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## ARTICLES



## CASE COMMENTS




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# *THE DIGEST*

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# *THE DIGEST*

## *Two-Thousand and Twelve*

### ARTICLES



### CASE COMMENTS

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# THE MODERN LAW OF NATIONS: Jus Gentium and the Role of Roman Jurisprudence in Shaping the Post World War II International Legal Order*

THOMAS E. BOUDREAU PH.D.**

## THE LAW OF NATIONS: A SUMMARY

The operating axiom of this paper is that a new Law of Nations was created in international law due to the solemn promises made in good faith by the Allied powers during World War II to their own, neutral, conquered and colonial peoples of the world. By doing so, these solemn promises created fiduciary interests, duties and norms that were to be recognized on the international level by governments and enjoyed by the peoples of the world if the war was won. This fiduciary Law of Nations governs the relationship of governments to their own and other peoples and enunciates the rights of such nations to human rights, self-determination, trusteeship and collective security. In particular, it limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples. By doing so, the emergence of the Law of Nations resulted in a fundamental realignment of the legal relationship between the nation and the state, terms that are usually conflated in the legal lexicon. Specifically, the new Law of Nations reconfigures the legal relationship between the nation and state by recognizing the international rights of the people within the state and, in the case of Nuremberg Charter, the rights of the

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 This is a WORK OF HISTORICALLY BASED JURISPRUDENCE concerning the actual origins during and immediately after World War II of the modern Law of Nations that protects the basic "property" of peoples; in his *Second Treatise*, John Locke defines "property as a people's liberty, lives and land. Since the Law of Nations is a law of peoples, I am in debt to Roman Jurisprudence for the fundamental concepts and classical practices that constitute the explanatory sources, substance as well as significance of this New Law of Nations.

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*** Professor Boudreau dedicates this paper to Dean Gutherie Birkhead, combat veteran in Patton's Third Army in the European Theater and to Mr. Donald McCandless, combat decorated Marine in the Pacific Theater in World War II, and to countless others of their generation in American or Allied uniform who made the Law of Nations possible through their service and sacrifice

nation against the state. These legal innovations result in a profound shift in the fundamental and historically competing sources of legitimacy and sovereignty away from the state to the nation or people of the polity.

Three legal concepts or practices dating back to, or influenced by, classical Roman jurisprudence are useful, even necessary, in order to understand and explain the sources, scope and significance of these World War II innovations in the international legal order. The first is "fiduciary," which derives from the Roman idea of "fidicia," a word derived from the Latin verbs fidere" meaning to "trust" and earlier from "foedus" meaning to "compact" and "bide." In Roman law, a "fidicia" is an early form of trust or pledge concerning the return of property, if a debt was fulfilled, to the owners. Hence the term "fiduciary," which is derived from Roman law, and means, (as a noun) a person holding the character of a trustee, in respect to the trust and confidence involved in a legal matter, and the scrupulous good faith and candor that it requires. As we shall see, the great international jurist Proffessor Oscar Schachter characterizes good faith as a key source of international obligation. (The Latin origins of fiduciary and faith are the same.) Hence, the following essay will argue that the promises concerning the goals of World War II made in good faith by the Allied governments to their own, conquered, colonial and neutral peoples of the world resulted in international legal obligations consisting of new fiduciary duties, relationships and norms such as human rights.

Second, the best way to characterize the substance of these new international legal norms is in terms of Jus Gentium, the term from classical Roman Jurisprudence to describe "a Law of Nations common. . .to the whole of humanity." In the following essay, we will examine the origins of this new Law of Nations due to the events of World War II, as well as argue that this law, somewhat modified, is now available to all peoples throughout the globe. Specifically, the origins of the Law of Nations can be found in the unique declarations, charters and conventions written during and in the immediate aftermath of World War II. The Atlantic Charter and related wartime summits or diplomatic declarations, the United Nations Charter, the Nuremberg Charter, the Universal Declaration of Human Rights—and the subsequent development of the so-called International Bill of Rights— the Geneva Conventions, the *Reparations* Case and the Genocide Convention represent, not mere additive elements in legal relations between states. This World War II corpus created a body of fiduciary norms that collectively caused a fundamental transformation, or paradigm shift, resulting a new fiduciary legal order that can be characterized in terms of the ancient Roman Corpus Juris (body of law) Jus Gentium or the "Law of Nations common. . .to the whole of humanity.

Third, due to the new fiduciary Law of Nations, the people are now, at least implicitly, the *imperium et imperia* (sovereign within the sovereign) of the newly legally limited state. Its classical roots can be found in the idea, often

exhorted by Roman philosophers, stating that the entire people, or Roman nation, were assumed to be the true rulers of Rome. This belief had important historical implications concerning the perceived and actual legitimacy of the early Roman Republic. As Polybius states in his *Histories,* "Thus here again one might plausibly say that the people's share of government is greatest, and that the Constitution is a democratic one."[1]

In more modern times, after the winning of the World War, the people or nation become, once again, the new *imperium et imperia* as the relative importance of the nation in relationship to the "state" increased and became more pronounced. In particular, the significance of this new Law of Nations is that its restricts the legitimate actions of the state, especially in terms of the use of military or other deadly force used against its own or other peoples. In a very real sense, a state's legitimacy—especially in the eyes of its own or other peoples— is governed by its observance of the Law of Nations. We will examine this development in terms of classical and contemporary Republican theory in a latter section of this essay.

This is not to claim that the development of the Law of Nations and the recognition of human rights on the international plane was a deliberate war aim. On the contrary, it evolved as a result of complex and convoluted interactions and compromises among the Allied powers fighting the war, some of whom had vast colonial holdings overseas and wanted to preserve these after the war, and those that opposed colonialism, especially the Americans or Soviets. In particular, the American administration under President Roosevelt wanted the termination of world-wide colonialism as one of the clear war aims to rally the conquered, colonial, neutral and allied peoples of the world to the anti-Axis coalition or, at the very least, not join the Axis cause at a time of mortal danger to the Allied nations. So, let's review the sources of this law during the greatest war in human history.

## PROMISES MADE: THE SOURCES OF THE MODERN LAW OF NATIONS

Because of the unprecedented scale of violence, suffering and death experienced by human beings in World War II, the victorious nations of the world agreed, even as the war was being waged and in the war's immediate aftermath, upon a series of declarations, treaties, and trials that literally transformed the very nature of international legal jurisprudence. The unmitigated violence of the Nazis against the Jews, involving the horrors of the Holocaust, as well as the terror directed against other European, Slavic, and Soviet peoples, was simply unparalleled in human history. On the other side of the globe, the slaughter and

1. WILLIAM EBENSTEIN, GREAT POLITICAL THINKERS: PLATO TO THE PRESENT 120 (Holt, Rinehart & Winston 4th ed. 1969).

exploitation of the Chinese, Vietnamese, Korean, and Pacific peoples added millions more to the war's toll.[2]

Because of these terrible realities, a unique *corpus juris* (body of law) was created in good faith to ensure, as far as possible, that the massive war against subject human populations—including a state's own as well as others—would never happen again. Developed during and immediately after World War II, this *corpus juris* consists of: 1) the Atlantic Charter, the Declaration of [the] United Nations and subsequent wartime or summit declarations by the western allies;[3] 2) the United Nations Charter;[4] 3) the Charter of the International Military Tribunal, hereafter referred to as the Nuremberg Charter, and the subsequent Nuremberg trials;[5] 4) the Universal Declaration of Human Rights that contributed to the subsequent post-war explosion in international human rights law;[6] 5) the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;[7] 6) the 1949 Geneva Conventions and the systematic elaboration of humanitarian law;[8] 7) the *Reparations Case* that recognized the international

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2. *See* PETER LONGERICH, HOLOCAUST: THE NAZI PERSECUTION AND MURDER OF THE JEWS. (Oxford Univ. Press Inc. 2010); *see also* GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II 894-921 (Cambridge Univ. Press 2d ed. 2005) (the last chapter of this excellent book is on the "cost and impact" of the war).

3. *See, for example,* Declaration of Principles, known and cited hereafter as the Atlantic Charter, by the President of the United States and the Prime Minister of the United Kingdom, August 14,1941 [hereinafter Declaration of Principles] *available at* http://www.nato.int/cps/en/natolive/official_texts_16912.htm; *see also* THE ATLANTIC CHARTER (Douglas Brinkley & David R. Facey-Crowther eds., St. Martin's Press 1994); Declaration of United Nations, 6 Dep't State Bull. 3, 3-4 (1942).

4. *See* LELAND M. GOODRICH & EDWARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS (World Peach Found.2d ed. 1949); JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, (Oxford Iniv. Press 2006) (2005); *see also* Charter of the United Nations [hereinafter U.N. Charter] *available at* http://treaties.un.org/doc/Publication/CTC/uncharter.pdf.

5. *See* Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544 [hereinafter Nuremberg Charter] *available at* http://avalon.law.yale.edu/imt/imtconst.asp; Judgement of the International Military Tribunal, Oct. 1, 1946 *available at* http://avalon.law.yale.edu/imt/judgen.asp. *See also* Quincy Wright, The Law of the Nuremberg Trial, 41 AM. J. INT'L L. 38 (1947).

6. *See* Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess, 1st plen.mtg., U.N. DOC A/810 (Dec. 12, 1948); *see also*: JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ORIGINS, DRAFTING AND INTENT (Bert B. Lockwood, Jr., ed., Univ. of Pa. Press 1999); *see also* WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW (Wadsworth Publ'g Co. 6th ed. 2010) (1990) (providing a brief overview of the evolution of human rights law since the Declaration).

7. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) *available at* http://www.hrweb.org/legal/genocide.html; *see also* JOHN COOPER, RAPHAEL LEMKIN AND THE GENOCIDE CONVENTION (Palgrave Macmillan 2008).

8. The Geneva Convention of 1949 and the two 1977 additional protocols are often referred to as the "Geneva Conventions," or as the "Law of Geneva." This now consists of the following: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; (entered into force Oct. 21, 1950) *available at* http://www.umn.edu/humanrts/instree/y1gacws.htm; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) *available at* http://www.icrc.org/ihl.nsf/full/370?opendocument;

personality of entities other than states, such as an international organization.[9] Subsequent to these developments is the gradual evolution, during the Cold War, of *jus cogens*[10] and the so-called International Bill of Rights.[11] As Professor Louis Henkin of Columbia observes, the modern human rights movement is an important development of the "various articulations of the war aims of the Allies in World War II."[12]

As we shall see, the three Charters—the Atlantic, the United Nations as well as the Nuremberg- and their related declarations or documents were critical factors in establishing the fiduciary foundations of the new international legal order.

This is because, beginning with the Atlantic Charter, and the Declaration by the United Nations, January 1 1942, the Allied wartime declarations contained specific promises and commitments by the Allied powers that created, in essence, a "fidicia" or trust between the promissory government and its own people or nation, as well as with other peoples in the world. Made during the war, these promissory declarations created, as we shall argue below, legally binding fiduciary duties, interests or relationships between the mortally threatened governments and the peoples or nations that they were trying to influence around the world.

The legal definition of the nation, unlike that of the state, has always been problematic and underdeveloped in international law.[13] For our purposes, the nation here is legally defined as a jural community consisting of a distinctive people, some or most of whom occupy a specific territory, which share a sense of moral and legal obligation toward one another. As Michael Barkun explains in his book *Law Without Sanction*, the concept of "jural community" means the "widest grouping within which there are a moral [or legal] obligation and a means of ultimately to settle disputes peacefully."[14] In this sense, the nation as a

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*see also* Protocols I and II Additional to the Geneva Conventions of August 1949, June 8, 1977 (entered into force July 12, 1978).

9. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

10. CHRISTOS L. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES, (North-Holland Publ'g 1976); *see also* Carin Kahgan, *Jus Cogens and the Inherent Right of Self Defense*, 3 ILSA J. INT'L & COMP. L. 767 (1997).

11. SLOMANSON, *supra* note 6.

12. LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Columbia Univ. Press 1981).

13. *See* JOHN RAWLS. THE LAWS OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED." (Harvard Univ Press 3d ed. 2000) (providing a non-historically based call for a law of the people). *See also* INTERNATIONAL LAW AND THE RISE OF NATIONS: THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS (Robert J. Beck & Thomas Ambrosio eds., 2002); J. Sammuel Barkin & Bruce Cronin, *The State of the Nation: Changing Norms and Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107 (1994).

14. MICHAEL BARKUN, LAW WITHOUT SANCTION: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY (Yale Univ. Press 1968).

jural community exists as a legal pact and an ongoing normative narrative even between the dead, the living and the unborn since it can keep legal obligations, such as public or private trusts, between preceding, present and pending generations. According to Professor Barkun, such jural communities can be found in so called "primitive" societies as well as in international law. As we shall see, because of legal developments during World War II, such nations had rights recognized prior to statehood, such as self-determination, and even against their own governments, as embodied in the Nuremberg Charter.

In short, the nations of the world took on extraordinary significance during World War II as the Allied governments made solemn promises to peoples throughout the globe in an ongoing attempt to mobilize the millions needed to defeat the Axis powers. These steps included the making of promissory declarations to millions of people under European colonial control in an effort to gain their supreme allegiance or, at least, not support the Axis side. The future fiduciary acts promised by the Allied governments included the promise of human rights, self-determination, systems of trusteeship and collective security when and if the war was won.

Yet, in the early years of the conflict, especially during the summer of 1941, the Axis powers seemed to be winning the war.[15] The German Colossus stretched from Norway and the North Sea through Europe and Greece to the Mediterranean and North Africa. Hitler had just attacked the Soviet Union and few observers thought at the time that the Russians could stand up to the German onslaught.[16] On the other side of the globe, the Japanese had more than a million men in China and seemed intent on carving out its "Co-Prosperity Zone" without any serious opposition. There seemed nothing that could—or would prevent the possible linkup of German and Japanese forces along the rim of the Indian Ocean, especially in 1940 till early June 1942. Such a linkup would enormously complicate the Allies capacity to win the war over their mortal enemies.[17]

So, the outcome of the war was very much in doubt in the early 1940s. In response, the Allies began to make promissory declarations to their own and other peoples involving the international recognition of human rights, self-determination and collective security to protect the ensuing peace, if they first won the war.

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15. WEINBURG, *supra* note 2; *see* WILLIAM L SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY (Simon & Schuster 3d ed. 1990).

16. In the early years of the war, the British were, in particular, skeptical of the Soviet ability to hold out. *See* ELLIOTT ROOSEVELT, AS HE SAW IT (Greenwood Press 1974).

17. GADDIS SMITH, AMERICAN DIPLOMACY DURING THE SECOND WORLD WAR 1941-1945 (Newbery Award Records 2d ed. 1985).

## THE FIRST PROMISES: THE ATLANTIC CHARTER

The very first, and one of the most important documents in this regard, the Atlantic Charter, makes it clear that the promises made by the governments of the United States and the United Kingdom were to the "peoples" or "nations" of the world. The choice of wording was deliberate. For instance, during the Atlantic Charter Conference in 1941, Roosevelt told Churchill that "the peace cannot include any continued despotism. The structure of the peace demands and will get equality of peoples."[18] This is, in part, the basis for Article Three of the Atlantic Charter promsing all peoples self determination; Roosevelt thought that this inclusion was critical to insuring the "equality" of all peoples. Accordingly, the Atlantic Charter mentions "peoples" or "nations" eight times and while the word "states" is used only once.

The Atlantic Charter was the culminating statement made by President Roosevelt and Prime Minister Churchill at their first meeting in Placentia Bay, Newfoundland in August, 1941.[19] At the outset of the meeting, the British undoubtedly wanted greater military involvement in the war against Germany by neutral America, not yet a formal belligerent. President Roosevelt, worried about the domestic opponents of the war, such as the isolationists, had the more subtle, focused and far-reaching goal of agreeing to a set of fundamental principles that would guide the Allied cause in the future.[20]

Specifically, before the meeting of the two leaders, Roosevelt made it clear to his private advisors that he wanted a concise statement of war aims from the very beginning that articulated, very forcefully, that the goals of the war included self-determination for all peoples and nations, including the colonial and conquered nations of the world.[21] He thought the failure to issue such war aims, especially the failure of President Wilson to get all the allies to sign off on the Fourteen Points prior to America's entry into World War I, at the beginning of the last war by the Allies contributed, in part, to the fiasco of the Versailles negotiations and treaty.[22]

President Roosevelt was determined not to repeat the same mistakes. In his memoirs of the meeting, (written as the war in Europe continued) Secretary of

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18. AMERICAN POLITICAL THOUGHT: THE PHILOSOPHIC DIMENSION OF AMERICAN STATESMANSHIP (Morton J. Frisch & Richard G. Stevens eds., Transaction Publishers 3d ed. 2011). *See also* Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*. 26 WILLAMETTE L. REV. 113 (1989).

19. SUMNER WELLES, THE TIME FOR DECISION (Harper & Brothers 1944).

20. ROBERT E. SHERWOOD, ROOSEVELT AND HOPKINS, AN INTIMATE HISTORY. (Enigma Books rev. ed. 2001). *See also* SUMNER WELLES, SEVEN DECISIONS THAT SHAPED HISTORY (Harper & Bros. Publishers 1951); ROOSEVELT, *supra* note 16.

21. WELLES, *supra* note 19 for FDR's son's personal account of the meeting and FDR's motivations. *See also* Sherwood, *supra* note 20; Foster Rhea Dulles & Gerald E. Ridinger, *The Anti-Colonial Politics of Franklin D. Roosevelt*, 70 Pol. Sci. Q. 1 (1955).

22. ROOSEVELT, *supra* note 16.

State Sumner Welles writes that President Roosevelt approached his first meeting with Prime Minister Churchill with a definite agenda in mind. Speaking of President Roosevelt, Welles states that:

> "he [Roosevelt] felt it imperative to take up for consideration certain major political problems. . ..Most important among the political problems which he desired to discuss with Mr. Churchill was the need for a general agreement between the two governments, while the United States was still at peace and the European war was still in its earliest stages, covering the major bases upon which a new world structure should be set up when peace finally came. . .The President rightly believed that the mere announcement of such an agreement would prove invaluable in giving encouragement and hope to the peoples now fighting for survival."[23]

A close aide of the President, Robert Sherwood, as well as Roosevelt's own son, on hand as a military officer at the summit, both later confirm Welles' account of the planning and purposes of the meeting. Hence, President Roosevelt was determined to use this first summit between Churchill and himself to obtain a basic statement of the ultimate allied war aims.[24] He addressed the subject of issuing such a declaration of war aims immediately upon his first meeting with Churchill on the U.S. warship Augusta and Churchill quickly agreed. In fact, in his memoirs, *The Hinge of Fate*, Churchill claims to have written the "first draft" of the Atlantic Charter.[25] This is undoubtedly true; however, there is very strong evidence Roosevelt already had a very good idea of what he wanted the agreement to say. After expressing his enthusiastic approval for Churchill's proposal, President Roosevelt stated, "he would like to consider the precise text very carefully in order to be certain that all the points which he himself had already formulated, and which he regarded as essential, were amply covered."[26]

There is, in fact, strong further evidence that FDR had already written out "all the points. . .which he regarded as essential" while working with Welles in Washington D.C. in the days before the first summit between the leaders. A key Roosevelt aide at the time, Robert Anderson, reports that then acting Secretary-of-State Sumner Welles wrote out a working draft of Roosevelt's personal ideas of a declaration while still in Washington, D.C., before the meeting, and took it to the summit; The President's son, who was with his father as a young naval officer throughout the summit, reports essentially the same facts.[27] Not

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23. WELLES, *supra* note 19, at 174. *See also* Memorandum of Conversation from Sumner Welles, Under Sec'y of State (Aug. 11, 1941) (on file with The Avalon Project at Yale Law School); THOMAS H. GREER, WHAT ROOSEVELT THOUGHT: THE SOCIAL AND POLITICAL IDEAS OF FRANKLIN D. ROOSEVELT (Mich. St. Univ. Press reprt. 1958).

24. WELLES, *supra* note 19; SHERWOOD, *supra* note 20; ROOSEVELT, *supra* note 16.

25. WINSTON CHURCHILL, HINGE OF FATE (Houghton Mifflin 1950).

26. WELLES, *supra* note 19 at 175. *See also* ROOSEVELT, *supra* note 16.

27. SHERWOOD, *supra* note 20; WELLES, *supra* note 19; ROOSEVELT, *supra* note 16.

surprisingly, as soon as the President received Churchill's proposal for such a joint declaration, he tasked Welles to work with the British to help write out the first draft of the document. Welles continued to work with the Prime Minister and Sir Alexander Cadogan until the final draft was agreed upon at the end of the summit.[28]

Examining the Charter reveals not only what it says or implies but, as important, to whom it is addressed—the "peoples" or "nations" of the world—terms that American statesmen would repeatedly use during the war in order to include colonial subjects as well as the conquered populations living under the Axis yoke. Even so, the Charter itself is seemingly simple, and succinctly states:

THE ATLANTIC CHARTER

"The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;

Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security;

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;

Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of

28. WELLES, *supra* note 19; SHERWOOD, *supra* note 20; ROOSEVELT, *supra* note 16.

> their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measure which will lighten for peace-loving peoples the crushing burden of armaments.
>
> Franklin D. Roosevelt
> Winston S. Churchill
> August 14, 1941"[29]

The heart of the Charter is the section on the "certain common principles. . . on which they base their hopes for a better future for the world." From the perspective of the American government and many colonized populations, the Atlantic Charter recognized first and foremost the rights of all peoples to self-government and, in essence, self-determination. President Roosevelt knew that the American people, particularly the vocal isolationists, were not going to support a war effort that resulted, once again, in the triumph of British or European colonialism.[30] Hence, at least for the American government, the nations under colonial control held precedence over states' once sacred claims to the "right" of colonial domination as a domestic matter. The United Nations Charter later embodied the right of the peoples to self-determination, which is, in essence, recognition of the nation or nations' rights on the international plane prior to statehood.[31] This was, perhaps, the most important element of the Charter. In short, the Atlantic Charter, taken at its face [or literal] value, is addressing the "peoples" or "nations" of the world, not simply "states."

For Roosevelt, the distinction was critical since he was convinced that people left in colonial servitude after this war was won would sow the seed of future wars. Such a belief, of course, directly clashed with British colonial and imperial policies.

As John J. Sebrega states, the "language of Point Three [of the Atlantic Charter] would cause much mischief in the Roosevelt-Churchill 'special relationship' during World War II."[32] Yet, at the time, desperate to forge an Anglo-American relationship, if not alliance, Churchill put on a brave face and agreed to the Charter.

There is strong evidence that the English people and, indeed, Churchill's own war cabinet, were not impressed with the summit statement and many were

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29. Declaration of Principles, *supra* note 3.

30. WEINBERG, *supra* note 2; SHERWOOD, *supra* note 20; WELLES, *supra* note 19; ROOSEVELT, *supra* note 16.

31. ("The purposes of the UN Charter are . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .") U.N. Charter, *supra* note 4, ch. 1, art. 1, pt. 2.

32. John J. Sebrega, *The Anticolonial Policies of Franklin D. Roosevelt: A Reappraisal,* 101 Pol. Sci. Q. 65, 66 (1986).

deeply alarmed by what the Atlantic Charter stated.[33] But it was too late; the message, hope and promises of the Charter were sweeping the globe.

As General Carlos Romulo of the Philliphines stated:

> "I toured the Asiatic territories and I learned from the leaders and the peoples of the flame of hope that swept the Far East when the Atlantic Charter was made known to the world. Everywhere these people asked the questions: Is the Atlantic Charter also for the Pacific? Is it for one side of the world, and not for the other? For one race and not for them too?"[34]

President Roosevelt answered the General's question. In a radio address to the American People soon after Pearl Harbor, President Roosevelt made the global scope of the Atlantic Charter fully explicit; in his "Broadcast to the World" on February 23, 1942. Roosevelt stated that: "The Atlantic Charter applies not only to the parts of the world that border the Atlantic, but to the whole world; disarmament of aggressors, self-determination of nations and peoples, and the four freedoms-freedom of speech, freedom of religion, freedom of want and freedom from fear."[35]

The origins of the fiduciary Law of Nations is found, in part, within the wording of the Atlantic Charter, addressed to the "peoples" or "nations" fighting (or conquered by) fascism, as well as in its recognition of a right that a people already possess prior to statehood, namely the right to self-determination. The Charter's wording is deliberate. As we shall see, the Atlantic Charter's deliberate wording, contributed to the subsequent creation of fiduciary general principles of international law in the post war world, especially within the Charter of the United Nations. In short, this was not in any way an act of state-centric law-making. In the face of a great and seemingly growing mortal danger, the Allied governments would endorse the Atlantic's Charter's norms as *fiduciary* "promises to keep"—if and when the war was won.

In particular, the Atlantic Charter purports to achieve, after Allied victory, a world in which "all the men in all lands may live out their lives in freedom from fear and want (paragraph six)."[36] This is the beginning of Roosevelt's attempt to have the four freedoms recognized as explicit war aims. This led, in turn, to the eventual recognition of these freedoms as human rights in international law that belong to individuals and to the peoples as a whole.[37]

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33. WILLIAM R. LOUIS, IMPERIALISM AT BAY: THE UNITED STATES AND THE DECOLONIZATION OF THE BRITISH EMPIRE, 1941-1945 (Oxford Univ. Press 1978).

34. DIPLOMACY: NEW APPROACHES IN HISTORY, THEORY, AND POLICY (Paul Gordon Lauren ed., The Free Press 1979).

35. Franklin D. Roosevelt, President of the United States, Fireside Chat: Broadcast to the World (Feb. 23, 1942) (transcript *available at* http://www.mhric.org/fdr/chat20.html).

36. Declaration Principles, *supra* note 3, at para. 6.

37. GREER, *supra* note 23; *See also* EDWARD MORTIMER, THE WORLD THAT FDR BUILT: VISION AND REALITY (Charles Scribner's Sons 1988); WARREN F. KIMBALL, FORGED IN WAR: ROOSEVELT, CHURCHILL AND THE SECOND WORLD WAR (Harper Collins reprt. 1998).

As a result, Roosevelt was recognizing, on an international level, what the peoples of the world already possessed. States are not the sources of human rights nor can government give what they don't own. According to John Locke, individuals and the nation or people as a whole inherently possess these rights naturally and preserve these rights when they create a social contract to live together in a civil society.[38] (In contrast, hypothetically speaking, there is no need to recognize human rights in a society of one.) By agreeing to the Atlantic Charter and to the subsequent wartime January 1st, 1942 Declaration of United Nations, governments were simply recognizing these rights for the first time on an international plane. This wasn't necessarily due to altruistic motives but rather as a consequence of their mortal danger and subsequent need to mobilize millions of people to serve in, fight, sacrifice, kill and possibly die in the war.

In this context, the telegram from Secretary of State Cordell Hull to American Ambassador in Great Britain John Winant immediately after the Atlantic Charter Conference is revealing of this promissory intent. Hull was concerned that the press in London seemed uncertain about the meaning of the fourth principle of the Atlantic Charter. He bluntly warned Ambassador Winant:

> "Actual and potential victims of the Axis powers will not take hope and do their up-most to resist aggression by joining forces with the United States, the United Kingdom and other like-minded nations if they gain the impression that the basic fourth point of the joint declaration is in reality an empty promise. . ."[39]

Hence, this is episodic evidence that even America's Secretary of State saw the Charter as essentially a promissory declaration.

Furthermore, the promissory nature of the Atlantic Charter is evidenced by the formidable task, explicitly referred to in paragraph six of the Charter, that was facing the two powers, namely "after the final destruction of the Nazi tyranny." In the summer days of 1941— long before Midway, (a stunning U.S. naval victory only six months after Pearl Harbor that allowed the Allies to focus their first priority on winning the war in Europe), Stalingrad, El Alamein, Rome, Normandy or Remagen—this was not at all a foregone conclusion. In fact, in August 1941, the outcome of the war in Europe, China and the Pacific was very much in doubt. For instance, President Roosevelt and Prime Minister Churchill met on the decks of the massive British battleship, the *Prince of Wales*, which was tragically lost with almost all hands only four months later in a futile effort to support the besieged British garrison at Singapore.[40] This loss

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38. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g reprt. 1980). *See also* A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY (Princeton Univ. Press reprt. 1995).

39. Telegram from Cordell Hull, Sec'y of State, to John Winant, Amb. I the U.K. (Aug. 25, 1941), *available at* http://avalon.law.yale.edu/wwii/at11.asp.

40. CHURCHILL, *supra* note 25, at 16.

alone must have been a searing heartbreak to the statesmen and senior military leaders who had enjoyed the hospitality, accommodations and friendship of the officers and crew during the first summit between Prime Minister Churchill and President Roosevelt. Yet, more tragic news was to come, especially since the Allies would need to cross the oceans to fight their enemies. Added to the losses that the American sustained at Pearl Harbor, the Allies lost over a dozen capital war ships and countless merchant ships to the Axis powers between the historic meeting at Plancenta Bay in August 1941 and the end of the year. This was a rate that simply could not be sustained if they had any hope to win the war.

Even so, the Charter planted the seed that was to grow as the war progressed into a highly developed system of promissory declarations to be fully redeemed, supposedly, in the post war world. Yet, all of this was still uncertain and premature in August 1941. Unfortunately, events were quickly to get much worse in the dark days of late 1941 and early 194 as the Axis powers would achieve stunning surprises and advances.

## THE PROMISES CONTINUE: THE DECLARATION OF [THE] UNITED NATIONS, JANUARY 1, 1942

The Atlantic Charter cannot be read in isolation from its immediate historical times, popular impact, or subsequent developments. This is because, within four months of signing the Atlantic Charter, the United States was attacked by Japan at Pearl Harbor and, within days, Hitler declared war on the United States as well. In early December, the United States suddenly found itself engulfed as a full combatant in a world war.[41] In the Pacific, the Japanese invaded the Philippines, Wake, Guam as well as the Malay Peninsula, taking the great naval base of Singapore, which provided them access to the Indian Ocean and possible link up with the Nazis. In Europe, Hitler's armies were poised to strike before Moscow. The Germans were also building up an army and air force to strike eastward in Africa toward the Suez Canal. In war theaters throughout the world, the Allied powers seemed to be in full retreat while the victorious Axis powers were advancing. The fast and furious pace of events resulted in the United States quickly forming an alliance with the other countries at war with fascism and signing together a joint declaration that reiterated the importance of the Atlantic Charter.

In his memoirs, *A Time for Decision*, Sumner Wells discusses the link between the Atlantic Charter and the Declaration stating that:

> When the United States was forced into war less than four months later [after the Placenta Bay meeting] the Atlantic Charter became the agreement that was to bind together the United Nations. It linked them as allies during the war, and pledged them to continue their association after victory had been

41. WEINBERG, *supra* note 2; SHIRER, *supra* note 15.

> won. In January, 1942, the United Nations Declaration adhered to by all the governments at war with the Axis powers, and later signed by additional governments as they also entered the war for liberty, bound them all to support the principles set forth in the Atlantic Charter and committed each of them to make no separate peace with the Axis nations so long as the war continued.[42]

In a robust display of solidarity and alliance, the United States joined 25 other governments –eight of whom were in exile- to make the "Declaration Of [The] United Nations on January 1st, 1942 in Washington, D.C., which reads as follows:

> "DECLARATION of [the] United Nations
> A Joint Declaration by the United States, the United Kingdom, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia
> The Governments signatory hereto,
> Having subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter.
> Being convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world, [Emphasis Added]
> DECLARE:
> (1) Each Government pledges itself to employ its full resources, military or economic, against those members of the Tripartite Pact:* and its adherents with which such government is at war.
> (2) Each Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.
> The foregoing declaration may be adhered to by other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism.
> Done at Washington
> January First, 1942"[43]

In this historic Declaration, made in good faith, the signatory governments announce their joint commitment to the common programme of purposes and principles known as the Atlantic Charter. They then expand this to include the recognition of human rights, perhaps for the first time, as an international issue

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42. WELLES, *supra* note 19, at 179.

*The Triparite Pact frefers to the Axis powers consisting of Nazi Germany, Italy and Japan.

43. Declaration of United Nations, *supra* note 3.

and norm "in their own lands as well as in other lands," and not simply within the domestic jurisdiction of the state.[44] Finally, each government pledges to cooperate with the other government signatories and not make a separate peace with the enemy. In short, the entire document is in the form of a promissory pledge to each other, and to the watching world, to do everything in their power to win the war to insure life, liberty, independence and religious freedom, and to preserve human rights and justice. The government signatories are undertaking the solemn pledges for themselves and, via the Atlantic Charter, the peoples of the world. As we shall see, the Roman legal term "fiducia" can be described as a "pledge" and is the basis of fiduciary interests, norms and relationships that characterize the Law of Nations.

Acting in good faith, the signatories to the Declaration were creating solemn legal obligations during times of mortal danger yet are not, as we shall see below, typical states. The Atlantic Charter was originally signed by two governments as representatives of their respective states. In contrast, the Declaration expands upon the number of signatory governments from two (in the Atlantic Charter) to twenty-six, and many are decidedly not states. This was, in part, by intentional design by Roosevelt and his Administration.

For instance, upon closer scrutiny, almost one half of the signatories of the historic, yet often overlooked, "Declaration of [the] United Nations" on January 1st, 1942 were conquered or colonized countries. Unless one resorts to a legal fiction in such situations, the "state" in such signatories was often *de facto* governments or nations effectively severed from the full legal characteristics of statehood. Hence, President Roosevelt's personal decision to call the signatory powers the "United Nations" seems to be a very accurate description of the alliance.[45]

For instance, India was a colony of Britain and the British war cabinet at first seemed to flatly reject the idea that India might sign the declaration at all.[46] In contrast, President Roosevelt, urged on by Harry Hopkins, was eager to have India sign the Declaration. Roosevelt, in an extant working draft in his own hand, even indicated the first ordering of India's place very high in the list of signatories, though this was later revised.[47] In doing so, Roosevelt was undoubtedly expressing his conviction that the Atlantic Charter, which was reaffirmed in the Declaration, applied to India after the war was won. The sovereign status of some of the other signatories was unclear, at least by current standards that legally define the "state."[48] For instance, Canada and New Zealand had

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44. SUMNER WELLES, THE WORLD OF THE FOUR FREEDOMS (Columbia Univ. Press 1943).

45. TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. (Yale Univ. Press reprt. 2000) (1997).

46. SHERWOOD, *supra* note 20.

47. *Id.* at 452-53.

48. *See*, SLOMANSON, *supra*, concerning the four legal criteria for defining a state.

dominion status within the British Empire, and though nominally independent, seemed to have a dual sovereignty consisting of the home government and the crown, represented in country by the Governor-General. (The Prime Minister of Canada, for instance, was not even invited to the August 1941 summit between Roosevelt and Churchill, even though it occurred in Placentia Bay, Newfoundland, which is technically almost within Canadian waters. At the time, Newfoundland seemed to possess a separate dominion status within the British Empire and was not part of Canada).

The government of Australia was then described by the British, not as a "dominion," but as a "commonwealth" subject to the King, who was the apparent sovereign, the same arrangement as with the other dominions. Churchill and the Prime Minister of Australia were to have a famous dispute almost a half year later over precisely who had the right to command Australian troops in the field.[49] (Churchill ordered them to Burma in the spring of 1942 while the Australian Prime Minister ordered them home to defend down under from possible Japanese invasion.)

Furthermore, almost a third of the signatories, eight in all, were governments in exile. (Due to Soviet occupation, some of these governments never effectively reasserted their control over their native homelands after the war was won.) The presence of so many governments in exile presents the most extreme example of the distinction between the people or nation on one hand, and the government on the other since the state has literally been disemboweled by the war.[50] In short, this is not international law making that was traditionally done before World War II largely between states. As such, the Declaration is a solemn pact between governments and their peoples, not simply a treaty between states.

This is why the Declaration doesn't say: "The States signatory hereto"—rather it simply says: "The Governments signatory hereto." In short, this was patently not an agreement simply between states, or a source of state-centric law. *As argued here, it is a promissory or fiduciary pact made in solemn good faith between governments and the allied, conquered colonial or neutral peoples of the world.* As the great jurist, Oscar Schachter, states in this regard: "political texts which express commitments and positions of one kind or another are governed by the general principles of good faith. Moreover, since good faith is an accepted general principle of international law, it is an appropriate and even necessary to apply it in a legal sense."[51] Elaborating upon this in

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49. *See*, *e.g.,* CHURCHILL, *supra* note 25, at 140-42.

50. Governments in-exile have often created perplexing problems of definition and appropriate powers in international law. *See, e.g.*, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMITH, INTERNATIONAL LAW: CASES AND MATERIALS 283-85 (Louis Henkin ed., West Group 3d ed. 1993).

51. *Id.*

the text *International Law*, co-authored by Louis Henkin, Richard Pugh and Hans Smit, Schachter continues:

> "A significant practical consequence of the 'good faith' principle is that a party which committed itself in good faith to a course or conduct or to recognition of a legal situation would be estopped from acting inconsistently with its commitment or adopted position when the circumstances showed that other parties reasonably relied on that undertaking or position."[52]

In short, the general principle of "good faith" can create a legal obligation. As we shall see, this is critical to the creation of a subsequent fiduciary duty.

At the time that the Declaration to [the] United Nations was made, January 1, 1942, President Roosevelt and other Allied leaders seemed to realize that promises must be made in good faith to the peoples of the world, especially when, at the time, it seemed as though the Axis were winning.

## PROMISES TO KEEP: THE CRUCIBLE OF WORLD WAR II

Analyzing the signatories to the January 1st, 1942 Declaration illustrates what, in times of mortal danger, governments, and not simply "states," can and do create binding international interests and norms. The placid and traditional idea that only states can make international norms or law applies a "one size fits all" test that simply does not adequately explain the binding legal and normative innovations that governments, peoples and even states engage in when faced with an unprecedented mortal threat. Traditional international lawyers may assert that only states can make international law. Yet, such an assertion, in order to be valid, requires that the profound innovation, changes and, in fact, revolution in international law caused by World War II simply be ignored, or reduced, wherever possible, to simply examples of state-centric law making. This traditional framework concerning the sources of international law simply is not adequate to analyze or explain the extraordinary legal developments that resulted from the Allies ongoing solemn promises and efforts made during desperate times to win the war by appealing to almost all the peoples and nations on the globe. In this sense, traditional lawyers who insist that only states can be sources of international law are like Dante's geometer, who, in the very last Canto of the *Paradiso*, "sets himself to measure the circle and who findeth not, think as he may, the principle he lacketh."

Even so, the list of signatories—while interesting—is not as important as what the Declaration reaffirms, namely the Atlantic Charter, and the audiences to which the Declaration is addressed, which included, at this bleak moment in the war, neutral, conquered or colonial peoples, as well as each other's domestic populations. In particular, the Allies had reason to fear that the conquered or

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52. SCHACHTER, *supra* note 50, at 100.

colonial peoples, such as the Ukrainians, or peoples of French Indochina, as well as the colonized peoples in India and Africa, might join the Axis cause. An outburst of anti-colonial sentiment, or even an uprising any where along the rim of the Indian Ocean, covered then with European colonies, would give the Nazis and Japanese a natural point and strategic place to link up their forces.

To prevent such a dangerous development, Churchill personally ordered the invasion of Vichy controlled Madagascar, over the heated objections of his own military chiefs, to prevent a possible link up and subsequent mortal threat to the Suez Canal and the critical Common-wealth North African military forces facing Rommel. He devotes an entire chapter in his volume *Hinge of Fate* to this ultimately successfully assault.[53] In short, preventing a German-Japanese linkup in the Indian Ocean, as well as keeping the neutrals and colonized peoples out of the war, was a critical concern of the Allies, especially in the first desperate months of 1942. The balance of power at this time was extremely precarious. For instance, the siding of the Turkish or Spanish people, alone, with Nazi Germany might have made a decisive difference in the European war during the early 1940s had they joined the Axis powers at this time.[54] This danger reinforces the reality of the dire Allied situation at the time; to confront these great and growing dangers, the Allies signed the Declaration as a promissory pact between governments and their own as well as other peoples throughout the world.

Specifically, with the Declaration of [the] United Nations of January 1st, 1942 that incorporates the Atlantic Charter, the Allied governments made declaratory promises concerning the self-determinations and human rights of all peoples in a sustained attempt to rally, first and foremost, their own nations or domestic populations to war. Second, they were making declaratory promises to, and attempting to mobilize, the conquered, colonized or neutral peoples and governments to the Allied cause by making explicit commitments concerning the ultimate purposes of the war— if the Allies were victorious. Third, they were making the promises to each other in order to present and fight as a common alliance with the explicit expectation that no one would defect and make a separate peace. Though historians might be tempted by hindsight to say that victory was certain in that war, the outcome was very far from clear to the statesmen signing the UN Declaration on a cold winter day in Washington D.C. at the very beginning of the new year, 1942.

The Roosevelt Administration never lost sight of this collective audience. This is one of the reasons that led Assistant Secretary of State Summer Welles to state at Arlington National Cemetery, a few months later, on the solemn occasion of Memorial Day, 1942 that: "This is a people's war. It is a war which

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53. CHURCHILL, *supra* note 25, at ch. 13.

54. SHERWOOD, *supra* note 20.

cannot be regarded as won until the fundamental rights of the peoples of the earth are secured. In no other manner can a true peace be achieved."[55]

These wartime promises, embodied in the Atlantic Charter and the Declaration of [the] United Nations, undoubtedly aided in influencing millions of colonial subjects in Africa, the Middle East, and Asia to fight against, or at least not aid, the Axis Powers. For instance, specific efforts by the U.S. and British governments were immediately commenced, based upon the Atlantic Charter, to insure that the colonies of Africa would remain on the Allied side.[56]

In essence, these principles and promises of the Atlantic Charter, the Declaration of [the] United Nations and subsequent intergovernmental statements created fiduciary relations, interests and duties concerning the peoples of the world.[57] (These solemn Declarations, like the post Moscow Four Power Summit Declaration (1943), could be described as an "Executory Trust" since later covenants and treaties, such as the Charter of the United Nations, would be required to fulfill these wartime promises,[58] though as we shall see other characterizations of a trust may apply as well). The governments are simply the trustees of the promises made, written literally in the blood of the people who, together with their governments (including the governments in exile within the allied cause), eventually won the war.

The Atlantic Charter and the Declaration of [the] United Nations were critically important because they set the pattern for promissory declarations between governments and their people throughout the war. For instance, unlike international treaties made between states, the Declaration was structured as an intrastate, or even a pre-state, pact (in the case of colonies, dominions and the Australian commonwealth) between government and its own and other peoples. In short, it created legal obligations between a government and its own and other peoples. As such, the resulting *international* legal obligations are before, or actually "beneath," the level of a treaty between two states. One consequence of

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55. Welles, Sumner, Under Sec'y of State, Memorial Day Address at the Arlington National Amphitheater: World Leadership to Protect Peace (May 30, 1942), *available at* http://www.ibiblio.org/pha/policy/1942/420530a.html.

56. AGNES CRAWFORD LEAYCRAFT DONOHUGH, COMM. ON AFR., THE WAR, AND PEACE AIMS, THE ATLANTIC CHARTER AND AFRICA FROM AN AMERICAN STANDPOINT, 1943 (an ironically, heavily British influenced publication that portended some of the possible post war problems with keeping the promises of decolonization. The British keep their promises; the same can't be said of the French who did not sign the original Declaration, unlike other occupied governments.).

57. There is a massive literature, of course, on the history and nature of a trust and the ensuing fiduciary duties, interests or relationships. *See*, *e.g.*, Tamar Frankel, Fiduciary Law (Oxford Univ. Press 2010).

58. I argue that wartime declarations like the Moscow Summit's "Declaration of the Four Powers" created, in essence, an executory trust since it promised an international organization and trial of the warlords when and if the war was won. For authority on the construction of an executory trust, *see City Bank Farmers Trust Co. v. The Charity Org. Soc'y*, 265 N.Y.S. 267 (App. Div. 1933); *Martling v. Martling*, 55 N.J. Eq. 771 (1898); *Carridine v. Carridine*, 33 Miss. 698 (1857); *In re Fiar's Estate*, 60 P. 442 (Cal. 1900). *See also Hoopes & Brinkley*, *supra* note 45.

this is that the fiduciary duties, norms, interests and relationships that resulted are, unlike many treaties between states, self-executing in the domestic courts of each nation as a jural community.

In the following section, we will explore the origins of the fiduciary foundations of these new legal norms in more detail by first examining the meaning of "fiducia" or "fiduciary" in Roman law and, secondly, the historical development during and after World War II leading to a fiduciary Law of Nations.

## "FIDUCIA": THE FIDUCIARY FOUNDATIONS OF THE LAW OF NATIONS

Under the extreme pressure of a mortal threat, such as World War II, a government of a state made "promises" to its own people, and to other nations, in order to mobilize the thousands, indeed millions, of individuals necessary to serve, sacrifice, suffer and perhaps even die so that that government and the people would survive. This fulfills the critical condition that Oscar Schachter states, namely that other parties concerned have reason to expect compliance and to rely on it. Some might argue that any governmental promise or pledge made under such circumstances as a mortal struggle or declared war are made under duress and are purely propaganda with no lasting political or legal significance. Yet, such a cynical interpretation makes a mockery of the subsequent service of the millions of soldiers and their families who expressed full confidence, as displayed in their subsequent actions, in the stated war aims by their governments concerning the ultimate purposes of the war. They believed in these promissory declarations to the significant extent that they left their home and peacetime jobs and served honorably, often enduring great hardships and sacrifice, until the war was won.

Many of the soldiers who served never returned and were killed on some distant shoreline, hilltop or forgotten battlefield. By the end of World War II, large American cemeteries stretched from the Aleutian Islands in the North Pacific to North Africa, from the beaches of Normandy and Anzio to the frontiers of Germany, from Guadalcanal to the blood-soaked sands of Iwo Jima and Okinawa. Soviet cemeteries ranged from the steppes of old Russia, deep in the Ukraine and the Crimea, from the gates of Moscow and Leningrad, from the Volga or the Don to the center of Berlin. British cemeteries could be found from the home islands through France to Germany, from Burma and Malaysia to Indochina, not to mention the countless British, American and Allied sailors or soldiers lost at sea. The Australians, Canadians, Chinese, French and Poles, and many other nations, had cemeteries scattered throughout the war zones as well. Most of these individuals were living breathing human beings when their governments first articulated and promulgated the promissory aims of the war in 1941 and 1942.

In short, before these promises could be even partially redeemed or fulfilled, hundreds of thousands of people were going to be killed in the attempt to win

the war. In view of this, these wartime promises cannot simply be construed or dismissed as simply contractual promises to specific individuals or mere propaganda. They constituted, in essence, solemn promises made in good faith that resulted in fiduciary duties, relationships and interests due to the peoples' expectation of compliance and to rely on it that prompted countless millions of people around the globe to leave home and go out to win the war. As such, these declarations and wartime promises formed an active, executory simple, or even involuntary (among certain Allied Powers), trust between these governments and their own and other peoples struggling to be free of German and Japanese militarism.[59] These promissory statements were solemn declarations made to entire peoples, in their present and future capacities, to be redeemed after victory on countless battlefields across the globe.

The idea of a fiduciary duty or relationship has ancient origins in Roman jurisprudence. The word "fiduciary" derives from the Roman idea of "fiducia," a word derived from the Latin verbs fidere" meaning to "trust" and earlier from "foedus" meaning a "compact" and "bide." In Roman law, a "fidicia" is an early form of trust or pledge concerning the return of property, if a debt was fulfilled, to the owners.[60] Hence the term "fiduciary," which is derived from Roman law, and means (as a noun) a person or entity holding the character of a trustee, in respect to the trust and confidence invested in the latter and the scrupulous good faith and candor which it requires.[61]

The contemporary legal definition of a "fiduciary" is derived from this Roman term of "fiducia," meaning a "pledge."[62] In essence, a trust is created, either by implied or active expression or intent, whenever one party, a trustee, pledges or promises to another in good faith to carry out a specific duty or promise, and the other party, the trustor, acts in confidence that this pledge will be carried out immediately or eventually for the specified beneficiary. A fiduciary relation or duty is created whenever a person or people trust or rely upon another to deliver upon promises made in good faith. As we have seen, the international jurist, Professor Oscar Schachter, characterizes good faith as a key source of international obligation.

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59. An active trust is one which imposes upon the trustee the duty of taking active measures in the execution of the trust. *See, e.g.*, *In re Buchls Estate*, 122 A. 239, 240 (Pa. 1923); *Welch v. N. Bank & Trust Co.*, 170 P. 1029, 1032 (Wash. 1918); FRANKEL, *supra* note 57. An involuntary trust requires no formal intent, but involves fraud, either actual or constructive, as an essential element. For our purposes, this is obviously the last resort. *See Farmers' & Traders' Bank v. Kimball Milling Co.*, 47 N.W. 402 (S.D. 1890).

60. JAMES HADLEY, INTRODUCTION TO ROMAN LAW, IN TWELVE ACADEMICAL LECTURES 181 (D. Appleton & Co. 1873). *See also* ANDREW RIGGSBY, ROMAN LAW AND THE LEGAL WORLD OF THE ROMANS (Cambridge Univ. Press 2010); HENRY CAMPBELL BLACK, A LAW DICTIONARY 496 (The Lawbook Exch. 2d ed. 1995); FRANKEL *supra* note 57.

61. *See also* HADLEY, *supra* note 60.

62. *Svanoe v. Jurgens*, 33 N.E. 995, 957 (Ill. 1893). *See also Haluka v Baker*, 34 N.E.3d 68, 70 (Ohio 1941).

Furthermore, a fiduciary (as a noun) has come to mean a person or entity holding the character of a trustee in respect to the trust and confidence involved in such a pledge. As such, a trustee has the legal duty of "scrupulous good faith and candor."[63] As an adjective, fiduciary means that the duty, interest or relationship so described has the character of a trust, whether voluntary or involuntary, and is founded upon the expectation of good faith and confidence. Specifically, as the Roman idea and practice evolved, a legally binding "fiducia," or pledge, creates a trustee, who often possesses a duty concerning property; a trustor, the person or entity that originally possesses the interest or property; and a beneficiary, who benefits from the transaction.[64] In the original Roman law and practice, the trustor was often the beneficiary as well. Much later, John Locke, in his *Second Treatise*, makes the people constituting civil society as both the trustors and beneficiaries of legitimate government, which simply acts as the trustee of the people's interests.[65]

Thus, Roman law inspired significant legal innovations concerning fiduciary interests, norms and duties. Though fiduciary law has evolved in complexity and legal application throughout the ages since Roman times, the basic idea is the same, namely a fiduciary legal duty is created whenever a person (or entity) pledges or promises to another in good faith to carry out a specific duty or promise, often concerning specific property, and the other party acts in confidence that this pledge will be carried out.[66]

This is especially true when property is involved that is not the prior possession of the trustee. It is important to note here that John Locke defined "property" as person, life and liberties, as well as his or her material possessions.[67] The relevant law in Roman, medieval and modern times unanimously agrees that the person making the pledge can not unjustly enrich himself or herself by virtue of false promises made in bad faith to the trustor or beneficiaries. In almost any current rule or system of law, such promises so made must be kept, especially when the trustor risks so much because of his or her confidence in the promissory statements.[68] This duty led, in medieval feudal and English law, to the duty of *Fides Servanda Est*, which literally means "Faith must be observed;" specifically, an agent must not violate the confidence reposed in him.

Hence, from this legal perspective of fiduciary duties construed since ancient times, governments have the duty to keep the solemn promises that they make in good faith to their own and other peoples, especially when these peoples or nations place full confidence in their government's promises to the point where

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63. BLACK, *supra* note 60.
64. BLACK, *supra* note 60. *See also* HADLEY, *supra* note 60; RIGGSBY, *supra* note 60.
65. LOCKE, *supra* note 38.
66. FRANKEL, *supra* note 57.
67. *See* LOCKE, *supra* note 38. SIMMONS, *supra* note 38.
68. FRANKEL, *supra* note 57.

significant numbers risk or actually lose their lives. In the historically grounded creation of the fiduciary Law of Nations during World War II, the peoples of the world became, in essence, both the trustors- as the source of the "property" consisting of their lives and liberties- as well as beneficiaries of the enunciated rights, norms and duties newly recognized by governments. (Once again, property here is defined in a Lockean sense as including people's lives, liberties and lands.)

As we have seen, to win the war, the Allied Powers began to make specific promissory pledges to the peoples of the world. Yet, governments cannot provide what they do not possess. In such situations, they can only recognize their solemn obligations to respect the interests and "property" of others that *already exist* within a civil society, although these liberties may be dormant and even unrecognized by the domestic government, especially upon an international level.[69] As such, in the promissory declarations and Charters supra, governments recognized, for the first time on the international level, their new or fiduciary responsibilities to protect and respect the rights of all peoples to their lives, liberties and land. Specifically, the wartime promises of the Allied Powers made in good faith to their own and other peoples created fiduciary norms, duties and interests between the respective governments and the allied, conquered, colonized and neutral peoples of the world. These promises were to become the *common property and possession* of all peoples when and if the war was won.

More importantly, these promissory declarations and charters created international fiduciary norms as general principles, such as human rights, that are unique in international law. Fiduciary norms require that a government recognize its own fiduciary responsibility as trustee of the new norm on at least three levels. First, the government as trustee must recognize that the norm belongs to the nation, to its people as an independent jural community[70]; it does not originate with the state. *This means, first and foremost, that that the fiduciary duties and norms created by governments and promised to their own and other peoples during the agony of World War II, such as human rights and crimes against humanity, are self-executing within the nation as an independent jural community.* Specifically, these fiduciary duties, norms and interests were created "below" the level of an interstate treaty and are *already binding* on a nation's judiciary. Second, a government signing the Declaration promises to

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69. LOCKE, *supra* note 38. *See generally* LEO STRAUSS, NATURAL RIGHT AND HISTORY. (Univ. of Chi. Press 1999).

70. BARKUN, *supra* note 14. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton Univ. Press 2005) [hereinafter SLAUGHTER, NEW WORLD] (discussing the enhanced role of judiciaries around the world). Reading this book made me realize that the nation's own judiciary could be the ultimate custodian of the Law of Nations and, as such, pursued this idea to this current publication; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA.J.INT'L L. 1103 (2000) [hereinafter SLAUGHTER, GLOBALIZATION].

recognize and respect these rights that belong to other peoples or nations beyond its own borders. Because of these solemn promises and subsequent massive response, especially by the Allied peoples around the world who relied and acted upon these promises at tremendous cost to themselves, the resulting fiduciary duties, norms, interests and relationships—after the war was won—became part of the very fabric of a legitimate government and, as such, a precondition for the legitimacy of its own sovereignty and state. This is a critical point to which we will return in the Conclusion.

Finally, in the last analysis, these rights and protections of the people are adjudicated by the judiciary in the nation's own courts as the ultimate safeguard of these fiduciary norms and duties, such as human rights. Only if these internal institutions fail do the rights of jurisdiction accrue to international or other jurisdictions.[71] In fact, inspired by a gifted student, I would argue that the term "self-determination," often contested in the legal literature, is an evolving phenomenon and process that is ultimately expressed in *a fully independent judiciary* that is the permanent protectorate of the people's rights and duties under the Law of Nations against potential governmental or state usurpations.[72] Thus, the ultimate expression of "self determination" is a nation of laws, not of men, especially in judicial matters of respecting basic human rights, and strict legal limitations on the legitimate use of force at home or abroad. In other words, the ultimate evolution of self determination is when the court decides, the nation abides.

The question remains: how do we characterize this new fiduciary Law of Nations? For reasons that we will explore in the following section, I believe that this modern Law of Nations can be best characterized by the classical Roman juridical concept and practice of *Jus Gentium* i.e. a Law of Nations. . .. common to the whole of humanity.

## JUS GENTIUM: THE CONTINUING INFLUENCE OF ROMAN JURISPRUDENCE

This new Law of Nations resembles, but does not completely correspond to, the classical conception of Jus Gentium or a "law of nations. . .common to the whole of humanity." (The terms Law of Nations and international law will be regarded as synonymous and will be regarded as interchangeable in the following sections. In contrast, the term "intergovernmental law" will be used as synonymous with public international law, or law made solely between states.) I will argue that it can be defined and described largely in terms of the Roman and Justinian concept of Jus Gentium or a Law of Nations. . . held in common

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71. Rome Statute, ICC-ASP/2/Res.3, U.N. Doc. A/CONF.183/9 (July 1, 2002) (is the legal bias of any jurisdiction by the International Criminal Court).

72. The student name is Trevor Smith; Concerning the evolving nature of a dometic judiciary, also see: SLAUGHTER, NEW WORLD, *supra* note 70.

with other nations or juridical communities in the world.[73] Because each jural community is unique, I will also argue that this is not the same argument found in the monist approach that the "law of nations and the law of each nation form an integrated, universal legal order."[74] The reality is much more complex and pluralistic.

To understand fully the scope and significance of these modern legal developments emanating from World War II, we must first understand the classical roots in Roman Jurisprudence of Jus Gentium. This requires us to resort to legal archeology or, in essence, an exercise in historical jurisprudence in order to comprehend fully the origins of the Law of Nations.

## HISTORICAL BACKGROUND: ROMAN JURISPRUDENCE AND THE LAW OF NATIONS

The *Institutes* of Justinian defines Jus Gentium as: "The law of nations. . . common to the whole human race."[75] This seemingly simple sentence that defines Jus Gentium presents significant definitional and conceptual complexities. As Arthur Nussbaum points out, in classical times, the meaning of Jus Gentium evolved as Rome expanded from a peninsular Republic to a vast empire.[76] At first, Jus Gentium, as a distinctive body of law, represented the Roman Republic's attempt to provide foreign merchants with a more equitable court of justice in which to pursue mercantile claims using comparative legal analysis of local laws and customs held in common with the Romans. As the Empire grew, the Roman conception of Jus Gentium evolved, under the influence of stoic philosophy, as a body of law that ideally governed the legal affairs of humanity as a whole.[77] The former definition reflected the origins of Jus Gentium in the Roman practice of using what might be described as comparative legal analysis of the local laws and customs of societies beyond the Republic to ascertain the controlling law in a particular case. The latter characteristics of Jus Gentium, influenced by stoic philosophy, emphasized during the days of Empire the universal nature of the legal norms that governed "the whole human race."[78]

The meaning of Jus Gentium comes from the Latin: Gentium (which is the genitive case for the Latin word gentes, meaning "peoples," or "nations"); and,

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73. Thomas Boudreau, *Jus Gentium and Systematic Legal Order: New Paradigm for International Law*, 5 INT'L PERSP. (1994).

74. SLOMANSON, *supra* note 6 (I first learned of this distinction in the Slomanson text which presents a clear and cogent descriptive analysis of this traditional dichotomy).

75. CAESAR FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 4 (J.A.C. Thomas trans., N. Holland Publ'g Co. 1975).

76. *See* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 14-15 (The Macmillan Company, New York, rev. ed. 1962) (1947).

77. *Id. See also* HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (Beacon Press, Boston 10thed. 1963) (1869).

78. *See* NUSSBAUM, *supra* note 76; *See also* JUSTINIAN, *supra* note 75.

"Jus," meaning, of course, law. Because of the precision of the Latin language, the phrase "Gentium" leaves no doubt that Roman jurists were referring to "peoples" or "nations" in the genitive case. There is no hint here of the concept of law *between* (or "inter gentes" in Latin) nations, peoples or governments. The Romans were describing with great precision the juridical concept of a law that originates from the different peoples and nations themselves, rather than a law that derives its origins from relations between governments or nations, which is an entirely different concept.[79]

In view of this, the Law of Nations, as the Romans originally intended it, becomes, at first, a question of evaluating the domestic law of each nation or people, and then trying to determine what this law has in common with all other nations and peoples. The sources of the Law of Nations are a nation's customs and "necessity."[80] At first, the origins of Jus Gentium were found within the common customs and law of the nation, not law created between the nations.

As the concept evolved and was influenced by stoic philosophy, Jus Gentium became a composite and potentially universal law that reflects the similar contributions of the "whole human race."[81] Thus, it is the law within a nation, to be found "in common" with all other nations, that is properly regarded in later Roman jurisprudence as the "Law of Nations."

The phrase, "the whole human race," reflects the influence of the stoic philosophy and its basic belief in the universal brotherhood of mankind. One of the great ironies of the period of Pax Romana is that a political order based upon the sword, iron disciple, and the military skills of the Roman Legions also gave birth, by the sheer success of the empire, to the innovative and prescient belief in the universal human family, a true "brotherhood of mankind."[82]

Of course, in the late Roman era, such universality could only be a philosophical longing or a juridical concept and a legal pretense since the whole of the Earth, let alone the entire human family, was unknown and largely unexplored. Even at the height of empire, the Roman world encompassed a relatively limited, though historically significant, section of the entire globe. Thus, the idea of a legal order based upon the laws common to the whole of humanity remained largely a legal fiction. It remained a lingering echo from the classical human heart for a more just and peaceful world, until the bloodiest war in human history occurred, resulting in a profound legal revolution concerning the newly limited legitimate powers of the state.

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79. *See also* BENEDICT KINGSBURY & BENJAMIN STRAUMANN, THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS (Oxford University Press, 2010).

80. *See* NUSSBAUM, *supra* note 76.

81. BOUDREAU, *supra* note 73.

82. BOUDREAU, *supra* note 73.

## DEFINING "THE MODERN LAW OF NATIONS"

Not until after the Holocaust and horrors of World War II were the legal, political and even geographical preconditions for Jus Gentium fulfilled. From a legal perspective, the important feature of the postwar period is that nearly all the governments at the time expressly consented to United Nations Charter, which is perhaps the fiduciary foundation stone of the new Law of Nations. After the war, new signatories continued to be added to the United Nations Charter from around the world. Thus, perhaps for the first time in human history, the sociolegal and political preconditions for a Law of Nations common to the whole of "Humanity" are actually being fulfilled. In this regard, it is important to note that the UN Charter and the new fiduciary Law of Nations were written, not by hypothetical individuals living alone in the Lockean state of nature, but by actual governments trying to survive during a Hobbesian state of war.

Yet, even in modern times it must be noted that, in a legal sense, the "whole human race" does not require de facto universality among all the peoples as nations of the world. For instance, the drafting of the concept of Jus Cogens after World War II, that culminated 20 years later in the Vienna Convention on the Law of Treaties, illustrates this point. Article 53 of the Vienna Convention states that a *jus cogens* norm is one endorsed by the whole.[83] Yet, in the extensive discussions among the drafters of the Convention, it is quite clear from the record that they did not mean by this Article that universal agreement by all states was necessary to be a universal norm. This would be giving the violator or an aggressor state or states, in essence, a veto power that violates and even voids the meaning or purpose of such a norm.[84] In view of this, a distinction can be made between *de facto* universality and *de jure* universality implicit within the now accepted principle of *jus cogens* that is embodied in the Vienna Convention. Hence the term "whole of humanity" is misleading. For this reason, we will simply use the word "humanity" when describing the Law of Nations. The challenge is to find what laws *are held in common within the various jural communities of humanity* and not necessarily to seek the consent of all human beings. In particular, by virtue of the bloody victory by the Allies in World War II, the fiduciary duties, norms, interests and relationships—many of which are embodied in the Charter of the United Nations—are the common birthright of humanity and all subsequent generations.

In this sense, the Charter of the United Nations is a hybrid document consisting of both fiduciary norms from the Law of Nations and public international law involving states. Hence, any state that signs the Charter of the United Nations agrees, by necessity, to the basic norms of the fiduciary Law of Nations as

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83. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.
84. *See* ROZAKIS, *supra* note 10.

well, such as self determination, recognition and respect for basic human rights and legal restraints on the unilateral use of force in international affairs. These fiduciary norms recognized within the Charter existed prior to and now independently of it as well, in the sense that the law of the Charter has been almost universally recognized and accepted by jurisdictions from around the world.

These slight modifications of the original meaning of Jus Gentium seem fully consistent with the classical intent of its ancient authors and practitioners who were, above all, concerned with the practical application of comparative laws.[85] If this Law of Nations is to be defined in terms of the classical Roman and Justinian concept of "Jus Gentium," then the meaning of the key word "common" must be explored and explained. The latter task, defining the word "common" looks deceptively easy. Yet, the word "common" has multiple and often the most uncommon of meanings!

## DEFINING JUS GENTIUM AS "LAWS COMMON TO HUMANITY"

Since World War II, treaties or conventions, as well as both customary law and general principles of international law, sometimes partake in the Law of Nations and often reach deep into domestic jurisdictions for their origins, formulation and use. In fact, I argue that the only true law between states is treaty law; the other sources, such as custom or general principles originate, and have always originated, in the Law of Nations.

If we are to use the term "Laws of Nations, largely in terms of the ancient Roman juridical concept of Jus Gentium, we must first define the various modern meanings of the term: "common," i.e., "The laws of nations. . .common to humanity." Due to limitations of space, we can only highlight the commonality of certain laws here. Such "common" laws include:

> (1) The series of treaties and conventions created during and after the World War II partly in response to fiduciary promises made by the allied governments to their own and other peoples. This is basically state-centric law though it now interpenetrates and overlaps with the fiduciary Law of Nations. For instance, the Charter of the United Nations is one such treaty, though, as we have already argued, it is actually a hybrid document that recognizes rights and legal norms, such as self-determination, under the Law of Nations as well; (2) Customary law including those laws common to domestic legal orders[86]; the decisions of domestic courts that are, or become, common to most of humanity though the domestic diffusion of customary law or the differential diffusion of non-consensual or fiduciary general principles of international law; in short, domestic courts and judiciaries play a critical role in

85. *See Maine, Henry, Ancient Law*, *supra* note 77.

86. *See* Roozbeh (Rudy) B. Baker, Customary International Law in the 21st Century: Old Challenges and New Problems 21 EUR.J. INT'L L. 173 (Feb. 2010) (providing a recent comment on customary law).

interpreting and upholding the Law of Nations; (3) General principles of international law that differentially diffuse into widespread state practice and domestic acceptance;[87] these include the fiduciary legal norms as a new class of general principles in international law created as a result of World War II; (4) Universal obligations and jurisdiction concerning certain types of crimes and activities including war crimes and crimes against humanity; the "Martens Clause" common to all of the 1949 Geneva Conventions is an example of such a shared or "common" obligation that can be adjudicated in national courts;[88] (5) The so-called global commons and other Public Trusts held in common by the whole of humanity, such as the high seas, the polar caps (geographically defined in terms of location), the atmosphere or outer space.[89] These areas belong to everyone as a common fiduciary interest of the peoples or nations of the world. As such, they are part and parcel of the fiduciary Law of Nations; in short, this far older and established international fiduciary order concerning the global commons and the freedom of the seas are the legal precedents of, the modern Law of Nations as a legal order. It is interesting to note in this regard that the Atlantic Charter refers to the "freedom of the seas" as one of the fundamental rights of the international legal order. (Grotius, the father of the Law of the Sea would be proud!)[90] In short, the new fiduciary norms consisting of the Law of Nations is easily grafted onto a far older, but often implicit fiduciary legal order. As such, this is one of the most promising areas for the future development and evolution of a fiduciary international legal order in the future, especially in dealing with global climate change. (6) Other pre-state (Westphalia 1648) legal and diplomatic customary and treaty norms, principles and practices that have survive a succession, not only of governments, but of successive states presiding over a given territory; often these norms begin in customary practice and thus become international law and, later in history, are embodied in treaties and thus are "hybrid" law—such as diplomatic privileges and immunities.[91] (7) Universal jurisdiction as a common basis for exercising international or national jurisdiction over crimes "so harmful to international interests that states are entitled—and even obligated—to bring proceedings against the perpetrator. . .. Human right rights abuses widely considered to be subject to universal jurisdiction include genocide, crimes against humanity and torture."[92] (8) The writing of jurists or scholars that are commonly accepted by the courts or

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87. *See* SCHACHTER, *supra* note 50.

88. *See* Theodor Meron, *The Martens Clause, Principles of Humanity and the Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (Jan. 2000).

89. *See* Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, in 35 INT'L & COMP. L. Q. 190-99 (Jan. 1986) (providing an example of the debate on the legal status of the global commons).

90. *See* THE ATLANTIC CHARTER, at ¶7, *supra* note 3.

91. *See* Thomas E. Boudreau, *A New International Diplomatic Order*, 24 OCCASIONAL PAPER (Stanley Foundation of Iowa, Dec. 1980) (published when I was a graduate student at the Maxwell School at Syracuse University).

92. *See* Princeton University, *The Princeton Project on Universal Jurisdiction*, *Program in Law and Public Affairs* (2001); *See also* UNIVERSAL JURISDICTION: NATIONAL COURTS AND PROSECUTION OF

> other international legal scholars as descriptive or definitive; 9) it should also be noted that the "domestic discourse" of governments with their own peoples concerning what their fiduciary obligations are or will be in the international legal order, especially during times of a perceived or actual threat, are a new source of international law especially when analyzed and decided by domestic jurisdictions.[93] Specifically, as we have seen, the fiduciary promises made by governments, especially during wartime when such governments are in mortal danger create, in essence, —depending on the specific circumstances of their founding or subsequent applications by domestic courts— public, resulting, implied or even executory fiduciary norms, interests or relationships to their own and other peoples concerning the (the government's) legal obligations to act or fulfill a promise in the future.

These are only some of the main areas where common or shared international legal duties, norms and fiduciary interests exist under the Law of Nations. The important point here is that, in keeping with the classical, yet largely aspirational concept of Jus Gentium in ancient times, there is now a historically grounded Law of Nations *common to humanity* that developed and evolved out of the agony of World War II.

## THE NATION AND THE STATE: THE NEW PROBLEMATIQUE?

After the Holocaust and horrible slaughter of WWII, states could no longer claim that their own nation(s) or populations within their powers were merely a passive presence with no international status or standing, subject only to domestic jurisdiction. The adoption of the Nuremberg Charter, the Convention on the Prevention and Punishment of Genocide and the revised Geneva Conventions of 1949 "internationalized"—and hence made problematic—the relationship between a state or government on one side and its own or other domestic populations on the other.[94] This leads inevitably to a legal split between the rights of the "nation" or the "people" united in a common jural community (able to assert its rights on a legal plane) and the responsibilities of a government. All too often these two different realities are rarified or abstracted into the simplistic social and legal construction of the "nation-state" or simply the "state."[95]

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SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., University of Pennsylvania Press 2004); *See also* Kenneth Roth, The Case for Universal Jurisdiction, FOREIGN AFF. (Sep./Oct. 2001).

93. THOMAS E. BOUDREAU, THE LAW OF NATIONS: LEGAL ORDER IN A VIOLENT WORLD (unpublished book in progress).

94. *See* TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (Quadrangle Books, Chicago, 1970).

95. The conflation of the very different terms "nation" and the "state" is so common that it seems part of the conventional wisdom, not to say the common vernacular of most contemporary political science and law texts. It is also, in my humble judgment, a misnomer, misleading and misses the very important and legally nuanced distinctions between the two words, especially since World War II.

As we have discussed, the promises made by Allied governments during the war were fiduciary in nature, made to the people or nation as a whole and recognized, on an international plane, the necessity of human rights, collective security and even individual liability for crimes against peace and humanity. The Nuremberg Charter even recognizes a people's rights, especially to exist free from arbitrary and overwhelming violence, against their own government.[96] The entire thrust of these legal innovations was to limit and restrain the exercise of unilateral and illegitimate force by a state against its own or other peoples. The result was the largely unintended, yet enduring creation of a new fiduciary Law of Nations recognizing that human rights, self-determination and the right of protection, even against one's own government, were now an integral part of international law. These legal innovations result in a profound shift in the fundamental and historically competing sources of legitimacy and sovereignty away from the state toward the nation or people of the polity. The people or nation is, in essence, the new *imperium et imperii* (sovereign within the sovereign) of the now legally limited state.

### *IMPERIUM ET IMPERII*: THE SOVEREIGN WITHIN THE SOVERIGN

The apparent roots of *imperium et imperii* as an enduring concept was in the evolution of Roman Law in the post Empire period.[97] Roman law ruled Europe for more than a thousand years after the fall of the empire. Various kingdoms and principalities used Roman law to adjudicate their disputes and property rights throughout the so-called Dark and Medieval Ages of Europe. The first recognized use of "Imperium et Imperii" was during this time to describe the idea of a divided sovereignty between the rulers and the ruled. Yet, the term can also be used to describe the ideal political arrangement of the early Roman Republic between the Senate and the Roman people.[98]

Yet, the idea of an *imperium et imperia* was not fully articulated or developed until the Medieval Ages in Europe when Roman Law was increasingly utilized. It sometimes conflicted with Canon law to describe and regulate the growing complexities of commerce as well as the relationship between a people and their polity.[99] In the late medieval ages, the idea of the *imperium et imperii* seemed to exist as more of an interrogatory as the Church, the divine right of kings and, ultimately, the people progressively claimed to be the true basis of legitimate political authority. With the Glorious Revolution in England, the American Revolution in the New World and the French Revolution on the continent, the

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96. *See* Nuremberg Charter, *supra* note 5.

97. *See*, STEPHAN WEISS, REGUM ET IMPERIUM (Paris Institut Historique Allemand, 2008).

98. *See* T. BROUGHTON, THE MAGISTRATES OF THE ROMAN REPUBLIC VOL. 3 (New York, American Philological Association, 1951-52) (describes this power as the Imperium, which was often delegated, but presumed to be exercised on behalf of the Roman people as a whole).

99. WEISS, *supra* note 97.

primacy of the people as the source of legitimate state authority seemed more assured, though always precarious. Yet, with the rise of fascism and communism in the 20th century, the people's role in politics, let alone as the legitimate source of political authority, seemed highly problematic to say the least.

In the post World War II period, the term *"imperium et imperii"* accurately describes the emergent significance of the new Law of Nations. Traditional (pre-World War II) international law was—and often still is—usually defined solely in terms of state centric law, or law made between sovereign states. In particular, before World War II, matters between the "nation" and the "state" were universally regarded as almost wholly within the domestic jurisdiction of the specific government in power and, hence, untouchable by international law.[100] Due to the profound legal innovations during and immediately after the war, such a "traditional" definition of international law is no longer historically plausible or legally accurate.

Since World War II, the legal (and political) reality of the relationship between the nation and the state is now much more complex and problematic because of the fiduciary relationships, interests and norms that governments created during the war. This obviously sets up a dynamic tension between the fiduciary and other rights of the nations and the powers and authority of any particular regime. The people want to preserve their rights and security, while governments, qua governments, usually want to increase their power and control.[101] The result is an ongoing and often contentious process of dynamic mutual definition or defiance and competing constructs or contested powers, as the nation and state vie with each other for ascendancy in private law, public affairs and political power.

*In particular, as seen above, fidcuairy international law now limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples.* By doing so, the emergence of the Law of Nations resulted in a fundamental realignment of the legal relationship between the nation and the government, especially concerning the permissible powers of the state. In essence, the nation or people are the new *imperium et imperii* of the once absolute state, the latter reaching its apotheosis in Hilter's regime of Nazi Germany. The Law of Nations resulted from the war against this regime and common commitment of the Allies, often expressed in fiduciary declarations, treaties and other documents, that such a state never be allowed to emerge again. The most important consequence of this is that the legitimation of state

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100. There were, of course exceptions: piracy, slavery and the Leagues' mandates; but I would argue that these, especially the latter, were episodic, often unenforced and largely ineffective. For instance, we still have slavery and piracy today.

101. This is a truism that borders on a tautology; to demonstrate this, simply see a good history book, or analysis of current events. Of course, the horrific ultimate example of this is the Nazi regime. *See* WILLIAM SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY (1990) (chronicles the endless gasping and predations for power of this lawless leviathan).

authority rests more solidly on the conduct of the state in actually observing the law of nations with its own and others' people. This is especially true in terms of the state's now legally limited ability to unilaterally attempt to legitimate the use of military or other deadly force in international affairs. For instance, this new legal reality in the Law of Nations is enshrined in Article 51 of the hybrid Charter of the United Nations. In short, the observance of the new fiduciary legal order becomes the *sin qua non* of a state's legitimacy and authority.

## A NEW INTERNATIONAL PLURALISTIC ORDER

A new and fully explicit fiduciary legal order came into being with the hard-earned victory of the Allies in World War II. Specifically, with the development of the Law of Nations as a consequence of World War II, the traditional dichotomy between public and private international law gives way to a more realistic and pluralistic legal order in which three types of international law interrelate and interact within domestic jurisdictions and international affairs.[102] These three interacting legal orders are: state-centric intergovernmental law, private international law and a former implicate fiduciary legal order that now becomes fully explicit with the incorporation of Law of Nations. It was implicate since the fiduciary legal order has, as mentioned above, always increasingly attempted—since Grotius— to govern the global commons.

These three orders of law dynamically diffuse into and interact with each other, yet each generally operates within a distinct legal sphere. Thus, the entire international legal order is pluralistic in nature and not necessarily monist or dualist.[103] Most important, within the Law of Nations there are a plurality of jurisdictions and not a single overarching "world law."[104] In other words, as Michael Barkun states, "[t]he world is not a one-law world, fervent wishes to the contrary notwithstanding; it is a world of 'diverse' public orders."[105] (See Figure 1)

102. SLOMANSON, *supra* note 6.
103. *Id.*
104. BARKUN, *supra* note 14.
105. *Id.*

A NEW INTERNATIONAL PLURALISTIC ORDER:
(Figure 1)

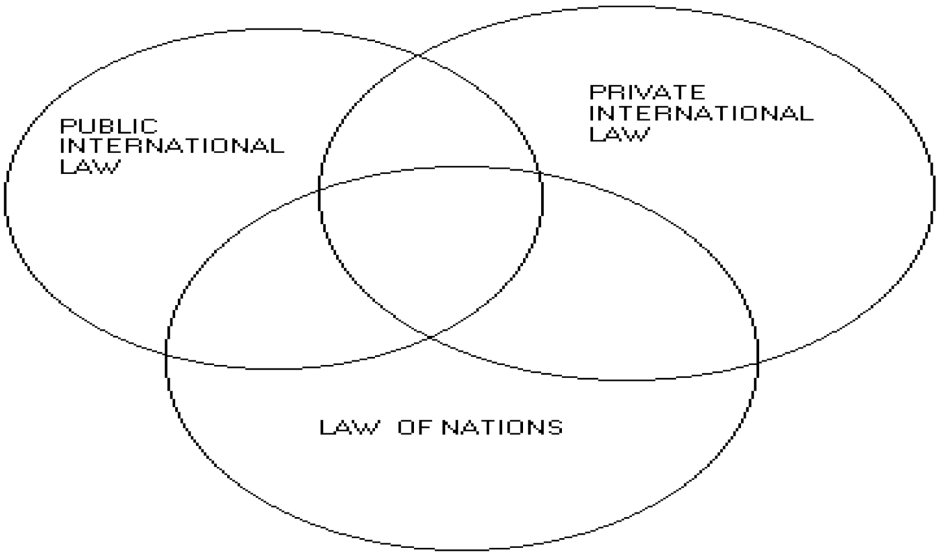


FIGURE 1: THE LAW OF NATIONS INTERACTING IN A THE INTERNATIONAL PLURALISTIC LEGAL ORDER

The concept of "global legal pluralism" accurately, though imperfectly, captures this phenomenon of an international legal pluralistic order.[106] It is imperfect for three reasons. First, global legal pluralism is a more complex phenomenon than the domestic diffusion of international norms across jurisdictions. This diffusion is occurring on a larger order of magnitude between entire legal orders, such as the public and private legal orders, as well as between and within domestic jurisdictions. Both processes are occurring slowly, at times, and episodically since some jurisdictions are more receptive at any particular time to incorporating law from other jurisdictions. Yet, these processes are assuredly occurring due to increasing globalization, facility of communication (such as the internet) and the increasing sophistication and networking of legal elites.[107]

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106. There is a rich and rewarding literature on the growing phenomenon of global legal pluralism. *See* Sally Engle Merry, *International Law and Sociological Scholarship: Toward a Spatial Global Legal Pluralism*, in 41 STUDIES IN LAW, POLITICS, AND SOCIETY 149 (Austin Sara ted., 2008). *See also* Harold Hongju Koh, Transnational Legal Process, 75 NEB. L. REV. 181 (1996). *See also* Paul Schiff Berman, Global Legal Pluralism, 80 S. CAL. L. REV. 1155 (2007) (Prof. Berman develops an excellent "procedural paradigm" of global legal pluralism that describes the transnational or domestic diffusion of legal norms across national, and often competing, jurisdictions).

107. SLAUGHTER, GLOBALIZATION, *supra* note 70.

Second, there is a vertical and horizontal dimension to the diffusion of fiduciary legal norms into domestic jurisdictions caused by the advent of the World War II and post World War II charters, norms and innovations. This development created a Law of Nations applicable to the whole of humanity or, at least, common to most nations of the world.[108] Such "vertical" or "common" legal norms resulted from the fiduciary promises and pacts of the allies during or immediately after World War II. These can, and are, being incorporated into domestic jurisdictions through judicial interpretation, legislative or executive action that can be described as the *differential diffusion of international fiduciary norms concerning new general principles of the Law of Nations*.[109] In certain cases, these new fiduciary legal norms, like the new norms of Nuremberg, can and do preempt domestic legal norms. Yet, governments will often attempt to hoard as much power and control as possible. As a result, there is, and will be, an intense competition in the future within and between these three legal orders—the public, the private and the fiduciary Law of Nations concerning which legal norm or norms should prevail, especially in cases involving the human rights, the environment or war crimes. As such, the differing jural communities and their domestic juridical institutions, if the latter are truly independent, provide the first and most significant safeguard for human rights and the Law of Nations.

Finally, it is not clear whether the phenomenon of global legal pluralism is a cause or a consequence of co-existing, contested and sometimes competing international legal orders. Though often overlooked, history cannot be ignored, especially when, during such protean periods as World War II, the entire structure of international law was changed, if not revolutionized.[110] As a result, on the macro level, there are three complimentary and often conflicting international legal orders—the public, the private and the emergent or re-emergent Law Of Nations, with each sphere slowly diffusing legal norms into the others—that creates a post World War II international pluralistic legal order. The comparative law process of legal norms diffusing into each other's domestic legal jurisdictions can be described as the transnational or domestic diffusion of legal norms across the borders of once completely sovereign states.[111] In fact, it is probably both, in a somewhat circular positive feedback loop, in that the domestic and differential diffusion of the new fiduciary norms results in

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108. This assertion contradicts the excellent and now famous article by Richard Falk,"International Jurisdicition: Horizonal and Verticla Conceptions of legal order," Temple Law Quarterly, 32 (1959), p. 295-320.

109. Kol, *supra* note 106.

110. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (The U. of CHI. Press 2nd ed. 1970) (1962) (describing such developments as a "paradigm shift").

111. Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168 (Stephen Macedo ed., 2004).

greater domestic pluralism. This places an even greater premium on the preeminence of comparative law and on the training of lawyers in comparative legal research methods. For instance, this is now part of the standard repertoire of lawyers who practice in the European Union. The need for this expanded comparative training among the legal profession is a direct result of the expanding scope of global legal pluralism.

## IN THE SHADOW OF GROTIUS: NEW LAWS OF WAR AND PEACE

The idea of a pluralistic international legal order is certainly not new. Grotius is the first to acknowledge the idea in his classic *The Law of War and Peace*. Specifically, in the *first three sentences* of the Preface to his classic work, Grotius states:

> Many have undertaken to expound or to summarize in commentaries or abridgements the civil law of Rome or of their own states. But few have treated of that law that exists between peoples, or between the rulers of peoples, whether based upon nature, or established by divine decree, or grown out of custom and tacit agreement; and no one as yet has discussed it in a comprehensive and systematic way, important as it is to mankind that this should be done. . ..[112]

In this passage, Grotius is acknowledging the pluralistic nature of the legal orders then operating in the sense that they were considered binding whatever the source, including natural, religious or customary law.[113]

In current times, the modern international legal order is pluralistic as well and consists of at least three different legal systems, including public and private international law and an emergent Law of Nations. The Law of Nations is the obvious newcomer to this pluralistic legal system. Hence, the first task of this essay has been to demonstrate how this new fiduciary Law of Nations came into existence during and after World War II. In turn, this involves and requires the domestic legal recognition of the new international Law of Nations concerning human rights as a new, fiduciary and largely self executing legal order.

## AFTER VICTORY: A REPUBLICAN ORDER OF RIGHTS AND RESTRAINTS

The new Law of Nations is at the heart of post World War II domestic and international legal limits binding the once absolute and sovereign state. This "Law of Nations" created by the Declarations, Conventions, Charters and Treaties resulting from World War II, especially the Charter of the United Nations,

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112. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 75 (Richard Tuck trans., Liberty Fun. Inc. 2005).

113. Benedict Kingsbury& Benjamin Straumann, The State of Nature and Commercial Sociability in Early Modern International Legal Though (N.Y. Univ. Pub. Law and Legal, Working Paper No. 1-1-2011).

represent the latest development in Republican and classical realist political theory and developments concerning the constraint and control of unilateral political power, whether exercised by the individual, group or state.[114] *In particular, it limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples.*

In his award winning book, *Bounding Power*, Daniel Deudney points out that Republican theory has, since classical times, been concerned with the restraint of centralized and unilateral or arbitrary political or military power.[115] Hence, the ultimate significance of the new Law of Nations can be found in the enduring Republican structures that resulted from the fiduciary promises made by the Allied powers to their own and others' peoples during World War II. The so-called International Bill of Human Rights and other various human rights regimes that evolved out of the wartime promises, such as the Declaration of [the] United Nations made by the Allies, can also be understood and explained as a republican system of security restraints upon the once almost absolute prerogatives of the state to use unilateral force. The United Nations Security Council, and its veto power, can be cited as another prominent, though imperfect, example of these Republican restraints.[116] Such an interpretation is consistent with the one put forward by John Ikenberry in his groundbreaking book, *After Victory* that the most successful and enduring political orders that emerge from war are those that include the voluntary restraints on power by the victors.[117] As we have seen, this process of imposing legally binding self-restraints on state power began *at the very beginning* of World War II in an attempt to mobilize the millions of allied, conquered, colonized, commonwealth and neutral peoples of the world in order to win against the Axis powers. When they did, the victorious governments recognized, at San Francisco during the drafting of the United Nations Charter (and afterwards), in essence, a system of self-restraints; these self-restraints included self-determination, human rights, war crimes against one's own and other peoples and the legal commitments to collective security against an aggressor that have been described elsewhere as a new Law of Nations common to the whole of humanity. *Hence, the ultimate measure of a state's own legitimacy as a sovereign power is its recognition and respect for these new fiduciary norms and relationships, described here as the modern Law of Nations*. This includes human rights and collective security, solemnly prom-

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114. DANIEL H. DEUDNEY, BOUNDING POWER: REPUBLICAN SECURITY THEORY FROM THE POLIS TO THE GLOBAL VILLAGE (Princeton U. Press 2007).

115. *Id.*

116. 16 THOMAS E. BOUDREAU, SHEATHING THE SWORD: THE PREVENTIVE ROLE OF THE UNITED NATIONS SECRETARY-GENERAL AND THE PREVENTION OF INTERNATIONAL CONFLICT (Greenwood Press 1991). (Due to drastic editorial cuts, this book (my first) is basically the "Cliff-Notes" of my Ph.D. dissertation (1985) which is a much better document).

117. G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT AND THE REBUILDING OF ORDER AFTER MAJOR WARS (Princeton U. Press 2001).

ised by the allied governments during World War II to their own peoples, as well as to the conquered, colonized or neutral nations of the world—after they won the war.

## CONCLUSION: THE LEVIATHAN AND THE LAW

This essay has examined the origins of the new Law of Nations in the promissory declarations and wartime charters—beginning with the Atlantic Charter—agreed to by the Allied powers in their initially desperate and eventually successful effort to defeat the Axis powers. These documents were critical in creating the new Law of Nations out of the crucible of the bloodiest war in human history.

World War II was a time of unprecedented mortal danger to the western democracies. The war began in 1939 and, in the first few years, the Axis powers seemed to be winning almost everywhere in the world. In response to unique historical, political and military forces interacting as the war unfolded and grew in fury, especially in late 1941 and early 1942, a new fiduciary Law of Nations began to emerge. This is not to say that the creation of a Law of Nations was intentional or a deliberate war aim; rather, the Law of Nations emerged and developed due to these several significant forces interacting and reinforcing with each other as the war progressed. In particular, President Franklin Delano Roosevelt and his administration was determined to articulate a set of war aims from the very beginning, even before America's official entry into the war promising, in deed, what President Wilson was only able to deliver in word–self-determination and human rights for all peoples. The Allies, eager for American participation in the war in Europe, agreed with these principles that set the stage for the subsequent emergence and evolution of a modern Law of Nations.

Three legal concepts or practices dating back to, or influenced by, classical Roman jurisprudence are essential to understanding and explaining the sources, scope and significance of the World War II innovations in the international legal order. First, the Roman concept of the "fidcuia" or "trust" is useful in characterizing the Allied promises to their own and other peoples as fiduciary duties and norms. This includes the rights to self-determination, human rights and strict limits on the state's once largely unchallenged prerogative to wage war. Second, the classical concept and practice of Jus Gentium, defined in Justinian's Institutes as a "law of nations. . . common to the whole of humanity" is useful, with some revisions and refinements, in characterizing the substance and nature of the new fiduciary duties and norms created by World Word II.[118] In particular, the modern Jus Gentium describes the new legal order that exists within the state and governs the relationship of the government and its own and

118. J. INST., *supra* note 75.

other peoples. Third, the idea of the *imperium et imperii* describes the significant new relationship between the people and its own government in which the fiduciary Law of Nations is, in the first (but not exclusive) instance, self-executing within the nation as a self-determined jural community. It was the often-explicit hopes and declarations of the western wartime Allied leaders that these legal innovations would prevent the emergence of another lawless leviathan, like the horrible Nazi regime in Germany, from emerging in the future.

Modern human rights law has its origins in these same legal developments, especially in the fiduciary promises made by governments to their own and others' people during the darkest times of the war. The United Nations Charter, a treaty binding on states, partially redeemed these promises by recognizing human rights on the international level and within state's respective territories. In other words, modern international human rights law largely has its origins in the new fiduciary norms recognized by governments during the war, and as such, exists independently of the U.N. Charter. From now on, the people or nation and its courts, as an independent jural community, are the *imperium et imperii* or ultimate source and beneficiary of human rights in international affairs.

As a result of these developments, a pluralistic international legal order was established in the wake of World War II that consists of the traditional state-centric intergovernmental law, private international law and a new Law of Nations common to the whole of humanity. How these different legal orders diffuse across their "borders" and interact in the future is the fruitful subject of further research. Current trends suggest that the domestic and differential diffusion of fiduciary and international norms across and within different jurisdictions will increase, thus strengthening the scope and significance of the Law of Nations in the future.

Yet, governments can sometimes be tenacious beasts so the progress of human rights law as part of the Law of Nations will always be tenuous and problematic, especially at first. If the past is precedent, states will unquestionably seek to maximize their own, unregulated power and so in the coming years, there will be a tremendous struggle in each unique jurisdiction of a people between preserving the unchecked power of the state versus recognizing anew the fiduciary and international rights of the human being. As part of this struggle, even the mere existence of a new Law of Nations will be denied. As such, this struggle, which has already commenced, will continue far into the future as the state seeks to break out of the legal limits imposed by the World War II revolutionary development of a fiduciary international legal order. Meanwhile, the people or nation of each jurisdiction will attempt to reaffirm and recognize anew the rights that they possess in common with all other nations on the earth. In the last analysis, the national courts and judges of each unique jurisdiction representing its people, as a distinct jural community, may hold the keys to

victory in the ongoing struggle for human rights between the ageless Leviathan and humanity quest for the rule of law.

# Italy—Journalists, Privacy and a Right to Information

ELIZABETH F. DEFEIS*

The tension between privacy rights and free speech rights, including access to information, is currently in play in Italy. Measures to limit the use of wiretaps have been proposed in Italy provoking protests from journalists, prosecutors, NGO's and various international organizations. The European Union and its member states, including Italy, have adopted strong explicit privacy protections through treaties, directives and national legislation.[1] Perhaps because of the Nazi and Fascist practices of secretly collecting personal data to target individuals, Europeans are particularly concerned with protecting an individual's privacy, including data protection.[2] In the United States, on the other hand, speech rights occupy a preferred position and privacy rights are recognized as inherent in other Constitutional rights and are applied in a less than consistent manner.[3]

Nevertheless when confronted with responses to criminal and terrorist activities, Italy and the United States have taken an approach that is quite similar. Interception of oral communications in the United States is regulated by federal law and requires a court order based upon information that includes inter-alia, a statement of the alleged offense, the facilities to be intercepted, a description of the communications sought to be intercepted and, if known, the identity of the persons committing the offense and of the persons whose communications are to be intercepted.[4] The order must be based upon probable cause that specifies the identity and location of the person whose communication will be intercepted. The court must also describe what type of communication will be intercepted, the crime, and what period of time the interception is authorized.[5]

In Italy, the Italian Data Protection Act governs wiretapping and, at the present time, a court order is required for the government to intercept a telephone

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1. *See* John P. Flaherty & Maureen E. Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249, 275 (1998).

2. *See* Daniel E. Newman, *European Union and United States Personal Information Privacy, and Human Rights Philosophy – Is There a Match?*, 22 TEMP, INT'L & COMP. L.J. 307 (2008).

3. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); *See generally* Katherine Vogele, *Electronic Surveillance*, 90 GEO. L.J. 1209 (2002).

4. *See generally* 18 U.S.C. §§ 2510-2522 (2010).

5. *Id.;* The court will issue the order if, "There is a belief that: (1) a person is committing one of the crimes enumerated in Title III; (2) communications concerning the offense will be obtained through interception; and (3) the facilities from which the communications are to be intercepted are being used in connection with the commission of the offense."

or other form of communication.[6] It can be authorized for "legal proceedings" involving crimes punishable by five years or more, in cases such as trafficking drugs, arms, contraband, and explosives.[7] It can also be granted for insults, threats, abusive activity and harassment carried out over the telephone.[8] Wiretaps can be ordered by a judge for fifteen days and extended almost indefinitely for an additional fifteen days.[9] Safeguards in the law are built in with respect to the use and disclosure of such information. The conversations of religious ministers, lawyers, doctors or others protected by professional confidentiality rules cannot be intercepted and there are more lenient procedures for anti-Mafia cases.[10] In response to the terrorist attacks of September 11, 2001, "preemptive wiretapping is now permissible even if no investigation is in progress."[11]

During the course of his tenure in office, Prime Minister Silvio Berlusconi has been plagued with reports of corruption, prostitution and cronyism, all dutifully reported by the media. Much of the information came into the hands of journalists through access to wiretaps causing ministers to resign, embarrassment to the government and numerous prosecutions reaching as high as the Prime Minister himself. Italian newspapers are replete with transcripts of leaked wiretaps ordered by the Milan prosecutors investigating alleged sexual activities of the Prime Minister.[12]

Wiretapping is used more often and with fewer restraints in Europe than in the United States. In the United Kingdom, the Netherlands, and Italy wiretapping is most prevalent.[13] Indeed, Italy has been characterized as the "eavesdropping centre of Europe".[14] The Max Planck Institute estimates that 76 out of every 100,000 Italians had their phones tapped, the largest number of any European Country.[15] In 2009, "Italian authorities monitored more than 112,000

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6. *See* Privacy International, *Italian Republic*, *Privacy and Human Rights 2003: Italy*, https://www.privacyinternational.org/survey/phr2003/countries/italy.htm (last visited July 13, 2011).

7. *Id.*

8. *Id.*

9. *Id. (*"Wiretapping in Italy is regulated by Articles 266-271 of the Criminal Procedure Code (*Codice di Procedura Penale or Cpp)* and may be authorized only for a 'legal proceeding,' except int eh case of terrorism related investigations."); *See also* Privacy Int'l, *Italy – Privacy Profile*, https://www.privacyinternational.org/article/italy-privacy-profile (last visited July 13, 2011).

10. Privacy Int'l, *Italy – Privacy Profile, supra* note 8.

11. *Id.*

12. *See* Philippine Daily Inquirer, *Wiretaps of Berlusconi's Sexcapades Captivate Italians*, (January 22, 2011), http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20110122-315870/Wiretaps-of-Berlusconis-sexcapades-captivate-Italians, (last visited July 13, 2011); Nina Mandell, *Italian Prime Minister Silvio Berlusconi Still Having bunga-bunga Parties, New Wiretaps Show*, NY Daily News, (June 6, 2011), *available at* http://articles.nydailynews.com/2011-06-06/news/29648575_1_bunga-bunga-parties-wiretaps-italian-prime-minister (last visited July 13, 2011).

13. Eric Weiner, *Europeans Love Warrantless Wiretaps*, SLATE, http://www.slate.com/id/2136147/ (last visited July 20, 2011).

14. BBC News, *Italian Bill to Limit Wiretaps Draws Fire*, http://www.bbc.co.uk/news/10279312 (last visited July 13, 2011).

15. *Id.*

phones and 13,000 locations, according to the Justice Ministry".[16] In past years, scandals ranging from "mani pulite" to soccer match fixing have involved wiretapping and subsequent publications of transcripts in the press.[17] It has been reported that Italian officials have inadvertently tapped Pope Benedict XVI and Secretary of State Hillary Clinton.[18]

A Bill to curtail the use and dissemination of wiretaps, also called the "gag law" or "legge-bavaglio," has been proposed by Prime Minister Silvio Berlusconi and has been passed by the Senate in June 2010. The Chamber of Deputies has not yet passed it nor has it been signed by the President as required to become law.[19] The Bill would substantially curtail the power of the Public Prosecutor and authorize far harsher penalties for illegal wiretaps. Sponsors of the Bill argue that reform is needed to protect privacy.[20] Berlusconi insists that the police have been allowed to carry out far too many wiretaps and that the reputation of a public figure could be destroyed before a case comes to trial.[21] Both supporters and opponents of the Bill agree that the present law is in need of overhaul, but opponents argue that the Bill goes too far, is an attack on freedom of the press, and will impede law enforcement as presently proposed.[22]

Under the proposed law, authorization for wiretaps or listening devices would be granted "for a maximum of 75 days only . . . if investigators [have] firm evidence that a crime [has] been, or [is] being committed."[23] The Bill requires that there be "clear indications of guilt" and that the wiretaps be "absolutely essential to the continuation of the investigation."[24] A panel of three judges must approve successive three-day extensions. Special authorization

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16. Rachel Donadio, *The Nation that Heard Too Much; Italian Politicians Want New Wiretap Limits, but Mafiosi Would Also Gain*, INT'L HERALD TRIB. (June 1, 2010), *available at* http://www.highbeam.com/doc/1P1-185860200.html.

17. *See* Total War Center, *In Italy, the Prodi Government Has a Significant Record of Illegality, Compared with the Often Slandered Berlusconi one*, http://www.twcenter.net/forums/showthread.php?t=63957 (last visited July 13, 2011); *See also* Barbara Trionfi, *Italy's Senate to Vote on Controversial Wiretapping, Media Law*, International Press Institute, (June 9, 2010), http://www.freemedia.at/europe/singleview/4983/.

18. Nick Squires, *Silvio Berlusconi Wiretap Victory in Confidence Vote*, THE TELEGRAPH, (July 10, 2010), http://www.telegraph.co.uk/news/worldnews/europe/italy/7818509/Silvio-Berlusconi-wiretap-victory-in-confidence-vote.html.

19. *See* Jean-Paul Marthoz, *In Italy, Vote Postponed on Berlusconi's 'Gag Law'*, COMMITTEE TO PROTECT JOURNALISTS, http://cpj.org/blog/2010/07/italy-postponed-berlusconi-gag-law.php; On June 10, 2010 the Senate passed the Bill. Of the 323 senators, only 189 were present at the voting of the Bill. 164 of the senators present, voted in favor of the Bill allowing it to move to the Chamber of Deputies, where it must be voted on again before it is brought to the Italian President for approval. To protest, the leader of the opposition Democratic Party refused to attend or vote and labeled the Bill a "massacre of freedom". The vote previously scheduled for September 2010 by the Chamber of Deputies has been postponed.

20. *See* Privacy Int'l, *Italian Republic, supra* note 6.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

would be required to tap lawmakers and priests, but restrictions on wiretaps in the case of mafia and terrorism investigations are relaxed.[25] Publication of full or partial conversations, including telephone, computer or electronic communications streams or data relating to telephone calls or electronic communication, though no longer covered by confidentiality, would be prohibited until the conclusion of the preliminary investigation or until the end of the preliminary hearing. Since search proceedings in Italy usually take anywhere from three to ten years to conclude, the public would effectively be denied access to relevant information until the information was in effect irrelevant.[26]

Journalists would be prohibited from publishing any document "relating to conversations or flows of communications or telecommunication, where it has been ordered destroyed."[27] Journalists who violate the law could face fines of 1,023 Euro ($1,472.86) individually, as well as up to a month in jail. Publishers face up to 465,000 Euro ($669,483.78) in fines per publication in violation of the law.[28] The Bill would also require that any documents relating to ongoing investigations be published only as an abstract, not in full — and violations might result in up to 300,000 Euros in fines ($431,925.02).[29]

Another provision widely denounced particularly by prosecutors and magistrates limits the use of authorized wiretaps to the specific case for which the interception was authorized, and not in any other investigation.[30] If the wiretaps reveal another crime, they cannot be used in a subsequent or separate investigation. Antonio Ingroia, the noted anti-mafia attorney of the Palermo tribunal, argued that the Bill strikes "a lethal blow to inquiries on corruption, organized crime and its political collusion.[31]

The response, particularly of journalists and those involved in law enforcement, has been overwhelmingly negative. On June 11, 2010, La Republica, Italy's national daily newspaper, ran a blank front page containing only a small "post-it" style memo stating "The gagging law will deny citizens the right to be informed."[32] Ezio Mauro, La Repubblica's editor in chief, stated, "We are running a blank front page to tell readers . . . that democracy has been short-circuited."[33] He stated, "The wiretap law is in reality a law on freedom, the

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25. Privacy Int'l, *Italy – Privacy Profile, supra* note 8.
26. Trionfi, *supra* note 16.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Giulio D'Eramo, *Italy's Media Unites in Anger*, Index on Censorship (May 28, 2010), http://www.indexoncensorship.org/2010/05/italys-media-unites-in-anger/.
32. Gulfnews.com, *Top Italian Newspaper Runs Blank Front Page to Protest Berlusconi's 'Gagging Law'* (June 12, 2010), http://gulfnews.com/news/world/other-world/top-italian-newspaper-runs-blank-front-page-to-protest-berlusconi-s-gagging-law-1.639882 (quoting La Repubblica (Italy), June 11, 2010, at front page).
33. *Id.*

freedom to find evidence of crimes through the procedures of all civilized countries."[34] He said "the gagging law decides for us, and decides according to the wishes of the government, what we should know, what we can write."[35] IPI Press Freedom Manager, Anthony Mills, urged the "Italian Senate not to pass the draft law, as the Bill contradicts fundamental principles in the Italian Constitution, hinders the system of checks and balances that underpins a functioning democracy, and prevents journalists from doing their work."[36]

Shortly after passage of the Bill, most newspaper, radio and television journalists went on a 24-hour strike to protest the law, effectively shutting down news around the country.[37] Even an American official weighed in and "expressed concern about the Bill's impact on the longstanding collaboration between American and Italian authorities with respect to counterterrorism and organized crime investigations.[38] US Assistant Attorney General, Lanny Breuer, stated that telephone recordings were "essential" for organized crime investigations.[39]

It is clear that the Bill, if passed, would put Italy in violation of its international obligations. Italy has ratified the Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms and the Treaty of Lisbon, which incorporates the Charter of Fundamental Rights for the European Union.[40] Each of these agreements contains guarantees of free expression which would directly impact the legality of the proposed Bill.

Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") states:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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34. Dawn.com, *Italian Daily Runs Blank Front Page to Protest 'Gagging Law'* (June 12, 2010), http://archives.dawn.com/archives/6877.

35. *Id.*

36. Trionfi, *supra* note 16 (quoting Anthong Mills).

37. Marthoz, *supra* note 18.

38. Rachel Donadio, *An Untapped Phone Call in Italy? It's Possible*, N.Y. TIMES, (May 30, 2010); *available at:* http://www.nytimes.com/2010/05/31/world/europe/31italy.html.

39. *Id.*

40. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007 O.J. (C 306) 01 (Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.).

a) For respect of the rights or reputation of others;
b) For the protection of national security or of public order (ordre public), or of public health or morals.[41]

The Human Rights Committee of the United Nations, which monitors compliance with the Covenant and receives individual complaints based on a violation of rights guaranteed by the Convention, requires that restrictions on freedom of expression "cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in Article 19, and must be necessary to achieve a legitimate purpose."[42]

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") states:

1. Everyone has the right to freedom of expression; this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[43]

Article 11 of the Charter of Fundamental Rights of the European Union is substantially the same as the language in Article 10 of the European Convention, however it adds the additional guarantee that "The freedom and pluralism of the media shall be respected."[44]

While neither the European Court of Justice nor the European Court of Human Rights ("ECHR") has ruled on the legality of the proposed Bill, the clear language of the Bill conflicts with the obligations required by the conventions. To determine whether a measure violates the European Convention with respect to free expression rights, a three part test similar to the test utilized by the Human Rights Committee is utilized: (1) whether the interference with freedom of expression is prescribed by law; (2) whether the interference pursues a legitimate aim; and (3) whether the interference is necessary in a democratic

41. International Covenant on Civil and Political Rights, G.A. Res. 2200A, (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 19 (Mar. 23, 1976).

42. Faurisson v. France, No 550/1993, U.N. Doc. CCPR/C/58/D/550/1993, (1996) (Involved the criminal conviction of a French university professor for denying the existence of Nazi gas chambers, presents the three part test as follows: "9.4 Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose.").

43. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

44. Charter of Fundamental Rights of the European Union, Nov. 4, 150, 2000 O.J. (C 364) 11.

society.[45] The ECHR allows a "margin of appreciation" to member states in implementing their treaty obligations.[46]

The Bill, if enacted in its present form, would meet the first two prongs of the test; i.e., it is a measure prescribed by law and its purpose, arguably, is to protect privacy. However, it would clearly fail the third prong. The proposed penalties for violation are unduly harsh, would seriously hamper access to information on the part of the media and the public, and consequently are not necessary. The ECHR has ruled that, although states' parties are permitted to regulate freedom of expression, they may not do so in a style that has a "chilling effect" on the media.[47] In *Cumpãnã v. Romania*, journalists were prohibited from working as journalists for one year and sentenced to prison for seven months for publishing newspaper articles alleging the unlawful behavior of a civil servant.[48] The ECHR stated that there had been a violation of Article 10 because the measures taken against the journalists were "manifestly disproportionate."[49] The Court found that imprisonment and prohibition of practicing their profession would block journalists from playing their "vital role of 'public watchdog' in a democratic society."[50]

Similarly, in *Radio France v. Franc*e, the ECHR discussed the public's general interest in a democratic society and stressed the importance of guaranteeing a free press.[51] The Court stated that, even though the press must stay within certain boundaries, it has a duty to promulgate information on matters of social

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45. *See Weber v. Switzerland*, 12 Eur. Ct. H.R. (ser. A) at 508 (1990) (Applicant challenged the imposition of a fine as excessive. In invalidating the fine, the court noted, "In the particular circumstances of the case, the applicant, in being convicted and sentenced to a fine, was subjected to an interference with the exercise of his right to freedom of expression, which was not 'necessary in a democratic society' for achieving the legitimate aim pursued. It followed that there had been a breach of art 10.").

46. Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 99 (1992); *See also Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976), Which involved publishers of prosecution of The Little Red Schoolbook under the Obscene Publications Act. The court discussed the margin of appreciation doctrine as follows:

> "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them. . .
>
> Consequently, [Article 10(2)] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force."

47. *Cumpãnã v. Romania* [GC], 2004-XI Eur. Ct. H.R. 1 2004); *See also* Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT'L L. REV. 183, 203 (2010).

48. Smet, *supra* note 39, at 202.

49. *Id.* at 203.

50. *Cumpãnã*, 2004-XI Eur. Ct. H.R. *supra* note 39, at 93.

51. *See Radio France v. France*, 2004-II Eur. Ct. H.R. 125, 149.

concern.[52] In addition, the Court has regularly discussed the public's right to receive such information.[53] In *Sürek v. Turkey*, the Court found that "while the press must not overstep the bounds set for the protection of vital interest of the state . . . it is nevertheless incumbent on the press to impart information and ideas" and the public has a right to receive them.[54] It is freedom of the press that provides the public a means to discover and form an opinion of their leaders and government.[55] Indeed, the ECHR has noted the essential role of the press in furthering democracy.

The Bill has been condemned by experts on freedom of speech from the United Nations, the Organization for Security and Co-operation in Europe, as well as by numerous NGO's concerned with the media and enforcement of human rights. Clearly, the Bill is contrary both to the letter and to the spirit of its international obligations as interpreted by the international tribunals.[56]

The UN Special Rapporteur on Freedom of Expression, "urged the Italian government to either abolish or substantially revise" the proposed legislation.[57] If adopted in its current form, he warned that it might undermine the enjoyment of the right of freedom of expression in Italy.[58] The severe penalties faced by journalists who violate the law could "seriously undermine all individuals' rights" to seek and impart information in contravention of the ICCPR.[59] Further, the penalties potentially faced by journalists were not "proportionate to the offense."[60] The fear of these punishments could easily "hamper [their] work to undertake investigative journalism on matters of public interest, such as corruption."[61] He noted that "while the perceived concerns regarding implications of publicizing wiretapped information to the judicial process and the right to privacy might be legitimate" the current form of the draft law is not "an appropriate response to such concerns" since it "poses threats to the right to freedom of expression."[62] Finally, he offered to provide technical assistance and perhaps

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52. *See id.*

53. *See Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 26 (1986).

54. *Sürek v. Turkey*, (No. 1), App. 26682/95, Eur. Ct. H.R. (1999).

55. *Id.*

56. *See* Reuters, *Update 1-U.N. Rights Expert Opposes Belusconi Wiretap Law, http://www.reuters.com/article/2010/07/13/italy-wiretaps-un-idUSLDE66C1DE20100713 (last visited July 20, 2011).*

57. *Id.*

58. United Nations Human Rights Office of the High Comm'r for Human Rights, *Italy: Draft Wiretapping Law Should be Scrapped or Revised, Says UN Expert on Freedom of Expression*, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10200&LangID=E (last visited July 20, 2011) (quoting Frank La Rue).

59. *Id.*

60. *Id.*

61. *Id.*

62. United Nations Human Rights Office of the High Comm'r for Human Rights, *Italy: Draft Wiretapping Law Should be Scrapped or Revised, Says UN Expert on Freedom of Expression*, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10200&LangID=E (last visited July 20, 2011) (quoting Frank La Rue).

undertake a fact finding mission to "ensure that the draft law is in compliance with international human rights standards on the right to freedom of expression,"[63] contained in the numerous treaties and international agreements that deal with freedom of the press and freedom of expression. To date, it does not appear that Italy has accepted this offer of assistance.[64]

The OSCE Representative on Freedom of the Media similarly noted that the provision fails "to acknowledge media standards" and urged that the draft law on telephone surveillance and electronic eavesdropping be brought "in line with OSCE commitments and European press freedom standards."[65]

Reporters Without Borders, a noted NGO, issued a statement prior to the Senate vote on the Bill and reiterated its appeal to Italy's senators not to pass the phone-tapping draft law.

"We urge Italy's senators to act responsibly and not become accomplices to a repressive law that is completely incompatible with the European democratic standards that parliaments are supposed to embody and guarantee."[66] It noted that because Italy is a founding member of the European Union, what is at stake goes beyond just the national domain.[67] Adoption of the Bill "would send a disastrous signal to other countries and would encourage dictatorships to use it as a model for restricting the investigative capacity of their local press with even more dramatic consequences. This aspect of the problem cannot be neglected."[68]

The issue of access to information is particularly acute in Italy. The media companies that the Prime Minister owns reach approximately 80% of television viewers.[69] While at one time the journalists dominated the public access to news, today only 20% of Italians receive their news from newspapers.[70]

Both the Council of Europe and the European Parliament have denounced this conflict of interest between the media interests controlled by Berlusconi

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63. *Id.*

64. *See* United Nations Human Rights Office of the High Commissioner for Human Rights, *supra* note 49.

65. Org. for Sec. and Co-operation in Europe, *OSCE Representative on Freedom of the Media Urges Italian Senate to Drop Law Proposals Restricting Free Flow of Information*, http://www.osce.org/fom/51080 (last visited July 20, 2011) (quoting Miklos Haraszti).

66. Reporters Without Borders for Press Freedom*, Last Chance for Senators to Block Ban on Publishing Phone Taps,* May 26, 2010, http://en.rsf.org/italy-last-chance-for-senators-to-block-25-05-2010,37560.html.

67. *See Id.*

68. Reporters Without Borders for Press Freedom, *supra* note 52 ("Telephone taps often constitute the main evidence in support of stories about the problems of corruption and organised crime. The sole practical aim of this Bill is to prevent any investigative reporting.").

69. Alexander Stille, '*Bunga Bunga' Berlusconi Redefines Winning: Alexander Stille*, BLOOMBERG, BUS. WK., (April 5, 2011), http://www.businessweek.com/news/2011-04-05/-bunga-bunga-berlusconi-redefinies-winning-alexander-stille.html (last visited June 20, 2011).

70. *Id.; See also* Benedetta Brevini, *Stop Blaming Italians for Berlusconi*, THE GUARDIAN, Feb. 16, 2011, http://www.guardian.co.uk/commentisfree/2011/feb/16/italians-berlusconi-control-media.

and his political role as Prime Minister. However, the European Parliament rejected a resolution that denounced the lack of media freedom in Italy as an internal matter.[71] Nor have they have taken a formal position with respect to the proposed law.

Clearly the proposed law is in conflict with international standards and Italian commitments. In an embarrassment to the country, Freedom House, an independent watchdog organization, based in Washington D.C., has downgraded Italy from "free" to "partially free," the only country in Europe to be ranked so low.[72]

While some have urged the European Union to address the issue, this appears unlikely.[73] It is the Italian public, itself, and its elected representatives that must respond. However, access to information is key if an informed decision is to be made. While in the United States the First Amendment occupies a preferred position, free press in Italy seems to have taken subordinate position to politics as usual. Italy was instrumental in the formation of the Council of Europe, which has focused on Human Rights and Democracy. It should now honor its commitments and shoulder its responsibility as a leader in the advancement of human rights and democracy.

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71. Bendetta Brevini, *Europe Should Protect Italy's Freedom of Speech*, THE GUARDIAN, (May 31, 2010), http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/31/europe-must-protect-italy-freedom-speech.

72. Brevini, *Europe Should Protect Italy's Freedom of Speech, supra* note 55.

73. *See id.*

# Living Underwater: How the U.S. Mortgage Market Collapse Affected Global Economies and How We Can Avoid Further Crisis

PHILLIP D. DYSERT*

## INTRODUCTION

The subprime mortgage market crash marked an abrupt end to the "free-wheeling" lending practices of the last decade. The mortgage market crisis, coupled with the leveling off, and in some cases, the dropping of housing prices, caused a drastic drop in the United States economic environment. The U.S. economic issues had a ripple effect on economies across the world. Mortgage backed securities allowed for investors to buy and sell mortgages easily on the secondary mortgage market. Additionally, foreign countries invested heavily in the U.S. mortgage industry, causing the U.S. government to act drastically when the bottom fell out of the subprime mortgage industry. This paper will examine the history of the U.S. mortgage industry, the process of securitization and globalization that lead to loose lending practices, the effects of the drop in the U.S. mortgage market on foreign economies, and how we can avoid a similar crisis in the future.

## I. "THE AMERICAN DREAM"

The foundation for the American Dream can be traced back to the United States Declaration of Independence. Our founding fathers "[held certain] truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, Liberty, and the Pursuit of Happiness."[1] The phrase "American Dream" was first coined by historian James Truslow Adams in 1931:

> The American Dream is that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to ability or achievement. It is a difficult dream for the European upper classes to interpret adequately, also too many of us ourselves have grown weary and mistrustful of it. It is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recog-

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* Phillip D. Dysert, J.D. Candidate, Syracuse University College of Law, 2012; B.B.A. Hofstra University, 2003. I would like to thank my wife, Aris, for her never-ending support. I would also like to thank my parents for their guidance. Furthermore, I am indebted to Professor Robin Paul Malloy for his invaluable guidance throughout the article-writing process.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

> nized by others for what they are, regardless of the fortuitous circumstances of birth or position.[2]

The idea of the American Dream today indicates the ability, through participation in the society and economy, for everyone to achieve prosperity.[3] This includes the opportunity for one's children to grow up and receive a good education and career without artificial barriers.[4] It is the opportunity to make individual choices without the prior restrictions that limit people according to their class, caste, religion, race or ethnicity.[5] Home ownership is a central idea at the heart of the American Dream for many Americans. Owning property is a benchmark for achieving the "American Dream."[6] The ability of a family to own a home is often viewed as a status symbol.[7]

The American Dream regarding property and home ownership has been followed in Europe as well. In the 1980s, in England, British Prime Minister Margaret Thatcher developed a plan to sell public housing units to tenants to create a sense of pride and accomplishment for the British people that comes with home ownership.[8] Additionally, in the summer of 2010, Russian President Dmitry Medvedev announced a plan for widespread home ownership in Russia.[9] Alexander A. Braverman, the Director of the Federal Fund for the Promotion of Housing Construction Development called it the "Russian Dream."[10]

## II. SECONDARY MORTGAGE MARKET

The emergence of the secondary mortgage market has allowed primary mortgage lenders to aggressively originate more home loans to borrowers. Home mortgages have been frequently bought and sold by investors because the secondary mortgage market can yield investors large profits. Initially, a borrower secures a mortgage from a lender in the primary mortgage market.[11] The primary market lender then sells these mortgages to secondary market investors and uses the proceeds of these sales to fund the origination of more mortgage

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2. JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA, 404 (Little, Brown, and Company 1931).

3. LEARA D. RHODES, THE ETHNIC PRESS: SHAPING THE AMERICAN DREAM, 12 (Peter Lang Publishing, Inc. 2010).

4. *Id.* at 13.

5. CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOME OWNERSHIP, 35 (William H. Rohe & Harry L. Watson eds., Cornell University Press 2007).

6. *Id.* at 36.

7. Nestor M. Davidson, *Property and Relative Status,* 107 MICH. L. REV. 757, 796 (2009).

8. David E. Guest, *Human Resource Management and the American Dream*, 27 J. Mgmt. Stud. 377, 394 (1990).

9. Anastasia Ustinova, "Building the New Russian Dream, One Home at a Time," *Bloomberg Bus. Wk.,* June 28—July 4, 2010, pp 7-8.

10. *Id.*

11. David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab,* 42 GA. L. REV. 1019, 1028 (2008).

loans for borrowers in the primary mortgage market.[12] Secondary mortgage market investors sell the securities backed by the purchased mortgage loans and purchase more mortgages from primary market lenders.[13]

Secondary mortgage markets actively reduce lender risk, enhance lender liquidity, and promote diversification of the lender's investment portfolios.[14] Mortgage companies package individual loans together in mortgage pools for resale in the secondary market.[15] The mortgage pool consists of individual loans with similar loan characteristics. Mortgage pools are then split into a number of different tranches.[16] Each tranche has a different grade, determined by comparing the characteristics of the tranche and historical data in order to predict the credit risk of the tranche.[17] Additionally, the securities are not graded on the risk of each individual loan, but on the risk posed by the entire pool.[18] Due to the diversification of the types of investors available to service mortgage loans, primary lenders were able to shift a great deal of risk to the secondary market investors.[19] Through this practice, the lender has the ability to enhance their liquidity, increase available funds for lending, and reduce risk by diversifying a primary lender's investment portfolio.[20] Unfortunately, a large number of the securities also had clauses that required lenders to take back loans should the borrower default or if the loan contained prohibited terms.[21] This remedy proved to be ineffective in practice because many lenders were unable to make payments when presented with demands for repayment.[22] Notwithstanding the safeguards for investors in securities markets, Wall Street was devastated with defaults on subprime mortgages.[23] These defaults led to massive failures of chief commercial and investment banks, which, in turn, led to a significant drop in the stock market.[24]

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12. *Id.*

13. *Id.*

14. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS, 381 (3d ed. Aspen Publishers 2007).

15. *Id.*

16. Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending,* 80 U. COLO. L. REV. 1, 8 (2009).

17. *See* Christopher L. Peterson, *Predatory Structured Finance,* 28 CARDOZO L. REV. 2185, 2200-06 (2007).

18. Zywicki, *supra* note 16, at 8.

19. Robin Paul Malloy, *Mortgage Market Reform and the Fallacy of Self-Correcting Markets,* 30 PACE L. REV. 79, 96 (2009).

20. *See Id.* at 95-96.

21. Peterson, *supra* note 17, at 2206 n. 124.

22. Zywicki, *supra* note 16, at 8.

23. *Id.* at 9.

24. *Id.* at 8-9.

## III. GLOBALIZATION: THE WORLD WIDE ECONOMY

"The word 'globalization' is used widely to summarize a complex worldwide development; it describes the growing number of interweaving dependencies—economic, political and cultural—among countries and the consequent blurring of international boundaries in those areas."[25] An investor can increase risk and returns through investing in foreign markets, many of which are more volatile than U.S. markets and "[t]he free flow of capital across national boundaries enables investors to seek the best available return on their investments over a broader spectrum of opportunities."[26] Internationalization also allows for better investor liquidity and the greater the numbers of investors in the marketplace, the greater the opportunity for those investors to dispose of their investments quickly and at competitive prices.[27]

It is estimated that foreign investors were holding over $1 trillion directly in U.S. agency bonds and U.S. mortgage backed securities.[28] Aside from these investments, much more money was invested indirectly, through short term commercial loans and investments veiled by favorable accounting rules, which potentially could have kept subprime investment numbers off a great deal of the balance sheets of foreign corporations.[29] It can be assumed that foreign investors may look outside of the U.S. to meet their investment needs after the U.S. subprime mortgage crisis. The concept of globalization has created a world economy, where the peaks and valleys of a large national economy, like the U.S., can greatly affect the economies of its neighboring countries and countries half way across the world.

## IV. THE EASE OF GLOBAL INVESTING THROUGH SECURITIZATION

Securitization is a means of dispersing risk amongst a wide group of investors and reducing risk exposures of financial institutions.[30] Securitization allows national, international, and individual investors almost limitless opportunities to invest.[31] Assets that generate cash flow, such as mortgages, credit cards, and equipment leases are most typically involved in securitiza-

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25. Michel V. Hurley, *International Debt and Equity Markets: U.S. Participation in the Globalization Trend,* 8 EMORY INT'L L. REV. 701, 701 (1994).

26. Michael Gruson, *The Global Securities Market: Introductory Remarks,* 1987 Colum. Bus. L. Rev. 303, 306 (1987).

27. Hurley, *supra* note 25, at 712.

28. Allen Frankel, *Prime or Not So Prime? An Exploration of U.S. Housing Finance in the New Century,* BIS Q. Rev., Mar. 2006 at 68, *available at* http://www.bis.org/publ/qtrpdf/r_qt0603f.pdf.

29. Joanna Slater & Craig Karmin, *A New World Disorder for Debt Traders,* WALL ST. J., Aug. 10, 2007, at C1.

30. Aaron Unterman, *Exporting Risk: Global Implications of the Securitization of U.S. Housing Debt,* 4 HASTINGS BUS. L. J. 77, 79 (2008).

31. John W. Uhlein, *Breakdown in the Mortgage Securitization Market: Multiple Causes and Suggestions for Reform,* 60 SYRACUSE L. REV. 503, 508 (2010).

tion.[32] Securitized assets are a more specific assumption of investment risk than typical securities because they basically transfer the risk of debt obligations and the fulfillment of debt obligations to the investor.[33] Investors receive higher rates of return from more securitized investments because of the higher risk of default.[34] Through securitization, the credit risk is separated from the asset and selling securitized loans in the secondary market provides funding and credit risk management.[35] This allows the risk of the investments to be dispersed amongst a vast group of investors and possibly increases the stability of the finance industry.[36] By spreading the risk of investments across multiple investors, securitization increases the efficiency of financial markets and reduces great fluctuations within those markets.

However, there has been minimal development in the standardization of securitized transactions or their regulation internationally.[37] Collateralized Debt Obligations ("CDO") are the fasted growing part of securitized markets.[38] CDOs are complex instruments that balance underlying assets of various qualities.[39] The only monitoring of these instruments on an international level are the rating agencies who price these securities.[40] "The complexity of CDOs masks and misrepresents risk transfers through an opaque grading system that combines investment pools with different risk exposures."[41] Nevertheless, credit risks are shifted to other areas of the market and do not disappear.[42] There is concern that a large number of investors are unaware of risks connected with securitized investments and may incur losses based on statements made by the issuers of the securities.[43] There exists very little marketing literature on CDOs, and the literature that does exist "does not focus on 'accelerated concentration risk,' probably because CDOs would then sound more like Russian roulette than the grand triumphant inventions of off-balance sheet financial engineering."[44]

Furthermore, banks favored the entire aspect of securitization and collateralization because it allowed banks to remove from their balance sheets the credit

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32. Unterman, *supra* note 30, at 79.

33. Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development,* 29 CARDOZO L. REV. 1553, 1557 (2008).

34. Unterman, *supra* note 30, at 80.

35. *Id.*

36. *Id.*

37. Kirill Glukhovsky & Joseph Tanega, *CDOS Under Siege: Part 1: Compliance under the IAS and Basel II,* 21(11) J.INT'L Banking L. & Reg. 652, 652 (2006).

38. *Id.*

39. Unterman, *supra* note 30, at 81.

40. *Id.*

41. *Id.* at 82.

42. *Id.*

43. *Id.*

44. Glukhovsky, *supra* note 37, at 655.

they originated.[45] This allowed banks to earn income without tying up considerable amounts of regulatory capital.[46] Additionally, banks could acquire fairly cheap wholesale funding by creating mortgage pools, selling them off and, at the same time, raising supplementary funds in the capital markets through further issuing asset-backed securities where "the assets that are physically backing the securities issued are the 'packaged' mortgages themselves."[47]

## V. THE SECURITIZATION OF THE MORTGAGE MARKET

Securitization was widely used to ease the practice of trading mortgages in the secondary mortgage market, starting as early as the 1970's, through the most prevalent CDOs, mortgage backed securities.[48] From the late 1930's to the late 1960's, the Federal National Mortgage Association ("Fannie Mae") was the sole institution that bought mortgages from depository institutions, mainly savings and loan associations, and effectively insured the value of mortgages by the U.S. government.[49] In 1968, Fannie Mae split into a private corporation and a publicly financed institution.[50] The private corporation was still called Fannie Mae and it continued to support purchases of mortgages from depository institutions.[51] In contrast, the publicly financed institution was the Government National Mortgage Association ("Ginnie Mae") and it explicitly guaranteed the repayments of securities backed by mortgages made to government employees or veterans.[52] These securities were the first mortgage pass-through securities that passed the principal and interest payment on the mortgage to investors.[53] Through the Emergency Home Finance Act of 1970, Congress created the Federal Home Loan Mortgage Corporation ("Freddie Mac").[54] Freddie Mac is a private corporation that provides competition for Fannie Mae and increases the availability of funds to finance mortgages and home ownership.[55]

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45. Omar Masood et al., *A Discussion of Financial Regulations' Impact on the Subprime Crisis: Implications for Financial Markets,* 15(1) Int'l J. Bus. 51, 60 (2010).

46. *Id.* at 60.

47. *Id.*

48. Kettering, *supra* note 33, at 1557.

49. Robin Paul Malloy, *The Secondary Mortgage Market a Catalyst For Change in Real Estate Transactions,* 39 Sw. L. J. 991, 993 (1986).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See generally* U.S. Sec. & Exchange Commission, *Mortgage Backed Securities* July 23, 2010, http://www.sec.gov/answers/mortgagesecurities.htm ("Mortgage-backed securities exhibit a variety of structures. The most basic types are pass through participation certificates, which entitle the holder to a pro-rata share of all principal and interest payments made on the pool of loan assets. More complicated MBSs, known as collateralized mortgage obligations or mortgage derivatives, may be designed to protect investors from or expose investors to various types of risk.").

54. Malloy, *supra* note 49, at 994.

55. *Id.*

These pass-through securities, which became commonly known as mortgage-backed securities ("MBS"), were essential to the securitization of the mortgage market. Before 1970, the buying and selling of mortgages was relatively stagnant.[56] It was nearly impossible for mortgage lenders to find buyers if they wanted to sell their loan portfolios quickly and at an acceptable price. Servicing the loans meant exposure to the risk that rising interest rates could drive a lender's interest cost higher than its interest income.[57] However, trading entire loans was extremely cost prohibitive because of the enormous amount of details and paperwork that was required.[58] MBS changed that by combining similar loans into pools. Fannie Mae, Freddie Mac and Ginnie Mae were able to pass the mortgage payments through to the certificate holders or investors.[59] This made the secondary mortgage market more attractive to both investors and lenders.[60] Investors now had a liquid instrument and lenders had the option to move any interest rate risk associated with mortgages off their books.[61]

## VI. THE SUBPRIME MORTGAGE: THE DESIRE TO OFFER LOANS TO LESS THAN PERFECT BORROWERS

As more investors entered into the secondary mortgage market, they sought new ways to maximize the value of home loans offered to borrowers and make more money for themselves. Traditionally, mortgages were only offered to "A" borrowers, individuals with superior credit ratings, job histories, assets, debt to income qualifications, and the ability to make significant down payments on home purchases (usually at least 20% of the sales price).[62] As more investors were introduced to the market, investors began to realize there was a significant number of the American population that did not qualify for traditional mortgages, but still desired to own their own home.[63] There became a demand in the market place for loans to higher risk borrowers with less than perfect credit.[64] Investors began to develop loan products for higher risk borrowers available at a higher interest rate than the traditional mortgage.[65] Additionally,

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56. *Id.* at 995.

57. *Id.* at 995-96.

58. *Id.* at 996.

59. David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market,* 33 FLA. ST. U. L. REV. 985, 1009 (2006).

60. *Id.*

61. *Id.*

62. Securitization: Asset-Backed and Mortgage-Backed Securities § 9.04 at 9-21 (Ronald S. Borod ed., 2003).

63. Robert Van Order, *The U.S. Mortgage Market: A Model of Dueling Charters,* 11 J. HOUSING RES. 233, 234 (2000).

64. Paul Beckett & John Hechinger, "*Subprime" Could Be Bad News for Banks—Riskier Loans, Now Prevalent in Industry, Show Problems,* WALL ST. J., Aug. 9, 2001, at C1.

65. *Id.*

some borrowers were also looking for alternatives to the traditional 30 year mortgage.[66]

### A. WHAT IS A SUBPRIME LOAN?

Subprime loans are mortgages that are generally given to borrowers with a 620 credit score or lower.[67] Through lending to a subprime borrower, lending institutions extend credit to individuals with lower monthly income levels, less wealth, and riskier credit profiles than traditional borrowers.[68] Subprime borrowers typically live in low-income neighborhoods, are less likely to have a college education, are more likely to be minority borrowers, and carry a large amount of credit card debt.[69]

To access the increasing market of subprime loans, lenders often took risks associated with lending to people with poor credit ratings or limited credit histories.[70] Lenders would balance the different loan factors against each other to evaluate the overall credit risk of a borrower.[71] For example, if a borrower's credit report showed a number of late payments on credit cards, he or she may still qualify for a loan if they had sufficient income. Lenders use a variety of methods to offset the additional risk of the subprime borrower, but typically this risk is offset by a higher interest rate.[72] By charging a higher interest rate, the lender compensates for increased costs associated with servicing these accounts, as well as protect against a higher default rate on the loans.[73]

Subprime mortgages also offer alternatives to the traditional 30-year fixed mortgage. The typical subprime mortgage is structured as an Adjustable Rate Mortgage ("ARM").[74] An ARM is still a 30-year mortgage note, but the intro-

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66. *Id.*

67. Mara Lee, *Subprime Mortgages: A Primer,* NPR. Mar. 23, 2007, http://www.npr.org/templates/story/story.php?storyId=9085408. A consumer's credit score is a three-digit number calculated using information in a borrower's credit report. Leslie McFadden, *What is a credit score?,* Bankrate.com, http://www.bankrate.com/finance/credit-cards/what-is-a-credit-score.aspx (last visited Apr. 9, 2012). The most common credit-scoring model on the market is the FICO credit score. *Id.* "A consumer has three FICO scores, one for each credit report provided by the three major credit bureaus: Equifax, Experian and TransUnion." *Id.* The scoring model analyzes five major categories from a consumer's credit report and weighs some of those factors more heavily than others: payment history (35%); amounts owed (30%); length of credit history (15%); new credit (10%); and types of credit used (10%). *Id.* Credit scores range from 300 to 850 and the higher the number the lower the consumer's credit risk. *Id.*

68. Amy Crew Cutts & Robert Van Order, *On the Economics of Subprime Lending* (Freddie Mac, Working Paper No. 04-01, 2004) *available at* http://www.freddiemac.com/news/pdf/subprime_012704.pdf.

69. Lee, *supra* note 67

70. Reiss, *supra* note 59, at 995-96.

71. *Id.*

72. Cassandra Jones Havard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending,* 56 SYRACUSE L. REV. 233, 251 (2006).

73. Lee, *supra* note 67.

74. *Id.*

ductory rate is fixed for a short period of time and adjusts according to the market after the fixed term.[75] Borrowers typically prefer ARMs when market interest rates are considered high.[76] The interest rate for the initial fixed period of an ARM is generally lower than the interest rate of a 30-year fixed mortgage.[77] When rates are high, a borrower does not want to get locked into a high interest rate for a 30-year term. A borrower takes an ARM with the hope that interest rates will fall and his rate will go down after the specified fixed period. Borrowers can also protect themselves from large increases in interest rates because ARMs generally have a cap on the interest rate.[78] The cap on an ARM is the limit on how much the interest rate can move during an adjustment period or for the life of the loan.[79] ARMs are also helpful for a borrower who is trying to repair their credit because the ARM keeps their interest rate lower than a 30-year fixed mortgage in the first few years.[80] If the credit repair is successful, the borrower will refinance into a more favorable loan upon the first adjustment period of the ARM.

Subprime loans also carry different amortization options than an "A" borrower loan. Typically "A" mortgages are fixed rate mortgages based on a full amortization schedule over a 30-year term.[81] The borrower has a fixed payment he makes every month that is calculated so the last payment will pay off the balance of the loan.[82] These loan payments generally constitute large percentages of interest payments and small percentages of principal payments early in the loan period.[83] The more a borrower pays into the loan, the lower his principal becomes and the higher the percentage of his payment that goes toward paying down that principal becomes.[84] Lenders have offered interest only mortgage loans where a borrower only pays the interest due on the loan over a fixed period of time, usually anywhere from three or ten years.[85] Interest only loans allow a borrower who knows he is going to refinance or payoff his mortgage (usually through the sale of his house) before the full term of the mortgage to have a lower monthly payment and save money while he is in the interest only payment of the mortgage. Borrowers need to be wary of an interest only mortgage, because they are not paying off any principle during this time.[86] If the value of the borrower's property drops below the principle amount due on the

75. MALLOY & SMITH, *supra* note 14, at 394.
76. *Id.*
77. *Id.*
78. *Id.* at 395.
79. *Id.*
80. MALLOY & SMITH, *supra* note 14 at 394.
81. *Id.* at 391.
82. *Id.*
83. *Id.*
84. *Id.* at 391-92.
85. MALLOY & SMITH, *supra* note 14 at 399.
86. *Id.*

mortgage, the borrower is said to be "underwater." or the borrower owes more than their mortgage is worth.[87] The underwater mortgage is a central reason for the influx of foreclosures in the last few years.

## VII. THE DOWNSIDE TO SECURITIZATION

Securitization was meant to make the financial system more resilient and immune to large market downturns. The idea of financial globalization was that banks no longer held assets on their books and packaged the assets in asset backed securities, like mortgage backed securities, for sale to investors in worldwide capital markets. The risk was widely distributed.[88] Securitization was the prevailing reason for the mortgage market collapse. By securitizing, banks were not carrying the risk and earned fees for transactions. The quality of banks' lending suffered dramatically.[89] Additionally, credit rating agencies had severe conflicts of interest due to the fact that they received fees from managers of the investment instruments they were rating.[90]

The process of securitization also contributed to a larger retention by banks of "toxic waste," or "assets that are particularly illiquid and vulnerable to changes in macroeconomic performance."[91] Throughout the late 20th century, there was steady expansion in the rate of asset securitization, most notably, mortgage-backed securitization in the U.S.[92] "For the period [of] 1996 to 2007 mortgage backed securities account[ed] for three-quarters of the annual US securitization market. At its peak in 2003, the share of U.S. outstanding mortgages being securitized on an annual basis reached roughly 40% before dropping off to levels below 20%."[93] Ultimately, investors, especially those who took out financing to acquire their assets, mainly holding mortgage backed securities, were subject to margin calls that forced them to trade, at a discount, their illiquid underlying investments.[94] The value of mortgage backed securities dropped rapidly and investors were quickly losing large amounts of money.

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87. Ryan Grim, et al., *Learning to Walk: Fear, Shame and Your Underwater Mortgage,* The Huffington Post, Feb. 3, 2011, http://www.huffingtonpost.com/2011/02/03/learning-to-walk-underwater-mortgages_n_html.

88. Nouriel Roubini, *Financial Globalisation Darkside*, Bus. & Fin. 2007 WL 22428405.

89. *Id.*

90. *Id.*

91. Duffe, D., 2007, Innovation in Credit Risk Transfer: Implications For Financial Stability (July 2, 2007) *available at* http://www.stanford.edu/~duffie/BIS.pdf/ (Working paper, on file with Stanford University).

92. Masood, *supra* note 45, at 7.

93. *Id.*

94. *Id.* at 61.

## VIII. THE BOTTOM FALLS OUT: THE COLLAPSE OF THE MORTGAGE MARKET

While on the surface it appeared that mortgage investors were making money hand over fist, behind the scenes the mortgage market was ready to crumble. Beginning in late 2006, a steep rise in the rate of subprime mortgage defaults and foreclosures caused the mortgage industry to experience a meltdown.[95] The subprime mortgage defaults and foreclosures had caused more than 100 subprime mortgage lenders to fail or file for bankruptcy.[96] Approximately 80% of U.S. mortgages issued to subprime borrowers were ARMs.[97] After U.S. housing prices peaked in 2006, the ensuing decline made refinancing more difficult. As ARMs approached the end of their fixed rate periods, they reset at higher rates, resulting in higher monthly mortgage payments for individual borrowers and greater mortgage delinquencies.[98] Securities backed with subprime mortgages, mostly held by financial firms, lost most of their value.[99] Global investors also reduced purchases of riskier mortgage backed debt and other securities.[100] This resulted in a decline in the capacity and willingness of private financial institutions to support lending, which tightened credit around the world, slowing economic growth in the U.S. and European markets.[101]

The turmoil of the subprime market was not the only factor that led to mortgage delinquencies. Areas, such as Michigan, Ohio, and Indiana, experienced a high concentration of mortgage defaults due to layoffs and plant closures as a result troubles in the U.S. automotive industry.[102] Additionally, Hurricane Katrina caused a number of foreclosures in Louisiana and Mississippi.[103] These areas also suffered high unemployment and struggling local economies prior to the sharp increase subprime delinquency rates in 2006.[104] Moreover, issues in local job markets exert "downward pressures on local home prices, making refi-

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95. David Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Policy: A Study of Regulatory Privilege,* 61 ALA. L. REV. 907, 915 (2010).

96. James R. Hagerty, *Fannie, Freddie Are Said To Suffer in Subprime Mess,* Wall St. J., July 28, 2007, at A3.

97. Justin Lahart, *Egg Cracks Differ in Housing, Finance Shells,* WALL ST. J., Dec. 24, 2007, *available at* http://online.wsj.com/article/SB119845906460548071.html?mod=Googlenews_wsj.

98. Faten Sabry & Chudozie Okongwu, Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets 65 (2009) *available at* http//www.nera.com/extImage/PUB_ASF_Report_June_2009.pdf.

99. Uhlein, *supra* note 31, at 506.

100. SABRY, *supra* note 98, at 82.

101. *Id.* at 57.

102. *Where Subprime Delinquencies are Getting Worse,* WALL ST. J., Mar. 29, 2007, at Map 2, *available at* http://online.wsj.com/public/resources/documents//info-subprimemap07-sort.html (data provided by First Am. Loan Performance).

103. *Id.*

104. Zywicki, *supra* note 16, at 24.

nance more difficult and reducing incentives to retain a home in the face of financial pressures."[105]

High rates of foreclosure aided in the lasting effects of the subprime mortgage crisis as well. Foreclosure can generally be explained by two different models of foreclosure. The distress model of foreclosure is where a borrower desires to repay a loan, but is unable to do so.[106] A distress model of foreclosure is typical when a family homeowner buys a home for the privileges of homeownership but then experiences expense or income shock that make the homeowner unable to repay his loan.[107] In many instances, this can result from a "triggering event," such as loss of a job or divorce that causes an income loss.[108] The inability to repay the homeowner's loan can also result from expense shock due to the reset of an ARM at a substantially higher interest rate.[109] In the distress model, foreclosure is in essence involuntary because the borrower wants to retain the home, but cannot afford it.

The second model of foreclosure is the option model. The option model foreclosure results from a change in the underlying value of the asset, which results in the foreclosure.[110] The borrower faces the option of repaying the mortgage as contracted in order to retain the property, or the borrower can default on the mortgage and surrender the property to the lender.[111] If the underlying value of the home falls, this gives an incentive to the borrower to exercise his option of default and surrender the property.[112] This situation is referred to as an underwater mortgage with the home being worth less than the mortgage.[113] The market experienced a rise in foreclosures, for whatever reason and the foreclosure epidemic drained wealth from consumers in addition to eroding the financial strength of banking institutions.

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105. *Id.* at 24-25.

106. This is also known as the "ability to pay" model, which "views home ownership as a consumption good, and borrowers default when they can no longer make payments." *See* William P. Alexander, et al., *Some Loans are More Equal Than Others: Third Party Originations and Defaults in the Subprime Mortgage Industry,* 30 REAL EST. ECON. 667, 667 (2002).

107. Zywicki, *supra* note 16, at 26.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 26-27.

112. Zywicki, *supra* note 16, at 27.

113. SABRY, *supra* note 98, at 67-68.

### A. THE RIPPLE EFFECT OF THE U.S. MORTGAGE MARKET COLLAPSE ON FOREIGN MARKETS

The subprime mortgage crisis caused a great deal of concern internationally as homeowners, lenders, financial institutions, and investors across the world felt the negative effects of the crisis.[114]

#### 1. *The Asian Financial Crisis*

The Asian financial crisis started with the collapse of the Thai baht, the standard currency in Thailand, in 1997.[115] The International Monetary Fund ("IMF") was forced to stabilize the currencies of Thailand, South Korea, and Indonesia program of over $40 billion.[116] Many countries were forced to build up foreign exchange reserves to create a hedge against future financial instabilities. For example Brazil, Russia, India, and most of East Asia "began copying the Japanese model of weakening their currencies, restructuring their economies, so as to create a current account surplus to build large foreign currency reserves."[117] In the aftermath of the Asian crisis, international investors steered away from investing in developing countries and looked to invest in developed nations, especially the U.S.[118] In the late 1990s and early 2000s, an influx of foreign currency reserves, including substantial amounts from Asia, began to increase their investment in US treasury bonds and other government backed investments, such as Fannie Mae and Freddie Mac mortgage backed securities.[119] "By the end of 2006, economists calculated that nearly 45% of all U.S. Treasury securities and almost 20% of the U.S. agency bonds and MBSs were funded by foreign, mainly Asian, investors."[120] The influx of foreign capital pouring into the U.S. economy helped keep interest rates low, even as much as one full percentage point.[121] Asian investments in the U.S. mortgage market have primarily been on federally regulated agency mortgage backed securities, typically those issued by Fannie Mae and Freddie Mac.[122] However, there was also a significant increase in foreign investment in unregulated mortgage securities, particularly those offered through unregulated mortgage brokers.[123]

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114. Robert Kuttner, *The Bubble Economy,* The Am. Prospect, Sept. 24, 2007 *available at* http://prospect.org/cs/articles?article=the_bubble_economy.

115. Gerald H. Lander et al., *Subprime Mortgage tremors: An International Issue,* Int'l Advances Econ. Res., 1, 2009, at 6.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Lander, *supra* note 115, at 6-7.

121. *Id.* at 7; *see also* Ashok Bardhan & Dwight Jaffe, THE IMPACT OF GLOBAL CAPITAL FLOWS AND FOREIGN FINANCING ON U.S. MORTGAGE AND TREASURY RATES, (2007), *available at* http://www.housingamerica.org/RIHA/RIHA/Publications/57160_7282_RIHA.pdf.

122. Lander, *supra* note 115, at 7.

123. *Id.*

### 2. *Other Foreign Markets*

The U.S. subprime mortgage crisis had varying impacts on foreign economies, many with large investments in Fannie Mae and Freddie Mac.[124] The United Kingdom felt a definite impact when its fifth largest mortgage lender, Northern Rock, needed an $8.78 billion bailout from by the Bank of England in the summer of 2007.[125] Northern Rock blamed the "global liquidity crisis" for the necessity of the buyout.[126] It was not until the second half of 2009 that Northern Rock Bank reached profitability again.[127]

The U.S.'s immediate neighbors, Mexico and Canada reacted with mixed approaches to the effects of the subprime crisis. The adverse effects of the subprime collapse in the U.S. did not have much of an impact on the Mexican economy. In early 2007, Mexico's Finance Minister, Agustin Carstens, claimed that the "U.S. housing slowdown and losses incurred by subprime mortgage lenders won't damp [sic] growth in Latin America's second-biggest economy."[128] Carstens attributed his positive outlook to the recovery of Mexico's financial market after a financial crisis in 1994, which resulted in a more resilient banking sector, which lessened the potential impact of U.S. economic troubles on Mexico's economy.[129] Unfortunately, because of the impact of the downslide in U.S. markets and an unforeseen flu outbreak, the Mexican economy took a considerable hit in 2009.[130]

The financial industry in Canada did not take as significant a hit as other economies due to the financial crisis and not a single Canadian Bank has failed or required a bailout from the Canadian government.[131] Canadian banks did not require a bailout despite the fact that homeownership rates in the United States

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124. Gregory Zuckerman, James R. Hagerty & David Gautheir-Villars, *Impact of Mortgage Crisis Spreads: Dow Tumbles 2.8% As Fallout Intensifies, Moves by Central Banks,* WALL ST. J., Aug 10, 2007, 1; HUNGARIAN NEWS AGENCY VIA THOMPSON DIALOG NEWSEDGE, *Hungary Growth May Slip Below 1pc, No Impact Seen From Subprime Crisis, City Says,* TECH. MARKETING CORP., Sept. 7, 2007, *available at* http://www.tmcnet.com/usubmit/2007/09/07/2921258.htm; (Pakistan), *Bankers Expect Turmoil to Hit Global Growth,* DAILY TIMES, Sept. 11, 2007, *available at* http://www.dailytimes.com.pk/default.asp?page-2007%5C09%5C11%&story_11-9-2007_pg5_13.

125. Joellen Perry & Jason Singer, *Behind U.K's Shift on Bank Bailouts,* WALL ST. J., Sept. 19, 2007, at C1.

126. Your Questions Answered, NORTHERN ROCK: CORPORATE RELATIONS: http://northernrock.ireland.ie/downloads/yourquestionsanswered.pdf.

127. Michael Santo, *Northern Rock Bank, UK Nationalized Lender, Moves Back to Profitability,* Mar. 10, 2010, http://www.huliq.com/3257/91922/northern-rock-bank-uk-nationalized-lender-moves-back-profitability.

128. Karla Palomo & Bill Faries, *Mexican Economy Will Weather U.S. Housing Slump, Carstens Says,* Bloomberg.com, Mar. 19, 2007, *available at* http://www.bloomberg.com/apps/news?pid=20601086&sid=awbzKoFuLfXM&refer=news.

129. *Id.*

130. *Mexico Economy,* ECONOMY WATCH, Mar. 24, 2010, *available at* http://www.economywatch.com/world_economy/mexico/.

131. Mia Rabson, *Well-regulated, Well-managed Canadian Banks Overshadow Freewheeling U.S. Colleagues,* WINNIPEG FREE PRESS, Aug. 9, 2009, at A1.

and Canada are very similar.[132] Unlike the United States, Canada requires a 20% down payment to purchase a house, or the buyer must acquire mortgage insurance, and Canada does not allow a tax break for mortgage interest deductions.[133] However, Canadian banks did not come out of the financial crisis unscathed. "Share prices for the big six banks dropped between 16.4 and 46.4 per cent in 2008 and combined annual profits fell to $12 billion in 2008 from $19.5 billion in 2007[,] [b]ut all but one of the banks (Canadian Imperial Bank of Commerce) still recorded a profit in 2008."[134] Terry Campbell, Vice-President of Policy for the Canadian Bankers Association attributed Canada's banking success to three main factors, "[the banks] had enough capital, were well regulated and well managed."[135] The Office of the Superintendent of Financial Institutions is the only regulator of Canadian banks and can closely monitor the regular dealings of Canadian banks in order to spot issues early and attempt to influence banks not to take certain risks.[136] Canadian banks also hold more capital to provide a larger buffer to offset significant losses.[137] This practice is unlike the U.S. banking regulatory practices, where the system is fragmented and "things can fall between the cracks."[138] Another reason for the success of the Canadian banks is the fact they are truly national banks. Most of Canada's big six banks have offices in every province, except National Bank.[139] This prevents Canadian banks from having their capital holdings concentrated in one region and allows transfer of capital from one region to another to accommodate the ebbs and flows of the Canadian economy.[140] Most Canadian banks are generally larger than typical American banks allowing them to do more than just retail servicing, giving them diversified enterprises to keep them in business during economic downturns.[141]

Further, in Brazil, the Brazilian Real reached a seven-year high in October 2007, right in the midst of the U.S. mortgage crisis.[142] In addition, 23.9 billion Reais worth of shares of initial public offerings were sold in Brazil through September 2007, up from 14.2 billion Reais worth of initial public offering shares sold in all of 2006.[143] Part of the increased confidence in the Brazilian

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132. Marie-Josee Kravis, *Regulation Didn't Save Canada's Banks,* WALL ST. J., May 7, 2009, at A17.

133. *Id.*

134. Rabson, *supra* note 131, at A1.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Rabson, *supra* note 131, at A1.

140. *Id.*

141. *Id.*

142. Adriana Brasileiro, *Brazil Real Strengthens Beyond 1.80 Per Dollar, a 7-Year High,* Bloomberg.com, Oct. 11, 2007, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=AjabeO9MMgME.

143. *Id.*

economy is evidenced by the steps taken by the central bank to improve liquidity, decrease debt, and boost exports.[144] The increase in initial public offerings shows significant interest of investors in Brazil's emerging market.

## IX. WHY THE U.S. GOVERNMENT CHOSE TO BAILOUT FANNIE MAE AND FREDDIE MAC TO SAVE ITS GLOBAL ECONOMY

In September of 2008, the United States federal government structured a bailout of Fannie Mae and Freddie Mac.[145] The central banks and other investors of China, Japan, Europe, the Middle East, and Russia held over $1 trillion worth of Fannie Mae and Freddie Mac debt.[146] The U.S. government apparently felt it had no choice but to shift the financial burden of Fannie Mae and Freddie Mac to the U.S. taxpayers.[147] A speculation about the possible collapse of either Fannie Mae or Freddie Mac (or both) increased in the summer of 2008 and foreign investors threatened to stop their purchases of Fannie Mae and Freddie Mac debt, which would have made it virtually impossible for Fannie Mae and Freddie Mac to function effectively.[148] Moreover, if Fannie Mae and Freddie Mac could not function effectively, the U.S. mortgage market could not function effectively.[149] The U.S. government made great efforts to protect foreign investors at the expense of common shareholders.[150] If not for the bailout, China's financial position would have been drastically damaged because 70% of the $1.8 trillion in China's foreign currency reserves were held in U.S. dollar denominated assets.[151] In addition, China was also the top holder of bonds issued by Fannie Mae and Freddie Mac, with $376 billion tied into the two government enterprises.[152] Therefore, if China were to lose faith in the U.S. dollar and subsequently dump it, the value of the dollar could plummet against other currencies.

Through the bailout, the U.S. Treasury fundamentally backs debt issued by Fannie Mae and Freddie Mac; therefore, holders of the debt no longer need to be apprehensive of losing their investments.[153] Foreign markets that invested in

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144. *Id.*

145. William Patalon III, *Foreign Bond Holders – and not the U.S. Mortgage Market – Drove the Fannie Freddie Bailout*, Money Morning, Sept. 11, 2008 http://moneymorning.com/2008/09/11/fnm/.

146. David R. Sands, *Overseas Debt Drives Bailout of Fannie, Freddie,* THE WASH. TIMES, Sept. 9, 2008, *available at* http://www.washingtontimes.com/news/2008/sep/09/overseas-debt-drives-bailout-of-fannie-freddie/?page=1.

147. Patalon III, *supra* note 145; *see also* John Ydstie, *Understanding the Fannie, Freddie Rescue,* NPR. Sept. 8, 2008 http://www.npr.org/templates/story/story.php?storyId=94393089.

148. Ydstie, *supra* note 147; Reiss, *supra* note 11, at 1023-25.

149. Patalon III, *supra* note 145.

150. Mark Zandi, *The Fannie-Freddie Takeover: A Latter-Day RTC,* MOODY'S ANALYTICS, Sept. 7, 2008, *available at* http://www.economy.com/dismal/article/_free.asp?cid=108515.

151. Patalon III, *supra* note 145.

152. Sands, *supra* note 146.

153. Reiss, *supra* note 11, at 1034.

the two mortgage giants were reassured by the boost of capital and restored faith in the U.S. dollar.[154] Unfortunately for the American people, the cost of the bailout carried a huge burden on the American taxpayer, with estimations approaching $363 billion.[155] Furthermore, through the bailout, the U.S. government has established a dangerous and potentially extremely costly precedent in the federal bailout.

## X. THE MODEL TO AVOIDING ANOTHER CRISIS MAY LIE NORTH OF THE BORDER

Before the bottom dropped out of the U.S. economy due to the effects of the subprime mortgage crisis and U.S. housing collapse, the U.S. mortgage market had very positive elements. The underlying idea of the subprime mortgage allowed a larger percentage of the U.S. population to realize the much sought after American Dream. Homeownership was not just for the upper middle class and for people who could afford to make large down payments on their home purchases. By shifting some of the risk to the borrower through higher interest rates, investors were able to underwrite more loans, and, in turn, become more profitable. Unfortunately, the bubble burst, causing a ripple effect throughout the U.S. and world economies. Borrowers could no longer afford their homes and foreclosure rates skyrocketed. Banks were not equipped to handle these losses and, due to their undercapitalization, over 150 U.S. banks were forced to close. The U.S. government was forced to bailout Fannie Mae and Freddie Mac to virtually save the economy and maintain the confidence of foreign investors, namely China.

While many economies felt the residual effect of the crash of the housing market in the United States, one economy, very close to home, was able to survive the plunge. The banking system in Canada gives the United States, and the rest of the world, an effective blueprint to follow as the market recovers. Through its nationalized banking system, the Canadian economic climate was able to endure the downturn and thrive in the new economic environment. While the extent of the subprime loan was clearly a major problem and leading factor in the collapse of the US market, banks with a more diversified portfolio would have weathered the storm more effectively. Canada lacked specialized lending institutions and thrived on large national banks, with many lending departments and high liquidity. Canadian banks buoyed the economic downturn because of the ability to concentrate on other investment opportunities and use capital from other departments to protect the loan servicing sectors.

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154. Sands, *supra* note 146.

155. Douglas A. McIntyre, *Taxpayer Cost of Fannie Mae and Freddie Mac Could Reach $363 Billion,* Oct. 21, 2010, http://247wallst.com/2010/10/21/taxpayer-cost-of-fannie-mae-and-freddie-mac-could-reach-363-billion/.

Despite perceived weaknesses, securitization and globalization are essential to a strong economic climate in the future. We are immersed in a truly international economy. The economic climate of all countries is dependant upon its domestic investments, but more importantly its international investments. The U.S. economy needs other countries, especially the Asian nations, to thrive. Diversification is the key to ensuring that future economic downturns will not be as great as the one we are slowly working out of.

However, simply ensuring that banking institutions are liquid and diversified is not enough. Lenders need to get smarter with the underwriting of home loans. Borrowers must be more accountable for the loans they take out on their homes. Blame should not have been placed on the lending institutions alone, though they certainly played their part. Borrowers need to be more responsible with their investments. The home is the largest investment a person is going to make in their lifetime, unfortunately, before the housing crash, borrowers were not acting like it. Lending institutions and borrowers must work together to ensure loans are given to borrowers that deserve them and borrowers can make all of their payments on time. Even though it has taken a hit in the last few years, the American Dream is still alive and well, it just needs to be a more realistic dream.

# *Wal-Mart Stores, Inc. v. Dukes*: The Fatal Class Action Suit

MICHELLE GALLO

## INTRODUCTION

Class action lawsuits necessitate specific requirements, which the class must satisfy under Rule 23 of the Federal Rules of Civil Procedure. The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* creates a stringent analysis of these requirements. By emphasizing a commonality of claims, the Court makes the fulfillment of even general requirements much more difficult for plaintiffs.

A class certification is a difficult determination, especially when the class contains more than 1.5 million employees nationwide. Tasked with determining if the class was proper for certification, the Court dissected the Federal Rules of Civil Procedure carefully to determine the applicability of the specific rules claimed by the plaintiffs. The Court's emphasis on commonality and typicality are justified under Rule 23(a) and therefore based on the Court's reasoning. It seems that plaintiffs must amend the relief sought or reduce their class into regional or even local districts to succeed on their claim of discrimination based on gender. The Court, however, left the question of the applicability of a different subsection on remand. This begs the question whether or not plaintiffs' claim would have succeeded if they had selected the correct rule or if their class action would still fail for lack of commonality of claims.

Additionally, the implications of this holding call into question the policy considerations regarding the interests of corporations and their rights in defending against a large class. Wal-Mart's position as the nation's largest private employer, with approximately 3,400 stores and employing more than one million people, seemingly provides the company a protection against large class action suits that could be applied to future corporations in similar situations, proving fatal to future class action suits that fall victim to discrete practices of discrimination.

## FACTS OF THE CASE

Wal-Mart Stores, Inc. operates approximately 3,400 stores and employs over one million people in the United States.[1] Pay and promotion decisions at Wal-Mart are typically left to local managers' discretion, which is exercised in a "largely subjective manner."[2] Local managers may increase wages of hourly

1. *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S.Ct. 2541, 2546 (2011).
2. *Id.*

employees with little oversight, while higher corporate authorities have discretion to set the pay for salaried employees.[3] Promotions within the company work in a similar fashion as wage decisions. Wal-Mart allows store managers to apply subjective criteria when choosing employees for initial management positions.[4] At the same time, there are some objective criteria an employee must meet to be admitted to Wal-Mart's management training program, including "above average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate."[5] Promotions to higher office are also at the discretion of the supervisor after the objective factors are satisfied.[6]

The named plaintiffs in this suit are three women, all current or former employees of Wal-Mart. Betty Dukes worked at a Pittsburg, California Wal-Mart starting in 1994.[7] She initially worked as a cashier, but later sought a promotion to customer service manager, which she received.[8] However, she was demoted back to cashier and subsequently to greeter, after a series of disciplinary violations.[9] Despite the infractions, Dukes believed that the demotions were actually the result of an internal complaint she filed, claiming that male employees were not disciplined for similar violations.[10] She also claimed the male greeters at the same store were paid more than she was.[11] Christine Kwapnoski worked at Sam's Club stores in Missouri and California.[12] During her time at Sam's Club, Kwapnoski held a variety of positions, including supervisory ones.[13] She claimed that a male manager yelled at her and other female employees, but not male employees under similar circumstances.[14] She also contended that a manager told her to "doll up, to wear some make-up, and to dress a little better."[15] Edith Arana worked at Wal-Mart from 1995 to 2001 in Duarte, California.[16] She initiated an internal complaint after being ignored by the store manager when she approached him about management training.[17] She was told to apply directly to the district manager if she believed her store man-

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3. *Id.*
4. *Id.*
5. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2546.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2548.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2548.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2548.

ager was being unfair, but decided against doing so.[18] She was subsequently fired for failure to comply with Wal-Mart's time keeping policy.[19]

These three employees represented the 1.5 million members of the certified class. They did not claim that Wal-Mart had any "corporate policy" against the advancement of women, but rather the discretion of local managers gave rise to disproportional pay and promotion practices in favor of male employees, directly violating Title VII of the Civil Rights Act of 1964.[20]

## PROCEDURAL HISTORY

Plaintiffs filed suit against Wal-Mart seeking injunctive and declaratory relief, punitive damages, and back pay, claiming the discrimination to which they were subjected was common to all Wal-Mart's female employees.[21] They sought to litigate the Title VII claims of all current and former female employees at Wal-Mart stores in a nationwide class action of more than 1.5 million women.[22] The case was brought in the Northern District of California, which certified a plaintiff class consisting of all women employed at any Wal-Mart store at any time since December 26, 1998 who may have been subjected to the challenged pay and promotion practices.[23] The District Court certified plaintiffs' proposed class.[24] The Ninth Circuit, sitting en banc, substantially affirmed the District Court's order, finding that the class had met the commonality requirement and the back pay claims could also be certified.[25] The Ninth Circuit also determined that allowing the class action would not deny Wal-Mart the chance to present statutory defenses so long as the District Court chose a random sample of claims for valuation.[26] The Supreme Court granted certiorari.[27]

## THE SUPREME COURT'S OPINION

The issue brought before the Court was whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).[28] Justice Scalia delivered the opinion of the Court. Chief Justice Roberts as well as Justices Kennedy, Thomas, and Alito joined. Justice Ginsburg filed an opinion concurring in part and dissenting in part, which Justices Breyer,

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2544.
22. *Id.*
23. *Id.* at 2549.
24. *Id.*
25. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2549-50.
26. *Id.* at 2550.
27. *Id.*
28. *Id.,* 131 S.Ct. at 2546.

Sotomayor, and Kagan joined. The 5-4 opinion reversed the certification of the plaintiffs' class, finding it not consistent with Rule 23(a) and finding plaintiffs' back pay claims improperly certified under Rule 23(b)(2).

Rule 23(a) requires a party seeking certification to demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) *there are questions of law or fact common to the class*; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[29] The Court found the commonality requirement of Rule 23(a) to be essential to the determination of a certified class.

The Court's approach in *General Telephone Co. of Southwest v. Falcon* describes how the commonality requirement should be approached, finding that the Rule required plaintiffs to demonstrate that the class members have all suffered the same injury, not that they have all suffered a violation of the same provision of law.[30] As the Court in *Falcon* described:

> There is a wide gap between an individual's claim that he has been denied a promotion on discriminatory grounds . . . and the existence of a class of person who have suffered the same injury as the individual, such that the individual's claim and the class will share common questions of law or fact and that the individual's claim will be typical of the class claims.[31]

The opinion in *Falcon* provided two ways in which this gap could be bridged. The first approach included a bias-testing procedure used by the employer to evaluate applicants.[32] Each applicant would take the test, and, therefore, all prejudiced by the test would meet the commonality requirement of Rule 23(a).[33] The Court here did not find this applicable to the Wal-Mart practices since the store did not have a testing procedure or other company-wide evaluation method that exhibited this type of consistent bias. The second consideration would occur when proof existed to show that the employer operated under a "general policy of discrimination" manifesting itself in hiring and promotion practices through entirely subjective decision-making.[34] The Court found this absent in the Wal-Mart case, taking into consideration Wal-Mart's announced policy that forbids sex discrimination and imposes penalties for denials of equal employment opportunities.[35]

Plaintiffs' evidence was only able to convince the Court that Wal-Mart had a policy of allowing discretion by local managers and supervisors over pay and

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29. Fed. R. Civ. P. 23(a).
30. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).
31. *Id.,* 457 U.S. at 157.
32. *Id.* at 159.
33. *Id.*
34. *Falcon,* 457 U.S. at 159.
35. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2545.

promotion matters. The Court found this policy to be just the opposite of a uniform employment practice that would meet the commonality requirement for class action suit. However, the Court did determine that local supervisor discretion could lead to a Title VII claim, just not one for every employee in a company using a system of discretion.[36] From this finding, the Court concluded "in a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[37] In her dissent, Ninth Circuit Judge Ikuta reasoned that evidence of discrimination at the regional and national level does not establish the existence of disparities at individual stores, nor does it establish a company-wide practice of discrimination through discretionary decisions by local store managers.[38] Additionally, in *Watson v. Fort Worth Bank and Trust*, the Court held that "merely proving that the discretionary system has produced a racial or sexual disparity is not enough."[39] There, the Court established a criterion that the plaintiffs must, from the start, identify the specific employment practice producing the discrimination.[40] Here, the plaintiffs identified only the existence of delegated discretion as the source of discrimination, which the Court found insufficient to meet the criteria of specific practices set forth in *Watson*, and, in addition, did not tie together the claims of all 1.5 million class members. Plaintiffs presented only 120 affidavits describing the instances of discrimination for all 1.5 million members from only 235 out of 3,400 stores, concerning stores in only six states.[41]

Plaintiffs' requested back pay as a result of the discriminatory promotion practices under Rule 23(b)(2). Rule 23(b)(2) states a class action may be maintained if Rule 23(a) is satisfied and if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.[42] The Court found that claims for individual relief do not satisfy the Rule, since the Rule does not authorize class certification in instances where individual class members would be entitled to different judgments against the defendant.[43] Looking to the historical basis of the Rule, the Court concluded that in none of the antecedents did plaintiffs combine individual claims for relief with their class claims.[44] The Court also considered the other subsections of Rule 23(b) and determined that individualized monetary claims belong under

36. *Id.*
37. *Id.*
38. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 629 (9th Cir. 2010) (Ikuta, J. dissenting).
39. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 1009 (1986).
40. *Watson*, 487 U.S. at 1009.
41. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2556.
42. Fed. R. Civ. P. 23(b)(2).
43. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2546.
44. *Id.,* 131 S.Ct. at 2558.

subsection (b)(3) of Rule 23.[45] Finally, the Court addressed the Trial by Formula discussed by the Court of Appeals. The Court found the Rules Enabling Act prohibits construing Rule 23 to "abridge, enlarge, or modify any substantive right," and therefore the class cannot be certified since Wal-Mart would not be entitled to litigate its statutory defenses to individual claims.[46]

## ANALYSIS/IMPLICATIONS

The majority and the dissent both discuss Rule 23(b)(3) and its structural feature that might have allowed for plaintiffs in this case to prevail on their claim for back pay. Rule 23(b)(3) states a class action may be maintained if Rule 23(a) is satisfied and if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.[47] The Rule also requires that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[48] The matters pertinent to these findings include the class members' interest in individually controlling the prosecution or defense of separate actions, the extent and nature of any litigation concerning the controversy already begun by or against class members, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the likely difficulties in managing a class action.[49]

The dissent argued that the majority overlooked the key dispute common to the class of whether Wal-Mart's discretionary pay and promotion policies are discriminatory. Justice Ginsberg, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan joined, agreed that the class in this case should not have been certified under Rule 23(b)(2), but considered that the class may have been certifiable under Rule 23(b)(3).[50] Under this consideration, a class may be certified if the plaintiffs show that common class questions "predominate" over individual issues.[51] Ginsberg believed that the majority erred in disqualifying the class from the start by holding that plaintiffs did not meet the commonality requirement set by Rule 23(a). He found that the majority used a more demanding criterion than Rule 23(a) requires.[52] By elevating the requirement of Rule 23(a)(2), the majority gave an inadequate consideration of whether Wal-Mart's discretionary pay and disputed practices are discriminatory, the issue common to the class.[53] Ginsberg reasoned that, while an individ-

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45. *Id.,* 131 S.Ct. at 2561.
46. *Id.,* 131 S.Ct. at 2561.
47. Fed. R. Civ. P. 23(b)(3).
48. Fed. R. Civ. P. 23(b)(3).
49. Fed. R. Civ. P. 23(b)(3).
50. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2561.
51. *Id.,* 131 S.Ct. at 2561.
52. *Id.,* 131 S.Ct. at 2562.
53. *Id.,* 131 S.Ct. at 2566.

ual employee's "unique circumstances" will ultimately determine whether she is entitled to back pay or damages, this should not factor into the Rule 23(a) determination of commonality.[54] In *Watson,* the Court found "a system of delegated discretion is a practice actionable under Title VII when it produces discriminatory outcomes."[55] Using this reasoning, Ginsberg suggested that finding Wal-Mart's pay and promotions practices violate the law on the merits would be the first step in the "usual order of proof" for plaintiffs seeking individual remedies for company-wide discrimination.[56]

Justice Ginsberg's findings raise the question whether the plaintiffs would have won their suit on the merits. Under Title VII §2000e-2(a):

> It shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or 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.[57]

Looking at the individual claims presented, each plaintiff may have had a strong case under this section of Title VII. If local managers were sued individually or by multiple employees from the same store, then the suit might have been found in favor of the employees on the merits since the manager's specific discretion resulted in unequal promotions and pay with regard to gender. Though splitting the class action into local suits may not have had as much of a profound impact nationally, the plaintiffs would have been more likely to prevail. In addition under §2000e-2(k):

> An unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity, or the complaining party makes the demonstration with respect to alternative employment practice and the respondent refuses to adopt such alternative employment practice.[58]

This section could have been utilized under a series of smaller suits rather than one large suit since specific practices of local managers could have been more

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54. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2567.
55. *Watson,* 487 U.S. at 990.
56. *Wal-Mart Stores, Inc.,* 131 S.Ct. at 2567.
57. 42 U.S.C. § 2000e-2(a) (2006).
58. 42 U.S.C. § 2000e-2(k) (2006).

explicitly determined. However, if the original, larger suit were to reach the merits, §2000e-2(k) may have been more persuasive since the plaintiffs' nationwide suit shows a clear case of disparate impact, despite a uniform practice. In *Washington v. Davis*, the Court focused the Equal Protection Clause in government hiring with regard to racial discrimination, but briefly considered a Title VII claim conceded that a hiring practice that disqualifies a substantially disproportionate number of a class will be stricken, even without a showing of discriminatory intent.[59] If Title VII did not apply to this case then disparate impact would not be enough to support the plaintiffs' case. The Court in *Washington* held that a showing of disproportionate impact is a factor in ascertaining intent to discriminate; it is not, on its own, sufficient to prove discriminatory intent when considered under Equal Protection requirements.[60]

While on the merits the Wal-Mart case appeared to favor the plaintiffs, further examination of the evidence showed that the class was so large and the claims so disperse that it would have been unrealistic to manage damage awards for each individual litigant, particularly in terms of back pay. Had the respondents sued in smaller classes based on local or district claims against a single manager or set of managers within the same set of stores, their claims may have been more palatable for the courts in determining the discriminatory effect on employees under the same local management scheme.

After the decision was revealed, Joseph Sellers, the lawyer for the female employees at Wal-Mart, said, "that while the road may be longer, I believe the case against Wal-Mart can still be made in cases brought on a statewide, regionwide, or even store-wide basis."[61] In addition, NYU Law Professor Samuel Issacharoff stated, "the problem with the Wal-Mart suit was that it started off big, seeking a framework for widespread damages."[62] Turning back to Rule 23(b)(3), it seems that after the class has been certified and prevails on their claims as a whole, individual considerations may be made. Since the class would be smaller, individual claims for back pay would be more manageable after a decision is reached on the merits for the entire class. The history of Rule 23 indicates that individual relief claims belong in 23(b)(3) since it includes procedural protections of "predominance, mandatory notice, and the right to opt out."[63]

Further consideration should be given to the protection afforded to corporate defendants within a class action. The majority began by stating that Wal-Mart is the nation's largest private employer, with approximately 3,400 stores and

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59. *Washington v. Davis*, 426 U.S. 229, 238 (1976).

60. *Id.* 426 U.S. at 239.

61. Nina Totenberg, *Supreme Court Limits Wal-Mart Discrimination Case*, NPR, June 20, 2011, *available at* http://www.npr.org/2011/06/20/137296721/supreme-court-limits-wal-mart-discrimination-case.

62. Totenberg, *supra* note 56.

63. *Wal-Mart Stores, Inc.,*131 S.Ct. at 2558.

employing more than one million people.[64] Wal-Mart is able to provide services to the public, struggling to find steady jobs and places to purchase goods at affordable prices. If Wal-Mart were to pay out damages to over 1.5 million past and present employees it could alter the way the company conducts business, changing the employment and services it currently provides. While Wal-Mart is a major corporation and might possibly be able to make such payments, the amount of payments is not clear and every corporation has its limits. Therefore, the question arises whether the Court would impose a stricter standard upon plaintiffs in order to form a limited protection for companies like Wal-Mart, since such corporations provide employment for a substantial number of people and essential services within the nation.

After the decision was announced, Wal-Mart's lead counsel, Theodore Boutrous, stated "this is an extremely important victory, not just for Wal-Mart, but for all companies who do business in the United States."[65] This statement emphasizes the idea that corporations across the nation will benefit from the Court's decision requiring more stringent fulfillment of Rule 23's requirements. This decision reinforced a pattern of the Supreme Court rulings making it more challenging for complainants, whether employees or consumers, to bring their issues to court.[66]

Moreover, Maria Greenberger, president of the National Women's Law Center, stated that the decision will "create a 'perverse incentive for employers' to set up structures under which individual managers may well use their discretion in discriminatory ways while the company remains immune to class action lawsuits because it has a formal policy against discrimination."[67] Under the same impression, Stanford law professor Deborah Hensler says she reads this decision as saying that, "unless a company has a policy that is clearly discriminatory on its face, which is hard to imagine in this day and age, that suits against discriminatory practices will now be much more difficult to pursue."[68] These ideas highlight the impact of the decision, since it is clear that corporations can now guard against class actions by setting up certain procedures, and subsequently use the decision here to protect themselves.

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64. *Id.,* 131 S.Ct. at 2546.

65. Totenberg, *supra* note 56; *see also* Bill Mears, *Supreme Court rules for Wal-Mart in massive job discrimination lawsuit,* CNN, June 20, 2011, *available at http://news.blogs.cnn.com/2011/06/20/supreme-court-rules-for-wal-mart-in-massive-job-discrimination-lawsuit/.*

66. Joan Biskupic, *Supreme Court limits Wal-Mart sex discrimination case*, USA TODAY, June 21, 2011, *available at* http://www.usatoday.com/money/industries/retail/2011-06-20-walmart-sex-bias-case_n.htm.

67. Totenberg, *supra* note 56.

68. *Id.*

## CONCLUSION

While the consequences of the Wal-Mart decision on future class action cases has not been fully determined, there are some certain implications that will result. Most notably, the requirements of Federal Rule of Civil Procedure 23 will be more stringently examined in class certification determinations. In addition, smaller cases with more specific claims will increase in an attempt to meet the rigid commonality requirements of Rule 23. Based on the opinion of the Court, it appears nationwide class action suits will become an infrequent occurrence in order to ensure certification of the class.

# *Stanford v. Roche*: Another Hurdle for Technology Transfer Programs?

MARGARET G. MASTRODONATO

## INTRODUCTION

Universities have always played a leading role in the research and development of new scientific and technological inventions. Across the United States, millions of dollars are allocated each year to fund research in a wide variety of fields and the development of countless inventions aimed at revolutionizing the market. However, a mere fraction of that amount is spent towards commercialization of these inventions, creating a bottleneck that inhibits the introduction of new technology into society.[1] University Technology Transfer programs aim to reduce the effects of that bottleneck by partnering with players in the industry to take a newly invented technology through the commercialization process with the ultimate goal of market penetration. These programs prove to be educational to both the students and the clients as they work together to analyze and prepare all aspects of the invention for market entry.

The 2011 decision in *Stanford v. Roche* vested intellectual property rights in the researcher or inventor. The decision inhibited the ability of a university or independently contracting party to control developments made by students or faculty without specially written agreements.[2] Following this change, technology commercialization programs at universities will be substantially more difficult to navigate for all participants due to the increased burden in licensing agreements necessary to secure intellectual property rights under the newly adapted application of the Bayh-Dole Act.

Technology commercialization programs provide a clinic-like setting in which students and faculty members work with commercial organizations towards introducing new inventions into different target markets. In this unique combination of the academic and commercial working environments, students team up with different types of entities such as research laboratories and technology development organizations to learn and navigate through many complex curricula, including intellectual property law, market structures, and business transactions. All participants have the same goal: to develop a strategic plan to

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1. *See* Risaburo Nezu, *Technology Transfer, Intellectual Property and Effective University-Industry Partnerships*, WORLD INTELL. PROP. ORG., 2 (2007) available at: http://www.wipo.int/freepublications/en/intproperty/928/wipo_pub_928.pdf.

2. Gene Quinn, *Supreme Court Affirms CAFC in Stanford v. Roche on Bayh-Dole*, IPWATCHDOG (Jun. 6, 2011), http://www.ipwatchdog.com/2011/06/06/supreme-court-affirms-cafc-in-stanford-v-roche-on-bayh-dole/id=17594/.

bring the technology in question from the inventive arena of the lab to the innovative commercial world.[3]

## HISTORY OF THE BAYH-DOLE ACT

Developed by United States Senators Bob Dole of Kansas and Birch Bayh of Indiana, the Bayh-Dole Act was first introduced in 1978 to address the issues plaguing commercialization in the United States. In his introductory address to Congress, Senator Bayh stated that "unless private industry has the protection of some exclusive use under patent or license agreements, they cannot afford the risk of commercialization . . . as a result, many new developments" are left idled and unused.[4] The legislation aimed "to promote the utilization of inventions arising from federally supported research, promote collaboration between commercial concerns and nonprofit organizations, and ensure that the Government obtains sufficient rights in federally supported inventions," and was enacted on December 12, 1980.[5]

Under the Bayh-Dole Act small businesses and universities can elect to retain title to their inventions, as opposed to conferring title to those organizations responsible for funding the subject matter. In return for this title, those organizations receive a "license right to the subject inventions," the terms of which vary based on the subject matter of the invention.[6] This allows the creator of the invention to retain control over their work while the entity responsible for funding the research and development retains the right to use and profit from the invention. However, these rights do not vest automatically. Rather they require specific contractual allocation of rights agreed upon by all parties privy to the arrangement.[7] At issue in *Stanford v. Roche* are the agreements necessary between universities and contracting entities in order to ensure control of the intellectual property rights contained in these inventions.

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3. *See generally* Syracuse University, *Technology Commercialization Law Program*, available at: http://law.syr.edu/academics/center-and-institutes/su-new-technology-law-center-nys-science-and-technology-law-center/technology-commercialization-law-program/ (last visited: Feb. 19, 2012).

4. Joseph P. Allen, *A Quick History of Bayh-Dole*, Robert C. Byrd Nat'l Tech. Transfer Center, 8 (Mar. 4, 2004)(quoting Senator Birch Bayh (Sept. 13, 1978)).

5. *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, ___ U.S. ___, 131 S. Ct. 2188, 2192-2193 at 2192-93 (Jun. 6, 2011)(quoting 35 U.S.C. §200.). ("*Stanford v. Roche*")

6. James G. McEwen, Sean M. O'Connor, & Susan Warshaw Ebner, *An Overview of the Impact of Stanford v. Roche on Technology Licensing Under Bayh-Dole*, 2, available at: http://abaiplspring.org/coursematerials2011/docs/Overview%20of%20Stanford%20v%20Roche.pdf (last visited Dec. 26, 2011).

7. *See Id.*

## FACTS OF THE CASE

The basis for this lawsuit extends back to 1985 when a research company called Cetus began developing methods for testing blood for the human immunodeficiency virus (HIV).[8] At the heart of these tests was a technique known as PCR developed at Cetus by Dr. Kary Mullis (Mullis), which allows "billions of copies of DNA sequences to be made from a small initial blood sample."[9] Mullis was awarded the Nobel Prize for the invention of PCR in 1993, but the technology was developed and applied by various research teams working at Cetus.[10] In 1988, Cetus began working with scientists at Stanford University to test the efficiency of new AIDS drugs, and Dr. Mark Holodniy (Holodniy) became a research fellow at Stanford around the same time.[11] When Holodniy began working, he signed a Copyright and Patent Agreement (CPA) explicitly stating that he "agree[d] to assign . . . right, title and interest in" any inventions resulting from his employment to Stanford University.[12]

While employed at Stanford, arrangements were made for Holodniy to conduct research at Cetus in order to become more familiar with their prize-winning method, known as PCR. In order to secure their own intellectual property interests, Cetus required Holodniy to sign a confidentiality agreement stating that he "[would] assign and do[es] hereby assign . . . right, title, and interest in each of the ideas, inventions, and improvements" resulting from his employment to Cetus.[13] The critical difference between the phrasing in these two contracts is the tense. The Cetus agreements included the phrase 'do hereby assign,' which qualified as a present assignment of rights, whereas the Stanford agreement was merely a promise to assign rights in the future. The majority opinion's determination heavily emphasized the importance of the present assignment of rights, and the inability to promise to assign future interest in an invention that does not yet exist.[14]

During the nine months he worked at Cetus, Holodniy developed a PCR-based procedure that allowed doctors to determine the effectiveness of HIV therapy.[15] Holodniy then returned to Stanford University and worked towards testing and refining the HIV measuring technique developed at Cetus, which

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8. *Stanford v. Roche*, 131 S. Ct. at 2192, *supra* note 5.

9. *Id.*

10. Roche Molecular Diagnostics, *Timeline of PCR and Roche*, available at: http://molecular.roche.com/About/pcr/Pages/PCRTimeline.aspx (last visited: Feb. 19, 2012).

11. *See Stanford v. Roche*, 131 S. Ct. at 2192, *supra* note 5.

12. *Id.*

13. *Id.*

14. *See* Steve S. Chang, *Supreme Court Renders Decision in Stanford v. Roche*, Banner & Witcoff (2011) available at: www.bannerwitcoff.com/_docs/library/articles/Chang%20Fall%20Winter%202011.pdf.

15. *Stanford v. Roche*, 131 S. Ct. at 2192, *supra* note 5.

resulted in the filing of multiple patent applications assigned to Stanford.[16] Stanford had obtained written agreements turning over intellectual property rights from all of their students and employees involved in the project.

Roche Molecular Diagnostics (Roche) focuses their business on the development and manufacture of "a wide array of innovative medical diagnostic products, services, tests, platforms, and technologies."[17] In 1991, Roche acquired Cetus's PCR-related assets, including the rights Cetus had obtained through employment confidentiality agreements.[18] This acquisition of rights established Roche as a party privy to any contracts Cetus signed in relation to the PCR technology. After carrying out their own testing and trials on the HIV qualification procedure, Roche followed through with commercialization and marketing of their 'kits,' which are now available worldwide.[19]

Stanford's HIV measurement research was funded by the National Institutes of Health, which qualifies as a governmental entity and therefore subjected the invention to the provisions of the Bayh-Dole Act.[20] Stanford properly performed all of the tasks required under the Bayh-Dole Act to retain title of the invention over the National Institutes of Health, and accordingly granted a nonexclusive, nontransferable license to the government.[21] However, there was a dispute over whether the confidentiality agreement Holodniy signed with Cetus invalidated the CPA signed with Stanford. To determine which entity possessed the intellectual property interest in Holodniy's work and the subsequent patents would require splicing of the contract language and an examination of the meaning of the agreements as intended by all parties.

## PROCEDURAL HISTORY

Stanford filed suit against Roche in 2005 for infringement of the patents related to the HIV measurement research. Roche claimed that, based on the agreement Holodniy had signed with Cetus, they had gained co-ownership of the HIV qualification procedure and therefore could not be sued for infringement.[22] However, Stanford claimed that the federal funding for the project gave the university superior rights in the invention under the Bayh-Dole Act and therefore Holodniy did not have any rights to assign.[23]

In 2007 the Northern District of California held that Holodniy's confidentiality agreement with Cetus "effectively assigned any rights that [he] had in the

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16. *Stanford v. Roche*, 131 S. Ct. at 2192, *supra* note 5.

17. Roche Molecular Diagnostics, *Who We Are*, available at: http://molecular.roche.com/About/Pages/default.aspx (Last visited: Feb. 19, 2012).

18. *Stanford v. Roche*, 131 S. Ct. at 2192, *supra* note 5.

19. *Id.*

20. *Id.* at 1293.

21. *Id.*

22. *See Stanford v. Roche*, 131 S. Ct. at 2193, *supra* note 5.

23. *See Id.* at 2193.

patented invention to Cetus."[24] This determination meant that, subsequent to the transfer of Cetus's PCR-related assets, Roche would be entitled to the intellectual property interests in any invention of Holodniy's that was developed in the course of his employment at Cetus and based upon the PCR technology. However, due to the application of the Bayh-Dole Act, Holodniy did not have any intellectual property interest in the HIV qualification procedure. According to the District Court, the Bayh-Dole Act vested title of a federally funded invention to the individual inventor only after the government and the contracting party have declined to obtain title.[25]

The Court of Appeals for the Federal Circuit concluded that Cetus had obtained Holodniy's rights in the qualification technique through the confidentiality agreement and that "the Bayh-Dole Act does not automatically void *ab initio* (from the beginning) the inventors' rights in government-funded inventions."[26] The Court of Appeals for the Federal Circuit ultimately reversed the District Court's decision and remanded the case for dismissal.

## THE SUPREME COURT'S OPINION

The issue before the Supreme Court was whether the ownership of an invention resulting from federally funded research automatically vests with the federal contractor or is reserved for the inventor under the Bayh-Dole Act. Furthermore, the Supreme Court had to determine whether an inventor can assign rights to a third party if those rights intersect with the rights of the federal contractor.[27] Justice Roberts delivered the majority opinion, joined by Justices Scalia, Kennedy, Thomas, Alito, Kagan, and Sotomayor, who also filed a concurring opinion. Justice Breyer filed the dissenting opinion, and was joined by Justice Ginsburg.[28]

The first portion of the majority opinion describes how the Supreme Court views ownership of intellectual property rights.[29] According to the Supreme Court, the idea that inventors have the right to patent their inventions has not changed as Congress has further exercised their authority to regulate the field of patent law.[30] Supported by judicial precedents dating back to 1851, this presumption is illustrative of the inherent aim of the patent system to protect the rights and interests of the inventor by granting them exclusive control over their

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24. *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 487 F.Supp.2d at 1099, 1117 (N.D.Cal. 2007).

25. *See Id.* at 1118.

26. *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 583 F.3d 832, 844-45 (Sep. 30 2009).

27. *See Stanford v. Roche*, 131 S. Ct. 2188, *supra* note 5.

28. *Id.*

29. *See Id.*

30. *See Stanford v. Roche*, 131 S. Ct. at 2194, *supra* note 5.

intellectual property.[31] The Supreme Court also specified that the law recognizes an inventor's ability to assign intellectual property rights to a third party.[32]

Through the application of those principles, the Supreme Court stated at the outset of the opinion that an employer can only gain rights to inventions that are the original and independent conception of the employee through a specific agreement.[33] However, these agreements typically allow the employee to retain ownership while granting a license to the employer, and usually require an express statement of the rights being granted. In accordance with these principles, the Supreme Court addressed the assignment of rights at issue.

After setting forth the principles of law, the Supreme Court relied on the principles of statutory interpretation to determine that, under the Bayh-Dole Act, inventors are not expressly deprived of their interest in federally funded inventions and may choose to retain control over the title of the subject invention.[34] To apply the Bayh-Dole Act, as Stanford asserted, would have required the Supreme Court to brush centuries of patent law precedents aside and interpret the statutory language in such a way that some of the clauses would be rendered superfluous.[35] This application would directly conflict with the Supreme Court's reluctance to render statutory terms unneeded and would result in a form of judicial legislation that is generally avoided.[36] Instead, the Bayh-Dole Act was read to refer to a specific category of inventions conceived or reduced to practice under a funding agreement that are owned by or belong to the contractor.[37] The Supreme Court adopted this interpretation because it gives meaning to every aspect of the statutory language and is supported by both case law and secondary authorities, such as dictionaries.

According to the Supreme Court, the provisions that pertain to a contractor "electing" to retain title are evidence that Congress did not intend to automatically vest title of the subject inventions to the employer. In situations involving federal funding, "the Bayh-Dole Act does not confer title . . . or authorize contractors to unilaterally take title," but instead sets forth a hierarchy of rights between the government and federally funded contractors.[38] Under the Act, the inventor has initial ownership of the invention. To gain ownership, contractors

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31. *See Stanford v. Roche*, 131 S. Ct. at 2195 (citing *Gayler v. Wilder*, 51 U.S. 493 (1851); *Solomons v. United States*, 137 U.S. 342 (1890); *United States v. Dubilier Condenser Corp.*, 289 U.S. 178 (1933)).

32. *See Id.* at 2194.

33. *See Id.* at 2195 (citations omitted).

34. *See Id.* at 2196.

35. *See Stanford v. Roche*, 131 S. Ct. at 2196, *supra* note 5.

36. *See Stanford v. Roche*, 131 S. Ct. at 2196, *supra* note 5. (quoting *Duncan v. Walker*, 533 U.S. 167 (2001)).

37. *See Stanford v. Roche*, 131 S. Ct. at 2196, *supra* note 5.

38. *Id.* at 2197.

must establish an express agreement requiring the inventor to assign ownership to the contracting organizations.[39]

In affirming the decision of the Court of Appeal of the Federal Circuit, the Supreme Court clarified that, had Congress intended to change intellectual property rights to vest title automatically in a contractor or third party, the language used to change those rights would not have been ambiguous and oblique, but rather clear and concise. In emphasis of the due diligence necessary in entering contracts and obtaining the assignment of rights in return for funding, the Supreme Court concluded that the Bayh-Dole Act did not vest title to Stanford despite Holodniy's contract with Cetus.

Justice Sotomayor's concurring opinion emphasized that some principles adopted by the Court of Appeals of the Federal Circuit raise concerns among some of the justices. However, since Stanford did not challenge those grounds on appeal, the appropriate determination was to affirm the ruling. In accordance with patent law precedence, the right to patent an invention was held to ordinarily vest in the person who creates the invention unless the creator and employer agree otherwise.

The dissenting opinion raised concerns that Justice Sotomayor's concurring opinion also touched upon. In their dissent, Justice Breyer and Justice Ginsburg note that the focus on language endorsed by the majority opinion "promulgates a drafting trap for the unwary" that could cause the public to pay twice for government-sponsored inventions: once for funding and a second time when purchasing from a party unaffected by the Bayh-Dole Act.[40] The dissenting opinion described alternative approaches to resolving the issues of this case that were based in equity.[41] However, the equitable solutions provided would have required reworking traditional principles of contract law, and therefore did not appeal to the Justices in the majority vote.

## ANALYSIS AND IMPLICATIONS

Underlying the issue in this case is the classic struggle between liberal and conservative politics, easily illustrated by disagreement between the judges about how the statutory language should be interpreted. Justice Breyer discloses a more liberal interpretation of the matters at hand in his dissenting decision of *Stanford v. Roche*, joined by Justice Ginsburg. The solutions recommended in the dissent focused more on the promotion of commercialization through a re-writing of contract law, as opposed to imposing further limitations on the Bayh-Dole Act.[42] The dissent suggested overturning the Federal

39. *See Id.*

40. Chang, *supra* note 14.

41. *See Id.*

42. Mary Hess Eliason, *Stanford v. Roche and Ownership of Federally Funded Research: Navigating the Vagaries of Contract Law*, PATENT LAW PRACTICE CENTER (Jun. 9, 2011), http://patentlaw

Circuit's decision in *Filmtech Corp v. Allied-Signal, Inc.* to allow the present assignment of future interest in an invention that has not been made.[43] Doing so would make the initial agreement between Stanford and Holodniy valid and lead to a more equitable solution to the infringement issue. This equitable solution could also carry with it inconsistency in application and confusion in future contractual interpretations. Justice Breyer also suggested an interpretation of the Bayh-Dole Act that essentially vests title to the federally funded invention with the contracting agency.[44] However, this interpretation directly contradicts the centuries of patent precedent and statutory principles supporting the majority decision.

The Supreme Court's holding in *Stanford v. Roche* will have three major implications in the university technology transfer fields. The first, and most broad in scope, is the fact that universities will need to be more precise and vigilant as they enter into research and commercialization relationships with other organizations.[45] The agreements they have their faculty and students sign will need to be meticulously prepared for proper tense and property assignments. Also, universities will need to police the subsequent agreements their faculty members and researchers sign with other organizations in the industry to ensure the university's property interests are not assigned to or inhibited by a third party.[46]

While attention to specificity is always encouraged whenever a contractual arrangement is entered into, the burdens of meticulously tracking each agreement signed by each student and faculty member may cause universities to shy away from entering into such agreements all together. However, the time and money saved by avoiding litigation in the long run and the intellectual property assets that the universities may gain through such agreements may serve as sufficient incentive to keep technology commercialization programs alive. In the immediate future, without indication as to the substantiality of litigation savings resulting from the initial expenditures associated with preparing meticulous contracts, the burdens of this application of the Bayh-Dole Act may cause universities to refrain from entering into such agreements.

The second impact of the majority holding concerns the past, present, and future contractual agreements between researchers and contracting companies. The Supreme Court decided that the Bayh-Dole Act would not allow the contracting party to circumvent earlier assignments of property rights made by the inventor.[47] This forces the contracting organizations to require up-front assign-

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center.pli.edu/2011/06/09/stanford-v-roche-and-ownership-of-federally-funded-research-navigating-the-vagaries-of-contract-law/.

43. *See Id.*

44. *See Id.*

45. *See* Quinn, *supra* note 2.

46. *See Id.*

47. McEwen, O'Connor & Ebner at 13, *supra* note 6.

ments of future intellectual property rights in the subject inventions in order to secure their interests and obtain the same sort of ownership rights.[48] The Supreme Court's decision will also force those privy to these research and development contracts to be precise in establishing contractual agreements disclosing and detailing the entirety of their intellectual property rights. Failure to do so will likely result in "disputes arising at various stages throughout the research and development, patenting and licensing phases" that not only hinder the progress of the invention but also increase the costs of the invention for all parties.[49]

The final impact of the *Stanford v. Roche* decision concerns university technology transfer programs. The heightened precision and meticulous attention to detail that needs to be given to these contractual agreements will greatly increase the "pressure and constraints on the [technology] transfer and research programs."[50] Programs that already deal with an overwhelming amount of material covering the subjects of business, intellectual property law, technology, market research, and economic valuations will also need to include a focus on property interest assignments and confidentiality agreements. The amount of time given to complete these programs will not be increasing in accordance with the amount of work to be done, and the complexity of the subject matter will rise to another level that is more difficult for students and client participants to navigate. With the pitfall of failing to execute precise contracts being a loss of intellectual property, universities may be more inclined to bring in professional attorneys to complete the contract negotiations. The costs of bringing in external counsel may be substantial enough to discourage participation by both students and faculty in university research, development, and technology transfer programs.[51]

## CONCLUSION

The Supreme Court's decision in *Stanford v. Roche* will be extremely burdensome for university technology transfer programs. Universities will be required to comb through the agreements that they have already made, and contracts that have already been signed, in an effort to make them more precise and protect more of their rights under the new application of the Bayh-Dole Act. They will also need to ensure that all future arrangements are made with meticulous attention to detail and as precise of a contract as possible. To do so, universities and other contracting parties will need to spend considerable time negotiating and reformatting the terms of the agreement. Although most of this arranging would be done upfront, the longer and more cumbersome these nego-

48. *See Id.*
49. *Id.*
50. McEwen, O'Connor & Ebner at 13, *supra* note 6.
51. *See Id.* at 14-18.

tiation agreements become the more overwhelming the technology transfer programs will be for both faculty and students. Adding in the necessity of bringing in external counsel, the financial and academic burdens to the programs may prove to not only discourage participation, but may result in a dramatic decline of the availability of such technology transfer programs as a whole. While the immediate effect of the *Stanford v. Roche* decision merely demands more care and precision from all participating parties, the potential of damaging effects on technology transfer programs is significant and may be difficult to manage.