2002 (It.). In both of these cases the child was returned.

32. Case C-497/10, Barbara Mercredi v. Richard Chaffe, 2010 E.C.R. I-2805.

33. *Id.*

34. Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).

35. *Three standards for U.S. habitual residence under the Hague Abduction Convention*, CROSS-BORDERS: AN INTERNATIONAL FAMILY LAW BLOG (May 9, 2013, 4:36 AM), http://blog.internationalfamilysolutions.com/international_family_law/hague-abduction-convention—habitual-residence/.

36. Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).

habitual resident. The parents were Israeli citizens, married in 1982 and had four children. Until 1997, the parents and children lived in Israel. In April 1997, with the father's consent, the mother and the children moved to Los Angeles. The father consented to have the mother and the children remain in the United States for fifteen months. The mother moved with the children to Beverly Hills, where she leased a home, purchased automobiles and enrolled the children in school. A year after they arrived in the United States, the mother filed an action in the Los Angeles County Superior Court seeking dissolution of the marriage and custody of the children. The court granted temporary custody to the mother, and entered a temporary restraining order enjoining the father from removing the children from southern California. Less than a month later, the father filed a petition in federal district court, seeking to have the children returned to Israel under the Hague Convention. The court denied the father's petition based on the findings that the children's habitual residence was in the United States, not Israel. The Court of Appeals remanded the case stating that the determination of whether there has been a change of habitual residence is a question of intent of the child's parents, which requires an actual "change in geography," the passage of "[a]n appreciable period of time" and results in "acclimatization."[37] The Court of Appeals noted that the parties did not agree for the children to live in the United States indefinitely, in fact the mother and the children held only temporary visas. It also stated that the trial court believed that its decision should be governed by a number of cases in which temporary stays abroad resulted in a change of habitual residence and failed to determine "whether the United States had supplanted Israel as the locus of the children's family and social development."[38]

B. CHILD-CENTERED ANALYSIS

The Sixth Circuit follows the child-centered analysis. In *Friedrich v. Friedrich*,[39] a mother took her young son from Germany where they had lived since the child's birth. The mother, a citizen of the United States, was a member of the United States Army stationed in Bad Aibling, Germany. The child's father, who was employed on the military base as a bartender and club manager, was German. The mother and son went to Ohio, and the father filed a claim in Germany seeking to obtain parental custody. A Municipal Court-Family Court in Rosenheim, Germany granted the father parental custody of his son. Soon afterwards, the father filed a return petition in the United States under the 1980 Convention, which the district court rejected. The Court of Appeals looked into the facts in the child's past, focusing on time and geography to determine habitual residence. The Sixth Circuit stated that habitual residence must not be con-

37. *Id.* at 1078.
38. *Id.* at 1084.
39. *Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

fused with domicile and that to determine the habitual residence the court must focus on the child, not the parents, and examine experience, not intentions.[40] The Court found that the child was born in Germany and lived in Germany except for a few, short vacations in the United States; it also found that "the removal precipitated the change in geography."[41] The Court held that the child was born in Germany and resided exclusively in Germany until his mother removed him to the United States; therefore, the child was a habitual resident of Germany at the time of his removal.[42]

C. CHILD-CENTERED AND PARENTAL INTENT

Courts in the Third and Eighth Circuits have attempted to balance the above two conflicting analyses. In the 1995 case *Feder v. Evans-Feder*,[43] an American couple moved to Australia with their son. Six months later, the mother returned to Pennsylvania with the child for a vacation. Shortly thereafter, she filed for divorce and custody. The father commenced a proceeding in the Family Court of Australia in Sydney, applying for the return of his child under the Hague Convention. After hearing the case, the Judicial Registrar of the Family Court of Australia issued an opinion declaring that the child and the parents were habitual residents of Australia immediately prior to the mother's retention of the child in the United States; that the father had joint rights of custody of child under Australian law and was exercising those rights at the time of the child's retention; and that the mother's retention of the child was wrongful within the meaning of the Convention. Shortly after, the father initiated an action against the mother pursuant to the Convention in the United States District Court for the Eastern District of Pennsylvania, alleging that his parental custody rights had been violated. The District Court denied the father's petition based on the father's failure to prove that the child's habitual residence in the United States changed to Australia. The Court of Appeals disagreed, holding that the child's habitual residence was Australia. The Court found that the child moved there with his parents, was enrolled in school and participated in several activities. The family moved to Australia with the intention of making Australia their permanent home: they sold their house in the United States and purchased one in Australia and both parents obtained employment in Australia. The court defined habitual residence as:

> the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective . . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis

40. *Id.* at 1401.
41. *Id.* at 1402.
42. *Id.*
43. Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995).

> of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.[44]

The Court of Appeals criticized the trial court's decision on the case stating that the court focused on the fact that the majority of the child's years had been spent in the United States, ignoring the approximately six months that the child lived in Australia immediately preceding his return to the United States and the circumstances of his life in Australia.[45]

The conflict over the definition of "habitual residence" is not yet resolved. The Ninth Circuit Court of Appeals in *Mozes* stated that "'[h]abitual residence' is the central-often outcome-determinative-concept on which the entire system is founded,"[46] and without consistency in its application the children that the Convention is designed to protect may be harmed. The court criticized the *Friedrich*'s court for failing to apply the 1980 Convention "wrongful removal" definition while using an ad hoc determination. It stated that "[s]ince the strict definition of 'wrongful removal' is based on the concept of 'habitual residence,' an ad hoc determination of the latter amounts to an ad hoc determination of the former."[47]

V. THE EXCEPTIONS TO THE RETURN OF CHILDREN – HOW THEY COMPARE TO THE "BEST INTEREST OF THE CHILD" STANDARD

Art. 12, 13, and 20 of the 1980 Convention allow several exceptions to the return of children to the non-taking parents in the children's habitual residence. A possible defense is the time limitation (one year) on when a parent should file his/her return application: the authority concerned shall order the return of the child forthwith if "a period of less than one year has elapsed from the date of the wrongful removal or retention."[48] The sooner a non-taking parent files a return application, the more likely it is that the courts will order the return of the child. A timely application also demonstrates that the non-taking parent objects to the child being taken from the child's habitual residence.

Another exception is the "well settled" defense. Article 12 of the Hague Convention requires the return of children who have been wrongfully taken or retained from their habitual residence without the consent of the non-taking parent, even if a return application is filed after the expiration of the one year time period, "unless it is demonstrated that the child is now settled in its new environment."[49] A court's determination of whether the child is settled in its

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44. *Id.* at 224.
45. *Id.*
46. *Mozes*, 239 F.3d at 1072.
47. *Id.* at 1073, n.10.
48. Hague Convention, *supra* note 10, at art. 12.
49. *Id.*

new environment depends upon the particular facts of the case. The respondent must establish this defense by a preponderance of the evidence."[50]

A third defense available to the taking parent is the nonexercise of custody rights and/or acquiescence or consent to the removal of the child to another country by the non-taking parent.[51] This defense must be established by a preponderance of the evidence.[52] Whether the non-taking parent acquiesced to the removal of the child is a question of fact. Thus, if one parent consents to the other parent taking the child on a temporary visit to that parent's home country, and that parent decides not to return, the non-taking parent will claim she or he did not consent to the permanent change of residence. Evidence of return airline tickets, school registrations, employment, etc., will help the court determine the true intentions of the parents. The Sixth Circuit Court of Appeals addressed the issue of acquiesce in *Friedrich*: "we believe that acquiescence under the Convention requires either: an act of statement with the requisite formality, such as testimony in a judicial proceeding, a convincing written renunciation of rights, or a consistent attitude of acquiescence over a significant period of time."[53] If the non-taking parent was exercising his/her custody rights prior to the wrongful removal, it would be helpful for the court to have facts supporting the allegation. If the parent was exercising custody pursuant to a court order, the petition should cite the applicable provisions of the order and copies of relevant documents may be appended to the return petition and are admissible.[54]

A fourth exception to the return of children is the "grave risk of harm" defense.[55] A court may refuse to order the return of a child where the taking parent proves, by clear and convincing evidence, that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[56] A well-reasoned analysis of what constitutes grave risk is articulated in *Friedrich*. The court noted:

> we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute- *e.g.,* returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habit-

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50. 42 U.S.C. § 11603(e)(2)(B).
51. Hague Convention, *supra* note 10, at art. 13(a).
52. *Mozes*, 239 F.3d at 1072.
53. Friedrich v. Friedrich, 78 F.3d 1060, 1070 (6th Cir. 1996).
54. Patricia M. Hoff, *Hague Child Abduction Convention Issue Briefs (1997)*, *available at* http://207.58.181.246/pdf_files/library/Hoff_HagueBrief1.pdf.
55. Hague Convention, *supra* note 10, at art. 13(b).
56. 42 U.S.C. 11603(e)(2)(A) (1988).

> ual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.[57]

The court concluded that evidence that a child will suffer adjustment problems if returned to the country of habitual residence is not enough to establish a grave risk of psychological harm that would defeat the Convention's return remedy.

A fifth defense is the argument that the return of a child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[58] This defense is meant to address "the rare circumstance in which returning a child to her habitual residence would offend all notions of due process or completely shock the conscience, such as a return to Syria under the current conflict."[59] This defense is rarely used.

The last defense allows a child to object to his/her own return to the country of habitual residence, if the child "has attained an age and degree of maturity at which it is appropriate to take account of its views."[60] In some countries such as Italy and the United States, children are given a chance to tell the court with which parent they would prefer to reside and the reasons for their decision. Although courts do not have an obligation to make a decision based on the children's wishes, such wishes may aid the court in determining whether is would be best to return the child or reject the return application. This defense is very similar to one of the factors considered by courts in custody determinations, in the United States, based on the best interest of the child standard: "the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference."[61] Under Minnesota law, the best interest of the child standard requires state courts to consider several factors in awarding custody to one parent: the wishes of the child's parent or parents as to custody; the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; the child's primary caretaker; the intimacy of the relationship between each parent and the child; the interaction and interrelationship of the child with the parents; the child's adjustment to home, school, and community; the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; the permanence, as a family unit, of the existing or proposed custodial home; the mental and physical health of all individuals involved; the capacity and disposition of the parties

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57. *Friedrich*, 78 F.3d at 1069.

58. Hague Convention, *supra* note 10, at art. 20.

59. Allison Maxim, *International Parental Child Abduction: Essential Principles of the Hague Convention*, MINNESOTA BENCH & BAR (Apr. 10, 2012), http://mnbenchbar.com/2012/04/international-parental-child-abduction-essential-principles-of-the-hague-convention/.

60. Hague Convention, *supra* note 10, at art. 13.

61. Minn. Stat. § 518.17, subd. 1(a)(2) (2010).

to give the child love, affection, and guidance; the child's cultural background; the effect on the child of the actions of an abuser, if related to domestic abuse; and the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.[62] Courts may not use one factor to the exclusion of all others.

Another best interest of the child factor, the child's adjustment to home, school, and community, finds a parallel in the 1980 Hague Convention, in the "settled in its new environment" defense allowed by Article 12; however, no time limitation exists in Minnesota law. In both situations, courts keep into consideration whether the child has adjusted well and is settled into an environment (home, school and community) to determine whether the child should reside in one place or another. The difference, however, lies in scope of The Hague Convention and the Minnesota law. Under the Hague Convention, courts are only allowed to determine whether a child should be returned to the child's habitual residence based on the return application and the defenses allowed to the non-taking parent. The courts in the child's habitual residence are competent to issue custody determinations and have a duty to issue custody determinations based on the best interest of the child standard.

Besides the ones mentioned, the "grave risk of harm" defense is commonly used to try to persuade the court that return would not be in the child's best interests. The taking parent may offer expert testimony and other evidence. Judges should be reminded that a Hague Convention case is not a substantive custody case, and a determination of the child's best interests is outside the scope of the Convention.[63] However, Article 16 of the 1980 Convention mandates that the judicial or administrative authorities concerned "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention."[64] In Hague Convention cases, courts do not have the power to determine return of children to the non-taking parents based on the "best-interest of the child" standard commonly used by United States courts.

VI. THE UNITED STATES – IMPLEMENTATION STATUTE AND COURT ENFORCEMENT OF THE 1980 HAGUE CONVENTION

The United States ratified the 1980 Hague Convention in 1988 - with reservations on articles 24, 26, and 42 - to secure the return of children taken into and from foreign countries.

Article 24 of the 1980 Hague Convention states:

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62. *Id.* at subd. 1(a).

63. *See Mozes*, 239 F.3d at 1073, n.10.

64. Hague Convention, *supra* note 10, at art. 16.

> Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English. However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.[65]

Article 26 of the 1980 Hague Convention states:

> Each Central Authority shall bear its own costs in applying this Convention. Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
>
> However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
>
> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.[66]

Article 42 of the 1980 Hague Convention states:

> Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted. Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.[67]

The United States expressed the following reservations for Articles: 24, 26 and 42:

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65. *Id.* at art. 24.
66. *Id.* at art. 26.
67. *Id.* at art. 42.

> (1) Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation. All applications, communications and other documents sent to the U.S. Central Authority should be accompanied by their translation into English.
> (2) Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program."[68]

ICARA

The legislation implementing the 1980 Hague Convention in the United States is the International Child Abduction Remedies Act (ICARA), enacted by Congress in 1988 and codified in 42 U.S.C. §§ 11601-11610.[69]

42 U.S.C. § 11603(a) details jurisdiction: "The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention." Therefore, the state court in which a return petition is filed is obligated to decide the case in accordance with the 1980 Hague Convention.

42 U.S.C. § 11603(g) adds to the 1980 Hague Convention a requirement that full faith and credit be "accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter."

The U.S. Courts decide several cases each year under the 1980 Hague Convention and ICARA. The cases in which courts reject a return application by a non-taking parent are all based on the exceptions listed above under Articles 12, 13 and 20 of the Hague Convention. The factual pattern in the 2003 *Antunez-Fernandes v. Connors-Fernandes*[70] case is somewhat typical. Mr. and Mrs. Fernandes met while she was teaching English in France. Both parties were legal citizens of countries other than France and were allowed to work in France under a French work visa. The couple had two children, who were 7 years old and 4 years old when the action was filed.

In August 2000, the family vacationed in Dubuque, Iowa, visiting Mrs. Fernandes' family. Within one month of their return to France, Mrs. Fernandes indicated that she wanted the family to move to the United States. Shortly there-

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68. United States Ratification of The Hague Convention on the Civil Aspects of International Child Abduction, Reservations pursuant to art. 37, ¶ 2, 29 Apr. 1988.

69. *The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence*, WASHINGTON COURTS (Sept. 2005), https://www.courts.wa.gov/committee/pdf/dvAndTheHagueConvention.pdf.

70. Antunez-Fernandes v. Connors-Fernandes, 259 F.Supp.2d 800 (N.D. Iowa 2003).

after, Mrs. Fernandes stated that she wanted a divorce. She filed for divorce in France, and in November 2000, and she left France with the children to go to Dubuque, Iowa.

As soon as Mr. Fernandes learned about the Hague Convention, he contacted the French Ministry of Justice, the Central Agency in France (the "Ministry"), which accepts Hague Convention applications. The French Ministry sent Mr. Fernandes' Hague Convention application to the United States Central Agency, the National Center for Missing and Exploited Children (the "National Center"), on March 25, 2002.

The United Stated District Court N.D. Iowa, Eastern Division had original jurisdiction over this action arising under the Hague Convention. The Court granted Mr. Antunez–Fernandes' Petition for the Return of Children to France and ordered that the children be returned at Mrs. Connors-Fernandes' expense. In its reasoning, the Court first had to determine whether Mr. Antunez-Fernandes, under French law, had "rights of custody" to the children. After considering Articles 371 and 372 of the French Civil Code (the "FCC"), which mandate that a child under the age of eighteen is subject to joint parental authority, the Court held that Mr. Fernandes had such "rights of custody." The Court then focused on art. 12 of the 1980 Hague Convention, declaring that the children were well-settled in the United States. However, the Court noted, "Establishment of the "well settled" exception does not make refusal of a return order mandatory."[71] Mrs. Connors-Fernandes tried to cut ties with her husband to prevent him from seeing the children, and the Court exercised its discretion in deviating from the exception. In addition, the Court examined evidence of potential harm to the children if they were returned to France under art. 13 (b) of the 1980 Hague Convention and found that the record did not "demonstrate by clear and convincing evidence that the children would be exposed to a grave risk of harm."[72]

A very recent case in the state of New York was decided in a similar manner.[73] The parties were never married. The Father was an Italian citizen, and the Mother was a citizen of the United States. The couple had two children and resided in Roma, Italy. In 2010, the parties' relationship deteriorated, and the Father moved out of their home in Roma and into a nearby apartment. After the parties separated, they shared time equally with the children. In winter 2011, the parties became involved in custody litigation in Italy. In November 2011, the Mother took the children to New York and filed custody petitions in Suffolk County Family Court, in which she alleged that her and the children's address was in Commack, New York. The Father filed a missing persons report with the Italian police. The Father also filed a petition in the Roma Family Court in

71. *Id.* at 815.
72. *Id.* at 816.
73. R.S. v D.O., No. 50479, slip op. (N.Y. Mar. 14, 2012).

which he sought an order directing the return of the children to his care and custody in Italy. On December 22, 2011, the Father filed his Petition for the Return of Children in the New York Supreme Court. The New York Court noted that an affirmation submitted by the Father's Italian counsel states that under Italian law, both parents jointly exercise parental authority by operation of law, absent an agreement or order to the contrary. The Court ordered the return of both children to Italy, their country of residence. The court based its decision on the fact that the Mother took the children without the consent of their Father into the United Stated. She also failed to prove by clear and convincing evidence that returning the children to Italy would pose a grave risk to them of physical harm. The Court also ordered the Father to report the delivery of the children to the appropriate Central Authority.

The above cases demonstrate the willingness of U.S. Courts to enforce the 1980 Hague Convention and return children to the non-taking parents, when appropriate. In regard to the willingness of other countries to cooperate with U.S. Courts in enforcing the 1980 Hague Convention, the U.S. Department of State, Office of Children's Issues (the U.S. Central Authority under 1980 Hague Convention) issued a "Report on Compliance with The Hague Convention" in April 2013."[74] The Report states the names of non-compliant countries, and lists the names of those with a pattern of non-compliance. According to the report, Costa Rica and Guatemala are non-compliant. The Bahamas, Brazil, and Panama have shown a pattern of non-compliance. In particular, Brazil demonstrated a pattern of non-compliance in the area of judicial performance, due mostly to delays and basing decisions in Hague cases on criteria not contemplated by the Convention.[75] This pattern of non-compliance likely experienced in Brazil by David Goldman' lawyer (Patricia Apy) that captivated the interest of many Americans, including New Jersey's Representative Chris Smith, Secretary of State Clinton and President Obama, ignited an American media frenzy. In an interview on "Today," Meredith Vieira asked Rep. Smith his opinion on the reason why the 1980 Hague Convention failed in this case. In response, Rep. Smith stated "The Convention itself is not a failure, it is the implementation on the part of governments. There is no effective mechanism for enforcement."[76]

The Report also lists countries with enforcement concerns, namely the failure to enforce Hague return orders. The list includes Argentina, Australia, France,

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74. Report to Congress on Compliance with The Hague Convention on the Civil Aspects of International Child Abduction, U.S. DEPARTMENT OF STATE (Apr. 2013), travel.state.gov/pdf/2013-1980 ReportonComplianceAbduction.pdf. The report covers the period from Jan. 1, 2012 through Dec. 31, 2012. The report is issued annually.

75. *Id.* at 3.

76. Interview by Meredith Vieira with Sean Goldman (Apr. 24, 2012), http://today.msnbc.msn.com/id/47162109/ns/today-today_news/t/i-wasnt-angry-boy-center-brazilian-custody-battle-speaks-out/#.T5cUX45ishx.

Mexico, Netherlands and Romania.[77] Many countries are listed as non-compliant, have demonstrated a pattern of non-compliance or have enforcement concerns; in addition, statistics show that the number of return applications has been steadily increasing since 2003. Unfortunately, due to these factors, it is possible that other cases of parental child abduction will capture the attention of the general population and the media in the near future.

VII. ITALY – IMPLEMENTATION STATUTE AND COURT ENFORCEMENT OF THE 1980 HAGUE CONVENTION

Italy ratified the 1980 Hague Convention in 1988. The legislation implementing the Convention is Law 64/1994 published in the Gazzetta Ufficiale n. 23 of January 29, 1994.[78] The Gazzetta Ufficiale contains several laws passed by the Italian legislature in addition to court opinions. Juvenile courts have original jurisdiction over 1980 Hague Convention cases; however, their decisions are not published in the Gazzetta Ufficiale.

In general, Italian courts have become more competent and efficient in deciding 1980 Hague Convention cases, and many decisions by Italian juvenile courts demonstrate a strict adherence to juridical norms.[79]

Similarly to American courts, Italian courts have based their decisions on Articles 12, 13, and 20 of the Hague Convention in determining whether to grant a taking parent the permission to keep the child. Courts have kept into consideration whether the non-taking parent "was not actually exercising the custody rights at the time of removal or retention" under Article 13(a) and the reasons for not doing so. Courts have also considered whether "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Article 13(b)).[80]

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77. *See* Report to Congress on Compliance with The Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 74.

78. Convenzione Europea, Legge di Ratifica N. 64/1994, *available at* http://www.sos-affido.it/index.php?it/29/convenzione-europea-legge-di-ratifica-n-641994.

79. VITTORIO PARAGGION & FEDERICO CICCARELLA, LA SOTTRAZIONE INTERNAZIONALE DI MINORI: CASISTICA E GIURISPRUDENZA (2005).

80. *E.g.*, T. Min. 93/2002 (It.) (Juvenile court in Palermo ordered the return of the minor to his American father after his mother took him to Italy and was unable to demonstrate that the return of the child would place him at risk); T. Min. 2505/96 (It.) (Juvenile court in Roma ordered the minors returned to the U.S.A. because no danger of physical or psychological harm existed and the return did not place the child in an intolerable situation); T. Min. 104/1997 (It.) (Juvenile court in Potenza ordered the immediate return of two minors to the U.S.A. due to joint custody agreement in North Dakota and absent a risk of harm to the children); T. Min. 63/97 (It.) (Juvenile court in Palermo denied the return of the child to her father in the U.S.A. because after the separation he had no contact with the child as required by art. 13(a)); T. Min. in Re M.M.E., a minor (1999) (It.) (Juvenile court in Messina ordered the immediate return of the child to his father in the U.S.A. because although he was not actually exercising the custody rights at the time of removal under art 13(a), the reason for not doing so was because the child was removed).

In a case decided in Naples on March 26, 1996, the juvenile court denied a mother's petition to return the three year old child to France based on Article 13 of the Hague Convention. The child's father (R.) and paternal grandmother testified in court that the child's mother (J.) gave her permission to R. to take the child with him to live in Italy after their relationship deteriorated. R. produced a written statement to that effect made by J. to a court in France. Thus, the court reasoned that the father did not wrongfully remove the child to Italy. In addition, the court noted:

> the repatriation of the child to France, causing a complete and definite separation of the child from his paternal grandmother who raised him since his birth, besides his father and relatives whom he loves, and to re-convey custody to the mother who is unstable and not fit to care for him adequately, would place the child at a grave risk of psychological trauma, with subsequent prejudice to the child's psycho-physical equilibrium.[81]

Similarly, in a 1999 decision, the juvenile court of Ancona rejected a father's application to return his two children to Australia based on Article 13 of the Hague Convention. In this case, the mother S. took the children to Italy from Australia, which generally grants both parents custody of the children. The children, A. who was six years old, and H. who was nine years old, were interviewed by the judge and two psychologists who opined that the children, if returned, would be exposed to grave risk of psychological harm given the absence of friendships for the children, uneasiness in the father-children relationship and the lack or limited availability of paternal relatives.[82]

As in *Antunez-Fernandes v. Connors-Fernandes* decided in the United States, the juvenile court of Palermo examined evidence of potential harm to the child if he were returned to Germany under Article 13 (b) of the 1980 Hague Convention. The court found that the record did not demonstrate that the child would be exposed to a grave risk of harm and ordered the return of the child to Germany to preserve the father's visitation rights. The mother, I., took the nine year old boy to Italy after her separation from the child's father, P., who had visitation rights with the child for four hours every fifteen days. The city attorney for the city of Palermo requested the re-instatement of the father's visitation rights to the juvenile court, which required the return of the child to Germany.[83]

In Italy and in the United States, as evidenced by all the above-mentioned cases, courts are very zealous in applying the Hague Convention and protect the children from grave risk of harm. The Hague Convention's exceptions to the prompt return to the children's habitual residence are always taken into account; however, these exceptions must be interpreted very narrowly because by al-

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81. T. Min. 26.3.96 (It.).
82. T. Min. 519/99 RIC. C.C. (It.).
83. T. Min. 2.5.2002 (It.).

lowing an exception to the restoration of the status quo prior to the removal would upset the fundamental rule of the 1980 Hague Convention to promptly return children to the non-taking parent.[84]

VIII. COMPARISON OF IMPLEMENTATION STATUTES

Each signatory country adopting the 1980 Convention passed an implementation statute. The legislation implementing the 1980 Hague Convention in the United States is the International Child Abduction Remedies Act (ICARA), enacted by Congress in 1988 and codified in 42 U.S.C. §§ 11601-11610.[85] Italy ratified the 1980 Hague Convention in 1988. The legislation implementing the Convention is Law 64/1994 published in the Gazzetta Ufficiale n. 23 of January 29, 1994.[86]

The American and Italian legislations are significantly different. The American legislation is slightly longer containing twelve sections or articles compared to the nine contained in the Italian legislation. In addition, the American legislation is somewhat more detailed: first, the American legislation contains a "Findings and Declarations" section (Sec. 2), which the Italian legislation does not contain. Second, the American legislation contains a "Definitions" section (Sec. 3), while the Italian legislation does not. Third, the American legislation contains a section on "Collection, Maintenance and Dissemination of Information" (Sect. 9) that allows the American Central Authority to collect and use information from foreign countries to locate a child for the purpose of implementing the Convention. The Italian legislation is silent on this issue. Lastly, the American legislation contains two more sections that the Italian legislation lacks: one called the "Interagency Coordinating Group" (Sec. 10) and one called "Agreement for Use of Parent Locator Service in Determining Whereabouts of Child and Parent." (Sect. 11). The Interagency Coordinating Group is composed of Federal employees and private citizens chosen by the Secretary of State, the Secretary of Health and Human Services, and the Attorney General to "monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority."[87] Section 11 amends Section 4.63 of the Social Security Act (42-U.S.C. 663) to allow the use of the Parent Locator Service by the American Central Authority, when necessary, to locate any parent or child on behalf of an applicant under the Hague Convention.

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84. *E.g.*, T. Min. 2000 (It.) (child was ordered to be returned to Switzerland to the mother); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009). (The district court erred in extending comity to the Greek court's denial of Petroutsas' petition since the Greek court failed to comply with the Hague Convention. The case was remanded).

85. *The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence*, *supra* note 69.

86. *See* Convenzione Europea, *supra* note 78.

87. 42 U.S.C.A. § 11609 (1988).

Both legislations contain similar sections explaining the jurisdiction and authority of the courts deciding Hague Convention cases, including a "Full Faith and Credit" clause. However, the bulk of the Italian legislation enumerates, in detail, the powers of the courts and which courts can hear an appeal. Any of the parties involved can initiate an appeal, including the Italian Central Authority. One final common element between the two legislations is a similar section for the appropriation, for each fiscal year, of the funds necessary to carry out the purposes of the Convention.

The Italian legislation does a good job at explaining what the powers of the courts are under the Hague Convention, and clarifying that the Central Authority can engage, when necessary, the assistance of public prosecutors, services for minors, other services in the public administration, and state police.[88] The American legislation does a good job at listing definitions for commonly used terms contained in ICARA and explaining the burden of proof needed to establish a defense under the exceptions listed in Articles 12, 13 and 20 of the Hague Convention. Overall, the American legislation is slightly more detailed and easier to follow.

IX. ACCEPTANCE OF ACCESSION

As seen above, Italy and the United States have recognized each other under the 1980 Hague Convention and are consistently working together to return children to their "habitual residence," when appropriate.

However, the 1980 Hague Convention is not a "multilateral" agreement in the true sense of the word. Each Contracting State member of the Hague Conference on Private International Law (HCCH) recognizes most contracting States whether members or non-members; however, they can decide whether to recognize other acceding states.[89]

Currently, the United States has not accepted the accession to the 1980 Hague Convention of the following countries: Georgia, Turkmenistan, Belarus, Republic of Moldova, Fiji, Uzbekistan, Trinidad and Tobago, Nicaragua, Thailand, Albania, Armenia, Seychelles, Gabon, Andorra, Russian Federation, Guinea, Lesotho, and Republic of Korea.

Italy has not accepted the accession of these countries: Gabon, Russian Federation, Guinea, Lesotho and Republic of Korea. Italy's acceptance of the accession of Albania and Seychelles will go into effect on June 1, 2013; Italy's acceptance of the accession of Morocco will go effect on July 1, 2013.[90]

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88. *See* Convenzione Europea, *supra* note 78, at art. 3.

89. *Acceptance of Accession*, HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW, (Updated May 8, 2013) http://www.hcch.net/index_en.php?act=publications.details&pid=3282&dtid=36.

90. *Id.*

Since Italy and the United States have not recognized the above-listed countries, theirs courts do not take into account the prior decisions made by courts in those countries; therefore a custody order in Gabon or Guinea, for example, can be meaningless in Italy and in the United States and vice versa.

X. CONCLUSION

Unfortunately, the story of nine-year-old Sean Goldman that captivated America in 2009 is not an isolated incident. According to statistics, each year, the number of return applications made by non-taking parents worldwide increases steadily.

Since the signing of the Lisbon Treaty on October 22, 2007, it has become easier to relocate from one Member State of the European Union (EU) to another under Art. 45 TFEU and 46 TFEU (freedom of movement for workers within the territory of Member States) and the right to move and reside freely within the territory of the Member States enumerated in Art. 20(2)(a) TFEU. In addition, the Schengen Agreement facilitates traveling from one member state to another by not requiring the use of a passport.[91] The United States has also seen an increase in marriages among people of different ethnic backgrounds.

To reach countries in which local courts and law enforcement have no jurisdiction, some countries have signed The 1980 Hague Convention on Child Abduction with the purpose of securing the prompt return of children who have been wrongfully taken from their country of habitual residence. To reach the judicial system, the non-taking parents who want to file a return application, must address their request to the Central Authority of the Country in which the child resided before removal and/or the Country in which the child was taken. Courts generally allow the parents to settle the issue without the courts' involvement; when the parents cannot settle the dispute, courts must interpret and apply the 1980 Hague Convention if the country in which the children resided before removal and the country in which the children have been taken are contracting States to the 1980 Hague Convention or whether that country's accession has been recognized. Italy and the United States are contracting Member States to the 1980 Hague Convention. Interestingly, as noted above, their courts have enforced the Hague Convention similarly, keeping in mind the Convention's exceptions to the return of children and interpreting such exceptions narrowly to avoid upsetting the Convention's fundamental rule to promptly return children to the non-taking parents. Additionally, both countries recognize each other; therefore, American and Italian courts have the necessary jurisdiction to decide these types of cases when a child is taken to or from either Country.

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91. For information on the Schengen Agreement, see *supra* note 2.

Vance v. Ball State University: The Court Misses the Forest for the Trees with its Definition of Supervisors Under Title VII

Nicholas Jacobson

Introduction

In the United States, the 1960s were defined by progressive movements which called for gender and racial equality. This period was marked by integration, the repeal of the Jim Crow laws, and other important social changes. Recently however, workplace protections for women and minorities which were enacted during this period under Title VII of the Civil Rights Act of 1964 ("Title VII") were weakened by the United States Supreme Court's ruling in *Vance v. Ball State University*.[1] In this case, the Supreme Court held that for employees to be considered supervisors under Title VII, they must have the authority to take tangible employment actions against other employees, such as hiring, firing, or demoting. This decision resolved a split between the Circuit Courts, and established that control over other employees' work activities is not sufficient to make an employee a supervisor for the purposes of Title VII. Employees who are harassed by coworkers, including those who direct their daily tasks, will now be unable to hold their employer strictly liable for such conduct unless the harasser had the authority to take tangible employment actions against the victim. This holding is contrary to the purposes of Title VII, and fails to recognize that control over the daily work activities of subordinates is the defining characteristic of supervisors in the workplace.

History of Title VII and the Hostile Work Environment Claim

The passage of the Civil Rights Act of 1964 offered women and minorities newfound legal protection in the workplace. Title VII of that Act provides:

> It shall be an unlawful employment practice for an employer –
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.[2]

1. 133 S. Ct. 2434 (2013).
2. 42 U.S.C. § 2000e-2(a) (1991).

Two decades later, the United States Supreme Court held that Title VII afforded "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[3] This decision extended Title VII's reach beyond acts of tangible or economic discrimination.[4] In *Harris v. Forklift Systems, Inc.*, the Court established the elements for a hostile work environment claim, holding employers liable when victims prove that: (1) "severe and pervasive" discrimination altered their employment conditions; (2) a reasonable person would find the work environment hostile or abusive; and (3) that the victim perceived it as such.[5]

In 1998, the Supreme Court considered two companion cases, *Faragher v. City of Boca Raton*, and *Burlington Industries, Inc .v. Ellerth*, which developed the standards by which an employer may be held liable for an employee's creation of a hostile work environment.[6] Where a hostile work environment is created by the harassment of a co-worker, employers are liable only when they are negligent in allowing the harassment to occur.[7] Alternatively, employers are held strictly liable when the harasser was a supervisor and the harassment constituted a tangible employment action against the victim-employee.[8] Tangible employment actions include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[9]

The final situation in which employers may be held liable for the harassment of an employee occurs when a supervisor's harassment does not constitute a tangible employment action, but instead creates a hostile work environment.[10] When plaintiffs claim that a supervisor created a hostile work environment, but no tangible employment action occurred, employers may avoid liability by asserting an affirmative defense.[11] Employers must show that (1) the employer was reasonable in trying to prevent and correct harassment; and (2) that the plaintiff unreasonably failed to utilize corrective opportunities provided by the employer.[12]

One question the Court left unanswered was what plaintiffs were required to prove to establish that a harasser was in fact a supervisor and not merely a co-worker. This question remained unanswered until June 24, 2013, when the

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3. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

4. *Id*. at 64.

5. Harris v. Forklift Syst., Inc., 510 U.S. 17, 21-22 (1993).

6. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

7. *Faragher*, 524 U.S. at 789.

8. *Ellerth*, 524 U.S. at 762-63.

9. *Id.* at 761.

10. *Id*. at 765.

11. *Id.*

12. *Id.*

Court announced its decision in *Vance v. Ball State University*. In its decision, the Court held that employees are supervisors under Title VII only if they are "empowered by the employer to take tangible employment actions against the victim." This decision, which resolved a split between the Circuit Courts, declined to follow Equal Employment Opportunity Commission ("EEOC") guidelines which included individuals authorized to direct other employees' day-to-day work activity within the definition of a "supervisor."

FACTS

Maetta Vance began working for Ball State University Dining Services ("Ball State") in 1989 as a substitute server. In 1991, Vance was promoted to part-time catering assistant, a position she held until 2007, when she was promoted to a full-time catering assistant. In 2001, problems began between Vance and a fellow employee, Saundra Davis, when Davis became aggressive while the two were discussing work duties. Davis shouted at Vance and struck her when she tried to walk away. Vance complained orally to her supervisors, but did not pursue the matter further as Davis was transferred to another department. On September 23, 2005, Davis returned to Vance's department. Allegations of harassment soon followed.

Vance filed her first complaint with Ball State containing allegations against Davis on November 7, 2005. In her complaint, Vance alleged that Davis stopped her when she was getting into a service elevator and threatened her. Davis had also filed a complaint concerning the encounter in the elevator approximately six weeks earlier. Davis claimed that it was Vance who had threatened her and used inappropriate language. Mr. Kimes, head of the division of Dining Services in which Vance worked, investigated the incident. After determining that he could not corroborate either of the employee's complaints, Kimes decided that he could only counsel both women. It was also alleged that Davis made references to "Sambo" and "Buckwheat" while speaking with another employee in Vance's presence. Vance, an African American, believed that these words were racially derogatory and offensive; however she did not file a complaint at that time.

Vance filed a claim for race, gender, and age discrimination with the EEOC on December 28, 2005, and continued to report complaints of harassment and threats. During this time, Vance was the only African American working in her department. She alleged that Davis and another employee, Connie McVicker, harassed her "by glaring at her, slamming pots and pans around her, and intimidating her." Another incident allegedly occurred between Vance and Davis in an elevator at work on August 10, 2007. Vance alleged that Davis had

threatened her by asking her, in a Southern accent: "Are you scared?"[13] After an investigation was conducted, it was found that Vance's complaint was corroborated by a co-worker. Davis received a verbal warning as a result.

For the court to determine whether or not Ball State University could be held strictly liable for Davis's behavior, it needed to first determine whether or not Davis was Vance's supervisor, or merely a co-worker. The Petitioner's brief stated several facts in an effort to establish that Davis was Vance's supervisor. Ball State's description of Davis's position as a "Catering Specialist" states that leadership of up to 20 employees, and supervisory powers over "kitchen assistants," were part of Davis's job function. Evidence was also introduced that Kimes was aware that Davis directed Vance's daily activities by providing "prep sheets" and delegating jobs to her in the kitchen. Vance herself had identified Davis as a supervisor in her complaints to Ball State. The deposition testimony of Donn Knox, a co-worker of Vance, revealed that he too viewed Davis as a supervisor. Knox further stated that he was told by Kimes that Davis was, in fact, a supervisor.

PROCEDURAL HISTORY

On October 3, 2006, Maetta Vance filed suit against her employer, Ball State University, and three fellow employees, William Kimes, Saundra Davis, and Connie McVicker, claiming that she was subjected to racial harassment which created a hostile work environment in violation of Title VII.[14] The complaint also included a claim for retaliation.[15] On September 10, 2008, the District Court for the Southern District of Indiana granted summary judgment for the defendants and dismissed the complaint in its entirety. The District Court found that Davis was Vance's co-worker and not her supervisor. Accordingly, Ball State University could not be held strictly liable for Davis's conduct under the *Faragher/Ellerth* framework.

On appeal, the Seventh Circuit affirmed. The Court acknowledged that other circuits had found that individuals who possessed the power to direct an employee's daily activities were supervisors under Title VII; however, the Seventh Circuit applied a stricter standard which defined a supervisor as "someone with power to *directly* affect the terms and conditions of the plaintiff's employment."[16] That power consisted of the ability to "hire, fire, demote, promote,

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13. Although it is not clear from the Seventh Circuit's decision, it is implied that the Southern accent was faked as part of the harassing behavior. *See Vance v. Ball State Univ.*, 646 F.3d 461, 472 (7th Cir. 2011) ("Finally, after Vance complained that Davis said 'are you scared' to her in a Southern accent, Ball State again investigated.").

14. Complaint at 5-6, Vance v. Ball State Univ., 2008 WL 4247836 (S.D. Ind. 2008) (No. 06-cv-1452).

15. *Id.*

16. Vance v Ball State Univ., 636 F.3d 461, 470 (7th Cir. 2011) (quoting Rhodes v. Ill. Dep't. of Transp., 389 F.3d 498, 506 (7th Cir. 2004)).

transfer, or discipline an employee."[17] On June 5, 2012, the Supreme Court granted certiorari to resolve the conflict between the circuits regarding the proper definition of a supervisor under Title VII.

THE SUPREME COURT'S OPINION

As previously noted, several courts, including the Seventh Circuit, had found that employees were not supervisors for the purposes of Title VII unless they had the power to "hire, fire, demote, promote, transfer, or discipline" an employee.[18] Other Circuits had applied a test in accordance with the EEOC's Enforcement Guidance which "tie[d] supervisor status to the ability to exercise significant direction over another's daily work."[19] Justice Alito, who was joined by Chief Justice Roberts, as well as Justices Scalia, Kennedy and Thomas (who also filed a concurring opinion), held "that an employee is a supervisor for the purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."[20] This decision affirmed the Seventh Circuit's ruling and established the more restrictive test utilized by the First, Seventh, and Eight Circuits as the proper test to determine supervisory status for the purposes of Title VII.[21]

In reaching this decision, the majority drew largely on the language used in the *Ellerth* opinion. In that case, the Court observed that co-workers were capable of creating a hostile work environment which could cause psychological harm, but that they could not "dock another's pay, nor can one co-worker demote another."[22] The Court cited additional language from *Ellerth* which stated:

> Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.[23]

The majority found that this language implied that "the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors."[24]

The majority rejected Vance's contention that the EEOC's more expansive definition was supported by the general meaning of the word and usage in other

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17. *Id.* (quoting Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)).
18. *Vance*, 133 S. Ct. at 2443 (2013).
19. *Id.*
20. *Id*. at 2439
21. *Id*. at 2453.
22. *Id*. at 2448 (quoting Ellerth, 524 U.S. at 762.).
23. *Id*. (quoting *Ellerth* 524 U.S. at 762).
24. *Id.*

legal contexts.[25] In his opinion, Justice Alito cited the varying definitions of supervisors in both vernacular and legal contexts as reason to disregard the petitioner's argument.[26] The majority reasoned that the ability to take tangible employment actions referenced by many definitions of the term would provide the most useful test for Title VII litigation. Justice Thomas expressed a similar view in a concurrence which also stated that he believed that the *Ellerth* and *Faragher* cases were wrongly decided.[27] He joined the opinion claiming that the more restrictive test provided "the narrowest and most workable rule."[28]

In rejecting the test advocated for by Vance and recommended by the EEOC, the majority expressed concerns that such a test would "depend on a highly case-specific evaluation of numerous factors."[29] They instead settled on a test which was "easily workable."[30] The Court claimed that the test it adopted would allow the supervisory status of employees to be determined prior to trial, and simplify the "inevitably complicated" work of juries.[31] The opinion also stated that the simplification of the process would "help to ensure that juries return verdicts that reflect the application of the correct legal rules to the facts."[32] According to the Court, the test could be readily applied at the summary judgment stage and preclude any consideration of the issue by the jury.[33] The majority further argued that "[t]he alternative, in many cases, would frustrate judges and confound jurors."[34]

Justice Ginsburg, in a dissent joined by Justices Breyer, Sotomayor, and Kagan, accused the majority of missing "the forest for the trees" and supported following the EEOC's Guidance.[35] The Dissent opined that "[t]he limitation the Court decree[d] diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[36]

IMPLICATIONS AND ANALYSIS

In its opinion, the Court failed to address the realities of the workplace. This decision will allow employers to insulate themselves from liability, while un-

25. *Id.* at 2444.
26. *Id.* at 2444-45.
27. *Id.* at 2454 (Thomas, J., concurring).
28. *Id.*
29. *Id.* at 2443.
30. *Id.* at 2444.
31. *Id.* at 2450.
32. *Id.* at 2451.
33. *Id.* at 2444.
34. *Id.*
35. *Id.* at 2458 (Ginsburg, J., dissenting).
36. *Id.*

fairly restricting opportunities for victims of discrimination to recover from their employers even when harassers are aided in their unlawful actions by the ability to control the work activities of the victim. As the dissent correctly points out, the majority's decision ignored the guidance of the very agency established by Congress to enforce Title VII and was "blind to the realities of the workplace."[37] Even the respondent-employer in this case agreed that the definition of a supervisor settled on by the Court "does not necessarily capture all employees who may qualify as supervisors."[38]

It is also notable that one of the harassers in the *Faragher* case would not qualify as a supervisor under the definition established by the Court in *Vance*. In that case, one of the harassers had the power to take tangible employment actions against the victim, while the other did not. However, in the *Faragher* opinion, the Court stated: "It is undisputed that these supervisors 'were granted virtually unchecked authority' over their subordinates, 'directly control[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities."[39] Neither the Court nor the defendants raised concerns over whether either of the harassers qualified as supervisors, even though only one had the authority to take tangible employment actions.[40] In *Vance,* the majority drew largely from the language of *Ellerth* while ignoring relevant language from *Faragher.* It is clear that when the *Faragher/Ellerth* framework was established, the Court recognized that those employees with the power to control the daily work activities of subordinate employees would be aided in their harassment through their ability, as supervisors, to "increase another's workload or assign undesirable tasks."[41]

The majority contended that these concerns are unwarranted. The Court argued that in cases where harassers are aided in the infliction of harassment by their ability to control victims' daily work activities, "the victims will be able to prevail simply by showing that the employer was negligent in permitting the harassment to occur."[42] The approach established by the majority shifts the burden from the employer, who would be required to prove an affirmative defense to avoid vicarious liability under the definition of supervisors proffered by the EEOC, to the victim, who now has the burden to establish that the employer was negligent in permitting the harassment to occur. The Court's decision unjustly increases the burden on victims seeking to hold employers accountable for the actions of their agents and undermines Title VII's purpose of preventing workplace harassment.

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37. *Id.* at 2458.

38. Brief of Respondent at 1, Vance v. Ball State Univ., No. 11-556 (S.Ct. 2013).

39. *Faragher*, 524 U.S. at 808 (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1544 (11th Cir. 1997) (Barkett, J., dissenting in part and concurring in part)).

40. *Vance*, 133 S. Ct. at 2458 (Ginsburg,J., dissenting).

41. *Id.* at 2461.

42. *Id.* at 2451.

Employers will now be able to insulate themselves from liability by limiting the number of employees with the ability to make hiring and firing decisions. The Court addressed this concern by stating that where an employee has substantial input into such decision, "the employer may be held to have effectively delegated the power to take tangible employment actions."[43] This concession muddies the waters of the test settled on by the Court due to its apparent clarity. Now instead of cases requiring litigation to determine whether or not an employee qualified as a supervisor due to their control over a plaintiff's daily work activities, litigation will be necessary to determine whether or not the power of the employee to recommend tangible employment actions regarding the plaintiff qualifies them as a supervisor.[44] The Court has already injected uncertainty into its "easily workable" test. The majority's assertion that, "in every case, the approach . . . [taken] will be more easily administrable than the approach advocated by the defense," is wishful thinking.[45]

Both the majority and the dissent recognized that even under the EEOC's more expansive definition, Vance would likely have been unable to prove that Davis was her supervisor.[46] Perhaps if Davis had possessed greater control over Vance's daily work activities, and had used that control to harass Vance, the Court would have been better able to understand the true nature of the workplace. Employees may not consider someone who has hiring and firing powers to be their supervisor. In fact, they may not even see employees who possess that authority during the course of their work. Employees would be more apt to recognize the person who manages their work schedule and actually oversees their daily work as their supervisor. These realities were recognized by the EEOC, which was established by Congress for the purpose of overseeing the enforcement of Title VII. Unfortunately, the Court, in a failed attempt to establish an easily applicable bright-line rule, ignored the EEOC's informed guidance and instead enacted a test which unjustly disadvantages victims of harassment and is blind to the realities of the workplace.

CONCLUSION

In *Vance*, the United States Supreme Court ruled that in order for employees to be considered supervisors under Title VII, they must have the authority to take tangible employment actions. The Court rejected EEOC guidance which included those employees with the authority to direct other employees' daily work activities in the class of supervisors. In doing so, it expressed a desire to dispose of the issue of supervisory status at the summary judgment stage and simplify the task of jurors. However, the Court failed in its effort to establish an

43. *Id.* at 2453.
44. *See also, Vance*, 133 S. Ct. at 2462 (Ginsburg, J., dissenting).
45. *Vance*, 133 S. Ct. at 2454.
46. *See Id.* at 2453-54; *Vance* 133 S. Ct. at 2465 (Ginsburg, J., dissenting).

easily workable test which can be readily applied at the summary judgment stage. Under the test established in *Vance*, litigation will still be required to determine whether employees are supervisors based on their input into hiring and firing decisions.

While failing to achieve its stated goal of establishing an easily workable test, the Court's decision will allow employers to escape liability by limiting the number of employees possessing the authority to take tangible employment actions. In addition to its ignorance to the realities of the workplace, the *Vance* decision has unjustly increased the burden on victims of harassment, seeking to hold employers liable for the conduct of those who were hired to supervise them in direct opposition to the very purpose of Title VII.

Decker v. Northwest Environmental Defense Center: The Clean Water Act and the Stormwater Runoff from Logging Operations

Danyelle Barron

Introduction

Environmental law is constantly evolving in response to the Federal Government creating regulations to minimize and mitigate the consequences of human actions and their effects on the natural world. In *Decker v. Northwest Environmental Defense Center*, the United States Supreme Court's decision focused on the Clean Water Act regulations concerning discharges into the Nation's navigable waters.[1] The Court gives deference to the Environmental Protection Agency's interpretation of a statute with little analysis. By engaging in this type of behavior, the Court appears to violate the separation of powers by undermining the State of Oregon's permitting authority that was granted under the Clean Water Act by the EPA Administrator.[2] In providing deference to the EPA, the Court found the discharge of the logging stormwater runoff at issue did not require a National Pollutant Discharge Elimination System permit.[3] This determination is inconsistent with the Clean Water Act regulation and Oregon's regulations pertaining to runoff, and consequently, may open the doors to future litigation of what additional sources of runoff are exempt from the permitting scheme.

Facts and Procedural History

overview of relevant sections of the clean water act

In 1948, Congress enacted the Federal Water Pollution Control Act, authorizing the Surgeon General of the Public Health Service to prepare comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries and improving the sanitary condition of surface and underground waters.[4] After several amendments, in 1972, Congress established broad national objectives for the act in order to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[5] To achieve these objectives, the

1. Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013).
2. *Id.* at 1329.
3. *Id.* at 1338.
4. Federal Water Pollution Control Act (Clean Water Act), Digest of Fed. Res. Laws of Interest to the U.S. Fish and Wildlife Service, http://www.fws.gov/laws/lawsdigest/FWATRPO.HTML (last visited Jan. 18, 2014).
5. *Id.*

amendments expanded limitations on pollutant discharges, including: requirements that limitations be determined for point sources consistent with State water quality standards; procedures for State issuance of water quality standards; development of guidelines to identify and evaluate the extent of nonpoint source pollution; water quality inventory requirements; and development of toxic and pretreatment effluent standards.[6] Further, as part the amendments of 1972, the Clean Water Act ("CWA") became the common name, and a permit system was established.[7] Section 402 (33 U.S.C. 1342) of the CWA, establishes the National Pollution Discharge Elimination System ("NPDES") permitting scheme, which requires individuals, corporations, and governments to secure permits before discharging pollution from any point source[8] into navigable waters of the United States.[9] Section 402(p), however, states that a permit is not required for discharge composed entirely of stormwater, *unless* the discharge is associated with industrial activity.[10]

In 1987, the CWA was amended to exempt most stormwater discharges, but this exemption did not include stormwater discharges that were associated with industrial activity.[11] The Environmental Protection Agency ("EPA") has adopted a regulation, known as the Industrial Stormwater Rule ("ISR"), defining "associated with industrial activity," as:

> The discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility . . . .[12]

The EPA has interpreted this definition to exclude the logging roads that are at issue in this case.[13] The ISR specified that facilities classified as Standard

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6. *Id.*

7. *Summary of the Clean Water Act*, ENVTL. PROT. AGENCY, www2.epa.gov/laws-regulations/summary-clean-water-act (last visited Jan. 18, 2014).

8. Point Source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." Clean Water Act § 502, 33 U.S.C. § 1362 (2011).

9. Clean Water Act § 402, 33 U.S.C. § 1342 (2008).

10. *Id.*

11. *Decker*, 133 S.Ct. at 1332.

12. 40 U.S.C. § 122.26 (2013).

13. *Decker*, 133 S.Ct. at 1331.

Industrial Classification[14] ("SIC") 24 are considered to be engaging in industrial activity for the purpose of § 122.26(b)(14).[15] SIC 24 identifies the logging industry as an industry involved in the field of "lumber and wood products."[16] Further, "logging industry" is defined as "establishments primarily engaged in cutting timber and in procuring . . . primary forest or wood raw materials."[17] This identification by SIC 24 directly conflicts with the EPA's interpretation of the definition of "associated with industrial activity," as the logging roads at issue can be identified under SIC 24.

In addition to the ISR, the EPA issued a regulation known as the Silvicultural Rule.[18] This regulation, defining a silvicultural point source, provides:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.[19]

FACTS OF RELEVANT DISPUTE

In Oregon's Tillamook State Forest, Petitioner-Defendant Doug Decker, representing Georgia-Pacific West and other logging and paper product companies, used two logging roads in the course of business.[20] Respondent-Plaintiff Northwest Environmental Defense Center ("NEDC") brought suit, alleging Defendant violated the CWA, by causing discharges of channeled stormwater runoff into two waterways, the South Fork Trask River and the Little South Fork Kilchis River, without a NPDES permit. This is problematic as some areas of Oregon average more than 100 inches of rain per year, causing water to run off the graded roads into a system of ditches, culverts, and channels that discharge the water into nearby rivers and streams. This discharge often contains large amounts of sediment, which can harm fish and other aquatic organisms. NEDC argued that a Silvicultural Point Source applies only to runoff not collected in

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14. The SIC is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. Summary of the NAICS, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM, http://www.census.gov/eos/www/naics/ (last visited Jan. 18, 2013).

15. *Decker*, 133 S.Ct. at 1332.

16. *Id.*

17. *Id.*

18. *Id.* at 1331.

19. *Id.*

20. *Id.* at 1333.

channels or other engineered improvements.[21] It argued this interpretation would make the channeled discharges in this matter point-source pollution under CWA, requiring a NPDES permit. Conversely, Defendant argued that a Silvicultural Point Source is a nonpoint source under the CWA, and therefore, the channeled discharges are natural runoff from silvicultural harvesting operations and do not require an NPDES permit.

NEDC stated it did not want to challenge the Silvicultural Rule, but to enforce it under a proper interpretation.[22] NEDC sought civil penalties of up to $25,000 per day, as well as attorney's fees.[23] It further requested injunctive relief in the form of an order that petitioners incur certain environmental remediation costs to alleviate harms attributable to past discharges.[24]

PROCEDURAL HISTORY

NEDC brought suit in 2006, in the United States District Court of the District of Oregon, which dismissed the action for failure to state a claim.[25] The Court concluded that NPDES permits were not required because the CWA and the Silvicultural Rule did not include ditches, culverts, and channels in the definition of a point source. NEDC appealed, and the Court of Appeals for the Ninth Circuit reversed in 2011, holding that while the EPA's Silvicultural Rule was ambiguous on the question of whether the conveyances at issue were point sources, those conveyances must be deemed point sources under the rule in order to give effect to the Act's expansive definition of the term, and since the ISR makes a cross-reference to SIC 24, the discharges at issue are associated with industrial activity within the meaning of the regulation.[26] The Court of Appeals held that the discharges were from point sources and not exempt from the NPDES permitting scheme by the ISR and therefore petitioners had been in violation of the CWA.[27] The Supreme Court then granted certiorari.[28]

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21. *Id.* at 1334.

22. *Id.*

23. *Id.* at 1335.

24. *Id.*

25. *Id.* at 1333.

26. *Id.* at 1333-34.

27. The Court of Appeals also held that the District Court had subject matter jurisdiction over this matter. *Id.* at 1334.

28. In response to the Court of Appeals ruling, the EPA issued a final version of an amendment to the ISR, clarifying ambiguities. Petitioners have argued that this amendment makes this case moot, however, the Supreme Court determined, referring to *Knox v. Service Employees Int'l*, that despite the recent amendment, a live controversy continued to exist regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the ISR. Knox v. Service Employees Int'l, 132 S.Ct. 2277, 2287 (2012).

ISSUE

The question at issue is whether the CWA and its implementing regulations require permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States.[29] Despite the recent amendment, the Supreme Court had to determine whether Petitioners may be held liable for unlawful discharges under the earlier version of the ISR.[30] The Supreme Court reversed and remanded the Court of Appeals decision.[31]

COURT OPINIONS

MAJORITY HOLDING AND REASONING

Justices Kennedy, Roberts, Thomas, Ginsburg, Alito, Sotomayor, and Kagan held that the CWA and its implementing regulations did not require NPDES permits before channeled stormwater runoff from logging roads could be discharged into navigable waters of the United States.

The NEDC made three arguments to support its claim: (1) the statutory term "associated with industrial activity" unambiguously covered discharges of channeled stormwater runoff from logging roads; (2) the preamendment version of the ISR unambiguously required a permit for the discharges at issue; and (3) the ISR required NPDES permits for stormwater discharges associated with other types of outdoor economic activity.[32]

To the first argument, that the term "associated with industrial activity" was unambiguous and covered the discharges from logging roads, the Court found that the NEDC overlooked the multiple definitions of the terms "industrial" and "industry."[33] The Court stated that the definition, "economic activity concerned with the processing of raw materials and manufacture of goods in factories," did not necessarily encompass outdoor timber harvesting.[34] Further, it was determined that the statute was ambiguous because it did not foreclose a more specific definition by the EPA, since it provided no further detail as to the intended scope.[35]

To the NEDC's second argument, that the preamendment version of the ISR unambiguously required a permit for the discharges, the Court looked to the EPA, which took a different view. The EPA concluded that the regulation referred to SIC 24 in order to regulate traditional *industrial* sources such as sawmills.[36] The Court stated that the EPA's claim that the regulation did not cover

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29. *Decker*, 133 S.Ct. at 1330.
30. *Id.* at 1335.
31. *Id.*
32. *Id.* at 1336-37.
33. *Id.*
34. *Id.* at 1336.
35. *Id.*
36. *Id.*

temporary, outdoor logging installations, was reinforced by the ISR's definition of discharges associated with industrial activity. Additionally, the Court stated that even if logging as a general matter was a type of economic activity within the regulation's scope, a reasonable interpretation of the regulation could still require the discharges to be related in a direct way to operations *at an industrial plant* in order to be subject to NPDES permitting.[37]

Finally, with regard to the NEDC's argument that the ISR is broad and requires NPDES permits for stormwater discharges associated with other types of outdoor economic activity, the Court found that the ISR could be limited by the requirement that the discharges be "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[38] The Court concluded that the types of economic activity mentioned in the ISR need not be read to mandate that *all* stormwater discharges related to those activities fall within the rule, just as the inclusion of logging need not be read to extend to all discharges from logging sites.[39]

In making these determinations, the Court deferred to the EPA's interpretation, stating that an agency interpretation will be used "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[40] This is the proper standard of review using *Chevron* deference,[41] however, the Court's reasons for deferring to the EPA's interpretation cannot be found consistent with the regulation. First, the Court stated it was permissible for the EPA to find that, when taken together, the regulation's references to "facilities," "establishments," "manufacturing," "processing," and an "industrial plant" leave open the rational interpretation that the regulation extends only to traditional industrial buildings, such as factories and associated sites, as well as other relatively fixed facilities. However, the Court also noted that the EPA's decision exists against Oregon's history of extensive efforts to develop regulations with respect to stormwater runoff from logging roads.[42] Specifically, Oregon has developed a comprehensive set of best practices to manage this stormwater runoff. For example, Oregon has rules mandating filtration of stormwater runoff before it enters rivers and streams, it requires logging companies to construct roads using surfaces that minimize the sediment in runoff, and it obligates firms to cease operations where such efforts fail to prevent visible increases in water turbidity. Further, Congress has given express instructions to the EPA to work "in consultation with State and local officials" to alleviate stormwater pollution by developing

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37. *Id.*
38. *Id.* at 1337.
39. *Id.*
40. *Id.*
41. Applying *Chevron* deference refers to the Court's duty to respect legitimate policy choices and give the responsibility of assessing competing views to the agency that has been delegated authority. *See* Chevron, U.S.A., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
42. *Decker*, 133 S.Ct. at 1338.

the precise kind of best management practices Oregon has established. With this direct order from Congress, the EPA's interpretation cannot be said to be consistent with the regulation nor with Oregon's regulations. Despite Oregon's best management practices, the Court gave deference to the EPA and held the preamendment version of the ISR exempted the discharges of channeled stormwater runoff from logging roads from the NPDES permitting scheme.

DISSENTING OPINION AND REASONING[43]

Justice Scalia dissented, stating the Court was in error to give effect to a reading of the EPA's regulations that was not the most natural one, simply because the EPA said that it believed the unnatural reading was right.[44] He stated the EPA had vividly illustrated that it was able to write a rule saying precisely what it meant, by doing *just that* while this case was being briefed. Justice Scalia focused on the Court's role in the interpretation of statutes, stating that the Court is the interpreter of regulations and statutes, and the purpose of interpretation was to determine the fair meaning of the rule; that whenever the agency's interpretation of the regulation is different from the fairest reading, it is in that sense "inconsistent" with the regulation. Justice Scalia further touched on the subject of the separation of powers, noting that *Auer v. Robbins* deference encourages agencies to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without the observance of notice and comment procedures."[45] This speaks directly to the Court's standard of review of applying *Chevron* deference to this matter. By not interpreting the statute and regulations separate from the EPA's interpretation, but in giving deference to the EPA, the Court allowed the EPA to create new law through its interpretation.

Rather than giving deference to the EPA's interpretation, Justice Scalia opined the Court should have used traditional textual interpretation in this case to answer either one or two questions.[46] First, he would ask if the stormwater discharged was from a point source. If the answer was no, then no permit would be required; but if the answer was yes, he would move to question two. The second question is whether the stormwater discharge was exempt from the permit requirement because it was not "associated with industrial activity." With these two questions, Justice Scalia would have held that the fairest reading of

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43. A concurring opinion from Justices Roberts and Alito stated this case should have been decided as briefed and argued, with existing precedent, rather than using Seminole Rock and Auer as precedent. See Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

44. *Decker*, 133 S.Ct. at 1339.

45. *Id.* at 1339. In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes. See *Auer*, 519 U.S. 452 (1997); *Chevron*, 467 U.S. 837 (1984).

46. *Decker*, 133 S.Ct. at 1342.

the statute and regulations was that these discharges were from point sources and were associated with industrial activity.

Justice Scalia used this traditional interpretation tool to analyze the regulation. In its reading of the regulation, the EPA viewed the stormwater here as "natural runoff," but Justice Scalia questioned whether stormwater discharges were "natural runoff" when they are channeled through manmade pipes and ditches, and carry with them manmade pollutants from manmade forest roads.[47] Justice Scalia found that giving the term the agency's interpretation would contradict the statute's definition of 'point source,' which explicitly includes any "pipe, ditch, channel, tunnel, and conduit." Therefore, the stormwater discharges came from point sources because they flowed out of artificial pipes, ditches, and channels, and were thus not *natural* runoff from a logging operation.

Further, the point sources that are exempt from NPDES permitting scheme, did not reach discharges that were associated with industrial activity. A discharge is associated with industrial activity if it comes from a site used for "transportation" of "any raw material." Logging is a category of industry, and the first industry group in SIC 24 is "logging," defined as "establishments primarily engaged in cutting timber." Therefore, Justice Scalia would have affirmed the holding of the Court of Appeals.[48]

IMPLICATIONS

Since 1973, Oregon has established regulations fit for the standards of the CWA. Section 402 of the CWA allows states to apply for authority over NPDES permits granted within the state.[49] Specifically, § 402(a)(5) states, "The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State."[50] With this authorization, Oregon's Department of Forestry established standards, under the Oregon Administrative Rules, that met the federal regulations, and provided the maximum practical protection to maintain forest productivity, water quality, and fish and wildlife habitat.[51] Oregon requires notification to the State Forester for a number of foresting operations under Chapter 629-605-0140, including harvesting of forest tree species.[52] As

47. *Id.* at 1343.
48. *Id.* at 1344.
49. Clean Water Act § 402, 33 U.S.C. § 1342 (2008).
50. *Id.*
51. Oregon Administrative Rules Chapter 629-625-0000.
52. Harvesting of tree species includes, but is not limited to felling, bucking, yarding, decking, loading, or hauling. Each of these are essential to logging operations. *See* Oregon Administrative Rules Chapter 629-605-0140.

an additional requirement, Chapter 629-605-0170 § 12 states that a written plan is required for operations of "how the operation is planned to be conducted in sufficient detail to allow the State Forester to evaluate and comment on the likelihood that the operation will comply with the Forest Practices Act or administrative rules."[53]

The Court acknowledged that Oregon had this expertise in the area of the development, siting, maintenance, and regulation of state forest roads.[54] However, despite Oregon having authorization over state NPDES permits, the Chapter 629 regulations on road construction and maintenance, which includes stormwater runoff from logging, and the notification and written plan requirements for forest operations, the Court turned to the EPA's non-natural interpretation of the CWA and ISR.

The Court focused on the idea that the ISR applied to other outdoor activities, such as mining, landfills, and constructions sites, and that the inclusion of these types of activities did not mandate that *all* stormwater discharges related to these activities fell within the rule. It concluded similarly that logging need not be read to extend to all discharges from logging sites. This begs the question that if you're not going to include all discharges within an activity, then why include any discharge at all? Where must the line be drawn to determine that one discharge from an activity is not as harmful as a second discharge from that same activity? The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of our Nation's waters.[55] Picking and choosing which stormwater discharges do not have to be regulated appears to go directly against the purpose of the CWA, especially as the EPA had failed to give reasons why not including the specific type of logging runoff in this case would not lead to a slippery slope of future litigation. If logging companies can continue their business without a permit recognizing and enforcing the regulation of the runoff from their operations, other companies, that may have worse practices, would have to also be found to not need a permit.

Additionally, section 101(b) of the CWA explicitly states, "It is the policy of Congress that *the States manage* the construction grant program under this chapter and *implement the permit programs* under section 402 and 404."[56] Under the CWA, Congress stated it is the State's responsibility to manage and implement the NPDES permit programs within its jurisdiction. Congress has delegated authority to the EPA to delegate the NPDES permitting program to individual States, and therefore, it is within Oregon's authority, and not the EPA's, to determine whether these logging operations require a permit. Accordingly, by turning to the EPA without first looking to Oregon law, the Court

53. Oregon Administrative Rules Chapter 629-605-0170.
54. *Decker*, 133 S.Ct. at 1338.
55. Clean Water Act § 101, 33 U.S.C. 1251.
56. *Id.*

gives the impression it is undermining Oregon's vast expertise and responsibility in implementing permits for logging operations under the CWA.

CONCLUSION

It is the goal of the CWA to protect our Nation's waters. Not regulating this type of stormwater runoff from logging operations with a NPDES permit appears to go against the stated goals of the CWA. Not including this stormwater runoff from logging operations in the permitting scheme today, may lead to future statute interpretations to not include other types of runoff tomorrow, resulting in irreversible damage and other consequences to our Nation's waters, and ultimately the livelihood of our society.

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