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reasonableness does not make it too vague to afford a practical guide for permissible conduct. n349 Justice Frankfurter wrote that the teaching of the Nash case is that it does not violate due process of law "to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience that he comes near the proscribed area." n350

- - - - -Footnotes- - - - -

n346 See, e.g., Ill. Ann. Stat. ch. 95 1/2, @ 11-503(a) (Smith-Hurd Supp. 1992) (making it a misdemeanor to drive a vehicle with "willful or wanton disregard for the safety of persons or property"). In *People v. Garman*, 103 N.E.2d 636 (Ill. 1952), a statute criminalizing homicide by "reckless driving" was upheld against challenge as vague, indefinite, and violative of due process. The Garman court held that the reckless homicide statute did not leave "the dividing line between lawful and unlawful [conduct] to conjecture":

[I]f the legislature, in creating a new crime, uses words having a common-law meaning or a meaning made definite by statutory definition or previous judicial construction, it may strike directly at the end intended to be curbed, leaving it to the pleader to state facts bringing the case within the statutory definition and to the judicial department of government to interpret the application of the act to the facts stated.
Id. at 638.

n347 229 U.S. 373 (1913). The Nash case involved criminal prosecutions under the Sherman Act.

n348 Id. at 377 (citations omitted).

n349 See Ernst Freund, *The Use of Indefinite Terms in Statutes*, 30 Yale L.J. 437, 443-44 (1921).

n350 *Winters v. New York*, 333 U.S. 507, 539 (1948) (Frankfurter, J., dissenting).

- - - - -End Footnotes- - - - -

Nash and its progeny set out two models of fair warning in Anglo-American law: precise specification and general standards that incorporate shared social understandings. The misrepresentation tort is an instance of the latter. Its fairness lies not in its specific enumeration of duties, but in the widely shared belief that lying, although sometimes tolerated, can inflict harm. When the consequences of dishonesty are not serious, they are ordinarily overlooked. But when a serious harm creates social costs that must be allocated between the deceiver and the deceived, the balance of interests favors the innocent party. The liar can claim no privilege to deceive, nor any value created by his or her deception. Thus, when trust and confidence are reasonably given and knowingly manipulated or exploited, the liar must be the one to pay the price.

B. The Elements of Sexual Fraud

The tort of misrepresentation balances rights and responsibilities between partners in a joint undertaking. Unlike other intentional torts, misrepresentation demands reasonable care from the victim. In placing legal duties on both parties, the tort imposes an unusually narrow standard of

liability. By virtue of its qualities of mutuality of obligation and context-specificity, however, sexual fraud is a legal theory well-suited to the complex task of sexual regulation emphasizing tolerance of diverse sexual values and expectations.

1. Words, Gestures, and Silence. -- Oral or written words, expressive conduct, and silence all may be actionable misrepresentations. n351 The meaning to be given to particular words or conduct is determined by their effect on an ordinary person. Thus there is no difference between answering "no" to a question and shaking one's head from side-to-side; both are understood by the ordinary person to mean "no." n352

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n351 See Keeton et al., supra note 152, @ 106, at 736-40; Restatement (Second) of Torts @ 525 & cmt. a (1977).

n352 See Keeton et al., supra note 152, @ 106, at 736.

-----End Footnotes-----

The critical issue is not the form of communication, but whether the communication is calculated to mislead. For this reason, mere carelessness or incompetence in expression -- for example, the inadvertent omission of the critical word "not" from the statement "I am not married" -- is not a fraudulent misrepresentation if the maker was simply [*457] negligent or sloppy in speaking. n353 On the other hand, silence or failure to disclose is a misrepresentation if the maker actively seeks to conceal the truth and create a false impression by silence. n354 Thus, one might refuse to answer a potential sexual partner's inquiry about HIV status, or ignore or evade the question, but it would be a misrepresentation to say, "I don't know my HIV status," when in fact one had received test results a week earlier. n355

-----Footnotes-----

n353 See Restatement (Second) of Torts @ 528 & cmt. a (1977).

n354 See Keeton et al., supra note 152, @ 106, at 737.

n355 A false denial of knowledge by one who possesses the facts may amount to a misrepresentation. See id. @ 106, at 737.

-----End Footnotes-----

Under normal circumstances, there is no duty to disclose information that one wishes not to reveal, and there are many familiar and self-protective social gambits short of lying available in order to protect privacy. An affirmative obligation to disclose may arise, however, when one realizes that another's ignorance or mistake may work to one's advantage. This affirmative legal duty to disabuse others of their misunderstandings is gradually emerging in cases where there is a special trust, where one party is known to be vulnerable, or where the risk of serious and preventable harm is great. Older cases find no duty to prevent others from making mistakes. n356 But in this century, as the power of laissez-faire notions has waned, there has been increasing and understandable discomfort with this rule. When the well-being of others rests

in our hands, and by speaking we could prevent harm, a sense of obligation to act is aroused. n357 Modern courts have found intentional misrepresentation for failure to speak in certain kinds of relationships: (1) when there exists a formal or informal relationship of confidence between the parties; (2) when there is a patent and known imbalance in the parties' intelligence or experience; and (3) when failure to speak creates great risk of physical injury. n358 Each of these exceptions could apply to a category of sexual relationships. Thus, there may arise an affirmative obligation to correct another's misapprehension [*458] or to disclose relevant facts when the relationship is one of special trust n359 or dependency, n360 or when serious physical harm is a foreseeable outcome of remaining silent. n361

-Footnotes-

n356 See id. @ 106, at 737-38.

n357 Professors Beverly Balos and Mary Louise Fellows have explored the idea that an affirmative duty to disclose should apply to all sexual relationships between nonstrangers. Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 Minn. L. Rev. 599, 605-11 (1991) (arguing that courts should use confidential relationship rules to decide cases involving sexual abuse between nonstrangers). They suggest that well-established principles governing confidential relationships demand heightened standards of care in intimate relationships; rather than justifying lack of care, personal closeness in fact makes such disregard less justifiable. *Id.* Balos and Fellows conclude that where trust has been given and vulnerability established, manipulation is both easier and more damaging and that it is thus justifiable to impose upon intimates a heightened duty of care. *Id.* at 606-08. The legal duty not to misrepresent proposed in this Article does not go so far as the Balos/Fellows proposal, but rests on similar observations about the importance of trust to sexual intimacy.

n358 See Keeton et al., *supra* note 152, @ 106, at 738-40.

n359 See *DeStephano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (counseling relationship with clergyman).

n360 See *Franklin v. Hill*, 417 S.E.2d 721 (Ga. Ct. App. 1992) (15-year-old girl induced into sexual relationship with tenth-grade economics teacher); *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988) (adult guardian told 14-year-old girl that she would be recommitted to juvenile detention center if she did not consent to sex).

n361 See *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Ct. App. 1984) (person infected with contagious herpes failed to warn).

-End Footnotes-

2. Intent To Mislead. -- Misrepresentation, including sexual fraud, is an intentional tort. Liability demands both knowledge of the falsity of one's statements and intent to induce the recipient to rely on the misrepresentation. n362 The misrepresenter must either know that she is lying; have no belief in the truth of her representations; recklessly disregard the question of truth or falsity; or be aware that she lacks sufficient information to know whether what she communicates is true or not, while nonetheless affirming that she knows it

to be the truth. n363 On the other hand, an honest (but mistaken) belief that one's statements are true, no matter how unreasonably held, does not amount to intent. n364

-Footnotes-

n362 See Derry v. Peek, 14 App. Cas. 337, 374-75 (H.L. 1889) (distinguishing action for intentional misrepresentation from negligence and warranty).

n363 See Keeton et al., supra note 152, @ 107, at 741-42. In the latter case, the degree of misrepresentation is treated as commensurate with the amount of information the actor possesses. See id. @ 107, at 742.

n364 Even so, the unreasonableness of belief may be strong evidence that the speaker is lying about her "honest" mistake. See id.

-End Footnotes-

The tort proposed in this Article regulates the choices we make, not the effects we unintentionally produce. Sometimes a speaker makes a qualified statement, such as "I am pretty much separated from my husband." This statement may be literally true (the speaker is living on and off with her sister during a time of marital trouble, but has not yet moved her possessions out of the spousal residence), but still have misleading effects by placing a situation in the best light. If the qualification is in plain view -- as I believe it is in my hypothetical example -- there is no intent to mislead. But if the qualification is hidden, for example by an ambiguous or overly technical distinction (for example, the statement, "I don't have AIDS" spoken by someone whose medical diagnosis is of ARC, or AIDS-Related Complex, a pre-AIDS condition that nonetheless can cause a sexual partner to become infected with HIV), the speaker intends to mislead. n365

-Footnotes-

n365 Thus an ambiguous statement that has both a true and a false meaning is actionable if the maker intends the false meaning and the statement is accepted as true by the recipient. See id. Likewise, a literally true statement may be a misrepresentation if it is intended to create a false impression, and successfully does so. See id. @ 106, at 736-37.

-End Footnotes-

[*459] Motive should not be confused with intent, however. If one intends to mislead, it does not matter that one acts with good, bad, or indifferent motives or purposes. n366 The fact that a liar wishes to do no harm, or even believes herself to be acting in her partner's best interest (as in lies justified as sexual fantasy), n367 does not alter liability for misrepresentation.

-Footnotes-

n366 See id. @ 107, at 741.

n367 See supra notes 323-331 and accompanying text.

-End Footnotes-

3. Serious Harm. -- The serious harm requirement precludes recovery for petty or trivial claims of sexual misrepresentation. Although a lie that causes only a little harm is no less wrong, it may not warrant legal intervention given the costs of doing justice. n368 The law of misrepresentation accommodates this practical concern by reserving its resources for serious harms. Having narrowed the scope of compensable injury to serious harm, however, courts should compensate all provable and proximately caused forms of serious injury, whether economic, physical, or emotional in character. Compensation for emotional injury -- that most disfavored category of tort damages -- should be treated as an ordinary element of consequential damages, subject to no special proof requirements.

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n368 Keeton et al., supra note 152, @ 110, at 765. Although the loss of sexual integrity is in and of itself an insult to human dignity, nominal damages like those available in an assault action cannot be recovered in an action for misrepresentation. See id.

-End Footnotes-

Full recovery for all consequential damages is not now the rule in many jurisdictions. Under the traditional rule, only economic losses may be recovered in a fraud action. n369 A growing number of courts, however, have rejected this limitation on fraud damages and compensate both physical and emotional injury as well. n370

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n369 See Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, 68 (Utah Ct. App. 1992); Dobbs, supra note 189, @ 9.2, at 602-03. Section 525 of the Restatement (Second) of Torts (1977) limits recovery under the intentional misrepresentation theory to "pecuniary loss." Id.

n370 See Robert L. Dunn, Recovery of Damages for Fraud, @ 4.7, at 147 (1988); id. @ 3.6, at 96 (physical injury); id. @ 3.13, at 118 (injury to spousal or other domestic relations); id. @ 4.19, at 173 (reputational injury). Sometimes emotional distress is adjudicated in accordance with the ordinary rules governing consequential damages in tort. See, e.g., Valley Dev. Co. v. Weeks, 364 P.2d 730, 733 (Colo. 1961) (emotional damages recoverable for fraud if they are natural and probable consequence of act). Courts sometimes impose special damage limits or proof requirements on emotional injury claims in fraud, restrictions that echo those traditionally imposed on the intentional infliction of emotional distress claim in tort. See, e.g., Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511, 521 (7th Cir. 1985) (construing foreseeability element to require proof that, by its very nature, fraudulent act was likely to cause emotional distress); Godfrey v. Steinpress, 180 Cal. Rptr. 95, 104-05 (Ct. App. 1982) (requiring extreme and outrageous conduct by defendant for plaintiff to recover emotional distress damages); see also Merritt, supra note 141, at 7-9 (criticizing traditional rule as based on outdated beliefs about nature of interests protected by fraud).

-End Footnotes-

[*460] Although there are lingering doctrinal issues peculiar to fraud, n371 the real source of judicial reluctance to compensate emotional injury in the recent sexual fraud cases appears to be the courts' general lack of confidence in their ability to objectively identify or evaluate emotional suffering claims with reasonable certainty. n372 The fear appears overstated, however, given that the problem of proving a plaintiff's subjective condition is not unique to claims of emotional suffering as opposed to other readily compensated forms of personal injury. The experience of pain subjectively varies among individuals, whether the pain suffered is emotional or physical. n373 Many personal interests that are undeniably "real" in human experience are not traded as commodities in the marketplace, and so are difficult to "price" for compensation purposes. n374 In measuring pain, the factfinder must often rely on little [*461] more than the testimony of the sufferer and medical experts. Medical experts are, however, increasingly able to evaluate the symptoms and severity of emotional injury with objectivity and precision. n375 In fact, emotional trauma is often more amenable to certain proof than other, already compensable forms of emotional loss, such as loss of spousal consortium. n376 Moreover, emotional suffering is a natural and foreseeable result of intimate betrayal, and a form of pain with which many people have had personal experience. Thus, there is no persuasive reason to fear that juries will not be able to judge sexual fraud plaintiffs' claims of emotional injury with the mixture of skepticism and sympathy that is the jury's strength.

-Footnotes-

n371 It could be argued that there are reasons to exclude emotional distress damages in fraud, even if they are generally awarded in tort. One obvious basis for excluding emotional distress is the origin of fraud in the early common law of contract, a body of law developed to protect economic interests. See Dobbs, supra note 189, @ 9.2, at 602; but see supra notes 212-226 and accompanying text for refutation of this argument. Modern courts now award emotional distress damages in contract cases, which makes the contract-tort distinction even less persuasive. See, e.g., Alfa Mut. Ins. Co. v. Northington, 561 So. 2d 1041, 1046-47 (Ala. 1990) (jury instruction allowing mental damages to be considered in breach of contract claim not reversible error); Umphrey v. Sprinkel, 682 P.2d 1247 (Idaho 1983) (emotional damages recoverable in contract action if breach was wanton and caused bodily harm, and defendant had reason to know that breach would cause mental suffering at time contract was formed).

n372 See supra notes 154-160 and accompanying text. To date no court adjudicating a sexual fraud action has cited the traditional rule limiting fraud damages to economic loss as the basis for its decision to deny a damages claim for emotional injury.

n373 See Morris, supra note 313, at 28-29. Arguing for the similarity of emotional and physical pain, Morris writes:

[P]ain . . . is not simply an automatic and unchanging response somehow hard wired in the body. The impressions communicated by the sensory pathways and spinal cord must be construed or interpreted in the brain that receives them. Brains . . . belong to individuals who in turn exist only within human history and within specific cultures. . . . Pain can be described as always a cerebral phenomenon in the sense that it is never simply a sensation but rather

something that the time-bound brain interprets and that the time-bound mind constructs: a specific human artifact bearing the marks of its specific human history.
Id.

n374 With the rise of the tort reform movement, opposition has mounted against damages for physical pain and suffering, not only against awards for emotional pain. If tort law abolishes recovery for physical pain and suffering, recovery for emotional pain perhaps logically should be abolished. To allow recovery for one type of pain and not the other, however, is incoherent. And even the tort reformers' generic opposition to pain and suffering awards must differentiate between the role such awards play in a negligence action and in an intentional tort action. Deterrence and compensation policies are unequivocally served by full recovery in an intentional tort action in ways that are perhaps more debatable in negligence or strict liability actions. See Richard N. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. Fla. L. Rev. 413, 416-23 (1984). In addition, tort law's role in vindicating human dignity interests is of greater importance in intentional tort than elsewhere. To paraphrase Justice Holmes, even a dog knows the difference between being kicked and being tripped over. See Oliver Wendell Holmes, *The Common Law* 7 (Mark D. Dowe ed., Little, Brown 1963) (1881). Social science research supports Holmes' quip, indicating that the intentional nature of a legal wrong intensifies the emotional distress that a victim suffers, causing feelings of self-doubt, self-blame, humiliation, and distrust of others not suffered by victims of less purposeful or targeted wrongdoing. See Ronnie Janoff-Bulman, *Criminal vs. Non-Criminal Victimization: Victims' Reactions*, 10 *Victimology* 498, 501-08 (1985).

n375 See *Leong v. Takasaki*, 520 P.2d 758, 766-67 (Haw. 1974) (analyzing concrete character of both short- and long-term emotional responses to trauma); *Corgan v. Muehling*, 574 N.E.2d 602, 608-09 (Ill. 1991) ("Scientific research has provided modern society with a detailed and scientific understanding of the human mind"; emotional distress "no less real" than physically manifested injury and should not be treated differently under law); *Knierim v. Izzo*, 174 N.E.2d 157, 166 (Ill. 1961) ("The stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye."). See generally Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 *Geo. L.J.* 1237, 1248-53, 1258-62 (1971) (comprehensive survey of medical aspects of emotional trauma). The author of this Comment concludes that "medical science is capable of satisfactorily establishing the existence, seriousness, and ramifications of emotional harm." *Id.* at 1253.

n376 In evaluating a loss of consortium claim, courts never inquire, for example, about the quality of a couple's relationship, or whether they were sexually active at the time of the injury or death.

- - - - -End Footnotes- - - - -

Unusual skepticism about emotional injuries in sexual fraud unfairly denies recovery for genuine harms suffered by innocent targets of intentional wrongdoers. Such skepticism reflects a cultural ambivalence about emotional pain more than any careful adherence to established standards of proof. By insisting on no less -- and no more -- than careful adherence to the generally applicable proof requirements shown to be effective through long use, courts can adjudicate claims of emotional injury with an acceptable degree of certainty,

and without imposing unfair burdens on plaintiffs. Tort damages of all kinds must be proximately caused by the alleged wrong, n377 and must be proved with reasonable certainty. n378 These requirements have proved both flexible and effective in deciding other kinds of damages claims that [*462] courts initially perceived as novel and uncertain, and they will be adequate to the task of separating the wheat from the chaff in sexual fraud cases.

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n377 See Restatement (Second) of Torts @@ 546, 548A (1977) (requiring both causation in fact and legal causation); Dobbs, supra note 189, @ 3.2, at 139-40.

n378 See Restatement (Second) of Torts @ 912 (1977); Dobbs, supra note 189, @ 3.2, at 139-40.

-----End Footnotes-----

4. Materiality and Justifiable Reliance: A Victim's Duty of Reasonable Care. -- Liability for intentional misrepresentation requires more than just a lie. Once the intentional falseness of the speaker's representation is established, the jury must then decide if the recipient in fact relied on the misrepresentation, and whether believing and acting on the misrepresentation was reasonable under the circumstances. This scrutiny of the victim's conduct makes misrepresentation highly unusual among intentional torts; ordinarily, one who intends to bring about a particular result cannot complain that his victim was careless or foolish in not preventing what he set out to do. But the misrepresentation action "helps those who help themselves," and the legal mechanism for justifying one's trust under this tort is the reasonableness standard, which functions as an objective corroboration of the victim's subjective claims of reliance and due care. n379

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n379 See Keeton et al., supra note 152, @ 108, at 750.

-----End Footnotes-----

a. Materiality. -- Under existing law, a misrepresentation is material if a reasonable person would act on it. n380 This means that the misrepresentation must relate to a matter about which a reasonable person would attach importance in determining a course of action. n381 Some materiality questions likely to arise in a sexual fraud setting are easily answered on the basis of the presumption that reasonable people wish to avoid physical harm and unwanted children. Thus statements about fertility and contraception ("I am using birth control") or about disease or health ("my herpes virus is inactive") probably are important to an ordinary man or woman's decision to consent to sex. By contrast, trivial lies ("I am a great and undiscovered poet"), or forms of politeness that mislead few ("no, I don't think you're too fat"), are not likely to be material to sexual consent. Such "white lies" are both innocent and harmless, and hence do not create liability. Their purpose is to move the relationship along, but they have no distributive effect between the parties. n382 White lies may even have the beneficial effect of encouraging interaction from which both parties will benefit.

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n380 See Restatement (Second) of Torts, @ 538(2)(a); Keeton et al., supra note 152, @ 108, at 753.

n381 See id.

n382 That is, one party does not give up something of value to the other in reliance on the misrepresentation. See Wetlaufer, supra note 338, at 1243.

- - - - -End Footnotes- - - - -

The materiality of many representations can be determined only within a specific relational context. To a person seeking a spouse, for example, a false claim to be unmarried may be highly material to sexual consent; in a more casual relationship, a potential partner's marital status may not play a part in the decision to have sex. Some sexual relationships exist entirely for the pleasure of the moment, while others are [*463] intended to be part of a trajectory towards a shared future. Problems arise, however, when sexual partners find they have engaged in the same act with different purposes in mind. In such cases, the issue to be decided is whether the couple simply failed to communicate, or one partner deliberately misled the other in order to have sex. Only a jury can evaluate such conflicting claims, considering each case within its particular factual context.

Despite the "importance to an ordinary person" standard, if the misrepresenter has notice that a particular recipient attaches unusual importance to a certain matter, even though most people would not, the law treats misrepresentations about that subject as material. n383 Thus, to falsely represent oneself as a born-again Christian to a woman whose unwavering adherence to her fundamentalist church causes her to believe that her love match must be a devoted believer, would be highly material to her decision to consent to sex, although to most people religious identity is of less importance. n384 For the same reason, one who knows that the prospect of marriage is important to a desired partner's decision whether to consent to sex cannot disregard this fact. In this situation, faced with the knowledge of another's conditions for consent, one who does not want marriage should either admit having less committed intentions or forgo having sex.

- - - - -Footnotes- - - - -

n383 See Restatement (Second) of Torts @ 538(2)(b):

There are many persons whose judgment, even in important transactions, is likely to be determined by considerations that the normal man would regard as altogether trivial or even ridiculous. One who practices upon another's known idiosyncracies cannot complain if he is held liable when he is successful in what he is endeavoring to accomplish.
Id. cmt. f.

n384 See id. cmt. f, illus. 1 (belief in astrology).

- - - - -End Footnotes- - - - -

In a complex and longstanding deceptive sexual relationship (such as a false promise to marry that sustains an intimate relationship over many years), n385 it can be difficult to sort out and weigh the various factors that might have influenced sexual consent over the course of the relationship. Even in a straightforward and casual sexual encounter, several layers of motivation may coexist, including the simple desire for sexual pleasure. Were a factfinder required to understand the entire motivational web of a relationship in order to judge whether a challenged misrepresentation was material, the factual issues in misrepresentation cases would likely become unmanageably complex. According to the Restatement, however, a misrepresentation need only be a "substantial factor" influencing reliance to be material. n386 In the Parker case discussed above, the fact that Dr. Bruner was educated, sexually [*464] experienced, prosperous, and worldly probably made him very attractive to Alice Parker. But after months of dating, her testimony at trial revealed that she finally decided to have sex with him because she believed his repeated assurances that they would marry. A jury need not discount Bruner's obvious allure to a young nursing student to credit the authenticity of her reasons for deciding to have a sexual relationship with him. The jury need simply find that his promise of marriage substantially influenced her decision.

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n385 See, e.g., Parker v. Bruner, 686 S.W.2d 483, 485 (Mo. Ct. App. 1984) (sexual consent procured on repeated and false promises of marriage), aff'd, 683 S.W.2d 265 (Mo.) (en banc), cert. denied, 474 U.S. 827 (1985), discussed supra at notes 142-47 and accompanying text.

n386 See Restatement (Second) of Torts @ 546 & cmt. b.

-End Footnotes-

b. Justifiable Reliance. -- Even when it is clear that the recipient relied on a particular misrepresentation, the jury must also find that this reliance was justifiable under the circumstances. n387 If the jury finds that a reasonable person would have relied on the misrepresentation, the reliance is justified; but if no reasonable person, given the information available or perceptible in the situation, would have relied, the harm flowing from the lie is not legally remediable. n388 The justifiable reliance requirement forces people to be somewhat protective of their own interests. It is not justifiable to rely on a representation that is obviously false. So, for example, it would be foolish to believe that a woman openly wearing a wedding ring is unmarried. n389 So, too, loose and general statements of what is obviously opinion unsupported by facts should not be relied on. n390

-Footnotes-

n387 See id. @ 537.

n388 See Keeton et al., supra note 152, @ 108, at 750.

n389 See Restatement (Second) of Torts @ 541 (1976).

n390 See id. @ 542 & cmt. e.

-End Footnotes-

The 1987 case of Perry v. Atkinson n391 illustrates how more knotty issues of justifiable reliance are likely to arise in the sexual fraud context. Lee Perry had a lengthy affair with Richard Atkinson, a married man, during which she became pregnant with Richard's child. Lee wanted to keep the child and become a parent with her lover. According to Lee's complaint, Richard told her that "although he would like her to have his child, he wanted to postpone doing so for a year." n392 Richard allegedly promised Lee that if she would abort this pregnancy, "even if they were not together in a year," he would conceive a child with her by means of artificial insemination. n393 Lee said she aborted the child in reliance on these promises. Later, when Richard refused to conceive another child with her by any means, Lee suffered severe depression. She charged that Richard had made the promise only in order to deal with what was for him an "inconvenient" pregnancy. n394 The Court dismissed Lee's suit for fraud and deceit on summary judgment, without having addressed the issue of whether she was justified in basing her childbearing decisions on these promises; thus, what follows [*465] is only speculation about how the justifiable reliance argument might have been analyzed had the case gone to trial. n395 It might be argued that Lee should have been more wary of a married man's promises to father a child with a woman other than his wife. On the other hand, the promises attributed to Richard were not only quite specific, but included an option of artificial insemination should he decide to remain married and, presumably, end his involvement with Lee. Thus Richard's statements seem to answer the doubts that Richard's marriage might have created in Lee's mind. Had California recognized the sexual fraud theory proposed in this Article, I believe Lee's claim should have been allowed to go to trial. n396 She alleged all the requisite elements of a sexual fraud, and the facts of Perry v. Atkinson support at least a plausible story of justified and detrimental reliance on false promises.

- - - - -Footnotes- - - - -

n391 240 Cal. Rptr. 402 (Ct. App. 1987).

n392 Id. at 403.

n393 Id.

n394 Id.

n395 Because Lee Perry's claim concerned fraudulent inducement to consent to an abortion, the case may be distinguished from the issue of fraudulent inducement to consent to sexual relations discussed in this Article. But the California court treated Perry's claim as analogous to such claims, referring to a broad category of cases involving choices that consenting adults made regarding their sexual relationships, see 240 Cal. Rptr. at 406, choices that include procreative decisions. See id. at 405.

n396 It is important to note that nothing about Perry's claims of coerced abortion implicates the "best interests of the child" concerns that pose a legitimate policy barrier to unwanted parenthood claims between parents. See supra notes 148-52 and accompanying text.

- - - - -End Footnotes- - - - -

But is it ever reasonable to believe a lover? Were our grandmothers right in telling us that men always lie for sex, and the woman who listens is a fool? This counsel rests on the presumption that lying for sex is in "the rules of the game." Such a presumption was the linchpin of the traditional double standard that left men free to go as far as women would allow, and made women alone responsible for both sexual boundaries and sexual consequences. n397 If we operate on the principle that "all is fair in love and war," then the theory of sexual fraud collapses, because it is by definition never reasonable to rely on anything said in the process of sexual negotiations. The alternative premise of my proposal is that trust rather than deceit should be nurtured as the ground for sexual relationships, and that mutuality and reciprocity are "the rules" by which sexual partners should play. If the sexual fraud theory proposed in this Article is accepted by the courts, potential sexual partners would be treated as adverse parties only in the exceptional rather than the ordinary case. Adversaries, of course, sometimes become sexually involved (a couple in the midst of a violent or bitter parting, for example, or opposing lawyers in the midst of a trial). But even in these polarized settings there is a legal limit on dishonesty. Under the existing law of misrepresentation, one may not lie -- even to a person whose interests are recognized as adverse -- about a factual matter [*466] (e.g., "I am sterile"). n398 Between known adversaries, however, reliance on less certain statements (opinions, promises, or statements of intention, for example) is ordinarily not justified in the ways that it may be between nonadverse parties. n399

-Footnotes-

n397 See generally Keith Thomas, *The Double Standard*, 20 J. Hist. Ideas 195 (1955) (documenting history of the double standard).

n398 See Restatement (Second) of Torts @ 541A (1977).

n399 See *id.* @ 542.

-End Footnotes-

The most difficult questions of justifiable reliance under the sexual fraud theory will concern promises of relational ("I'll marry you if you do this") or emotional ("I love you") commitment. n400 Obviously, matters of love and commitment are often very much a part of the decision to consent to sex. n401 It is not enough that a lover has given his partner good reason to believe that he truly loves her and hopes to marry her; his intentions must also have been material to her decision to consent to sex with him. n402 The tort proposed in this Article remedies harm caused by induced reliance, not simply disappointment. Breach of a promise sincerely made, but for some reason not fulfilled, is not an intentional misrepresentation because the element of fraudulent intent is absent. n403 Feelings change and romances fail, and the law has no remedy for such hurts. Only that subset of promises of love and commitment that were knowingly false when made, and made in order to get sex, are at issue.

-Footnotes-

n400 A promise to love or to marry cannot itself be enforced by the law, but this does not affect the availability of a tort action for dishonesty in making it. See Restatement (Second) of Torts @ 530 & cmt. c (1977); Keeton et al., supra note 152, @ 109, at 763. Because a promise has both legal and moral force, it would not be unreasonable to rely on a promise even knowing that it could not be enforced through law.

n401 See Vivian Berger, Not So Simple Rape, Crim. Just. Ethics, Winter/Spring 1988, at 69, 76-77 (reviewing Susan Estrich, Real Rape (1987)).

n402 See Restatement (Second) of Torts @ 544 cmt. b (1977).

n403 See id. @ 530 & cmt. b. "When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action . . . for deceit." Keeton et al., supra note 152, @ 109, at 764. Defendant will escape liability for fraud if she can show that her statement (including any implied assertion of knowledge) was in full accord with her sincere belief. See Page Keeton, Fraud: The Necessity for an Intent to Deceive, 5 UCLA L. Rev. 583, 583-92 (1958).

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Liability for misrepresentation of intentions is not an issue unique to sexual fraud; it has been much debated in the area of economic fraud as well. n404 No one can guarantee for another person that the future will bring a "happy ending," whether in love or business. n405 But one who makes a promise of love and marriage to another also conveys something much more concrete -- a statement of fact about a matter of which the speaker has special knowledge. n406 In avowing such feelings, the speaker represents that his heart and mind are at that moment filled [*467] with the committed intentions and deep emotions of which he speaks. If this is not true, his avowals are intentional misrepresentations of his present state of mind. n407 Thus reliance on promises of love and commitment is justified if it was reasonable to believe that the feelings professed were genuine and held with conviction, and that the speaker intended in that moment to try to carry them out. Thus Alice Parker was probably justified in believing Ronald Bruner's promise of marriage, especially when he procured a marriage license as proof of his sincerity. n408 But if Alice had had some reason to doubt the sincerity of the promise, or should have known of facts that would have made her question whether the promise feasibly could be fulfilled, her reliance would not have been justified. For example, if Alice had known that Ronald was already married to someone else, a jury doubtless would have expected her to be somewhat more skeptical of his promise to marry her. But the mere fact that Ronald failed to carry out his marriage promise is not by itself good evidence that at the time he made it, he did not intend to perform it. n409 His intentions cannot be judged outside of the context of specific facts, the nature of the relationship between the parties must be taken fully into account. Differences in capacity, foreknowledge of special vulnerabilities or sentimental commitments, and the prevailing level of trust between the parties should be the relevant factors: n410 .

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n404 See Keeton et al., supra note 152, @ 109, at 762-65.

n405 No person's prediction of future events over which he or she has no control is reasonably relied on. See id. @ 109, at 762. This rules out the obviously speculative fancy ("With you beside me, I'll be a millionaire before I'm thirty.").

n406 See Restatement (Second) of Torts @ 530 (1977) ("The state of a man's mind is as much a fact as the state of his digestion."); see also id. cmt. c ("a promise necessarily carries with it the implied assertion of an intention to perform it").

n407 See Keeton et al., supra note 152, @ 109, at 762-63.

n408 See Parker v. Bruner, 686 S.W.2d 483, 485 (Mo. Ct. App. 1984), aff'd, 683 S.W.2d 265 (Mo.) (en banc), cert. denied, 474 U.S. 827 (1985).

n409 See Restatement (Second) of Torts @ 530 & cmt. d (1977).

n410 See, e.g., Stark v. Equitable Life Assurance Soc'y, 285 N.W. 466, 470 (Minn. 1939) (close friendship between defendant's agent and the insured was regarded as significant in combination with other factors).

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The problem of sorting out sincere promises not fulfilled from promises false when made is a challenge that arises in all types of misrepresentation cases, whatever their subject matter. The greed that motivates the most common forms of economic fraud is as complex and tangled a feeling as the lust for sex and power that underlies sexual fraud. The factual determinations to be made in a sexual fraud litigation will require nuanced human judgments, but juries exist for such purposes. n411 We must trust that if the courts are competent to judge [*468] economic fraud claims, they will also prove competent to judge sexual fraud claims.

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n411 Cf. Richard A. Posner, The Economies of Justice 176 (1982) (suggesting that modern courts are more adept than primitive tribunals at making difficult factual determinations). On the other hand, placing one's sexual life and choices before a jury is precisely what many people fear about making sex a public issue. See supra notes 266-299 and accompanying text for a discussion of sexual privacy. The experience from rape trials, for example, is not promising. Juries tend to judge sexually active women harshly, concluding that any breach of conventional morality means a woman has assumed the risk of sexual violation. Sexual fraud plaintiffs would not automatically be protected by rape shield laws from sexual slander employed as a defense tactic. See Estrich, supra note 113, at 10. The prospect of going to trial in these circumstances will surely discourage many worthy plaintiffs, particularly those with unconventional sexual histories.

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5. Reasonableness and Diversity. -- The reasonableness inquiry embedded in the structure of the sexual fraud tort does not measure the victim's actions against a universal standard, but instead requires different things of different people depending on the relationship involved. The flexibility of the

reasonableness standard makes it possible to sensibly regulate the range of sexual relationships typical of the modern world, from committed courtship to one-night stands, thus accepting a diversity of current sexual mores without having to force a cultural consensus about what "good sex" is. n412

-Footnotes-

n412 For a discussion of the current debate over sexual freedom and regulation, see supra notes 209-218 and accompanying text.

-End Footnotes-

For some critics, however, it is precisely this lack of consensus in our society about this "good" sexual behavior that makes it unfair for the law to intervene in order to decide what is "reasonable" in a sexual setting. Professor Cohen, for example, points out that men and women are not likely to agree about what to expect from a sexual relationship: "[T]he contours of appropriate behavior between the sexes, either as a prelude to, or part of, a sexual relationship, or simply as an aspect of ordinary, social discourse are not a fixed, universally known, or widely shared set of rules." n413 Faced with such conflicts in sexual values, Cohen fears the legal system will unfairly judge men's efforts to initiate sexual relationships. n414 Feminists are similarly concerned that social prejudices regarding male and female sexual behavior will enter into decisions about sexual reasonableness, n415 but they fear that the likelier result is unfair judgment of women's sexual conduct.

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n413 Cohen, Sexual Harassment and the Law, supra note 288, at 9. In appealing to "diversity of sexual values," Cohen primarily means differences between men and women, see id. at 8, although he also notes that there are race, ethnic and class-based differences in sexual expectations and conventions. See id. at 9-11.

n414 See id. at 9-10.

n415 Some courts share this concern as well. See Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245 (Sup. Ct. 1985) (cautioning that sexual fraud cases could "appeal solely to the prejudices and sympathies of the trier of fact").

-End Footnotes-

The application of reasonableness standards to sexual behavior has been most extensively explored in the context of workplace sexual harassment litigation. n416 In this analogous factual setting, feminist [*469] commentators have observed that "objective" standards of reasonableness, by affirming male-biased standards of acceptable sexual conduct tend to diminish or erase the experiences of women. n417 Men tend to view many forms of sexual conduct as "part of the game;" by contrast, women tend to be more sensitive to loss of sexual control, perhaps because they are so often targeted for sexual abuse. n418 In a landmark case, Ellison v. Brady, n419 the Ninth Circuit ruled that a sex-blind reasonableness standard "tends to be male-biased and tends to systematically ignore the experiences of women." n420 The Ellison court adopted instead a "reasonable woman" or "victim's perspective" standard as the appropriate measure of reasonable response. n421 Privileging the defendant's perspective, the

court concluded, risked "sustain[ing] ingrained notions of reasonable behavior fashioned by the offenders." n422 On the other hand, using the victim's perspective to determine the effect of sexual conduct would have the salutary effect of encouraging men to learn how sexual conduct affects women, thereby bridging the current gap in perception between the sexes. n423

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n416 See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1197-1202 (1989); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1207-08 (1990); Susan M. Matthews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 Yale J.L. & Feminism 299, 312-14 (1991); Wendy Pollack, *Sexual Harassment: Women's Experiences and Legal Definitions*, 13 Harv. Women's L.J. 35, 64-66 (1990).

n417 See Abrams, *supra* note 417, at 1197-1202; Ehrenreich, *supra* note 417, at 1207-08; Pollack, *supra* note 417, at 64-65.

n418 See Abrams, *supra* note 417, at 1203; Ehrenreich, *supra* note 417, at 1207-08.

n419 924 F.2d 872 (9th Cir. 1991).

n420 *Id.* at 879.

n421 *Id.* at 878-79. The "reasonable woman" standard was also adopted in *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (sexual harassment) and *Radtke v. Everett*, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991) (same); cf. *Harris v. International Paper*, 765 F. Supp. 1509, 1515 (D. Me. 1991) (reasonable victim standard applied in context of racial harassment case), vacated in part and modified, 765 F.Supp. 1529 (D. Me. 1991).

n422 Ellison, 924 F.2d at 881 (citation omitted).

n423 See *id.* at 880.

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The reasonable victim standard can be clearly applied in the sexual fraud context, extending the theoretical insights it embodies into other arenas in which men and women sexually interact. For example, in a sexual fraud case brought by a female plaintiff, all issues of materiality and justifiable reliance should be judged in light of the sexual expectations, perceptions, and position of an ordinary woman. This contextual approach to reasonableness is consistent with existing law directing that questions of reasonableness in misrepresentation cases are to be judged in light of the deceived person's particular circumstances. n424 This approach takes greater account of the victim's position, but it is not unfair to defendants: the defendant's knowledge of falsity and intent to mislead continues to be judged by reference to his subjective state of mind. The reasonable victim standard simply requires the deceiver, in deciding how to conduct himself, to consider from the perspective of the person to whom his conduct is addressed what reliance his words and conduct will create. He will not be penalized for good [*470] faith mistakes, for sincere promises not fulfilled, or even for typical lover's

nonsense. But he will not be able to excuse intentional misrepresentation as "reasonable" simply because men have always lied to women for sex.

-Footnotes-

n424 See Keeton et al., supra note 152, @ 108, at 751.

-End Footnotes-

Although focusing on the reasonable victim perspective may increase sexual fraud plaintiffs' chances of winning, the standard also entails subtle risks, particularly in its "reasonable woman" form. Asking juries and judges to decide what a reasonable woman would have done may generate new stereotypes about appropriate sexual behavior for all women, obscuring meaningful differences in women's perceptions and expectations along the lines of class, race, ethnicity, sexual orientation, or marital status, not to mention individual temperament. n425 Certainly, women do not share any single vision of sexual life, n426 as women's presence on both sides of every active sexual policy debate demonstrates. n427 Feminist sexual politics must respect and leave room for such differences among women. Properly understood, however, the reasonableness inquiry in a misrepresentation action requires consideration of the perspective of this plaintiff, n428 and not just reference to stereotyped notions about women's behavior, or the behavior of any other culturally distinct group to which the plaintiff might belong. n429 [*471] Thus, highly determinative cultural factors, like race, age, education, sex, professional status, language, or ability, should be taken into account in judging whether a sexual fraud plaintiff reasonably relied on the defendant's representation, especially if the plaintiff identifies these distinctions as relevant to her understanding of the alleged fraud. But room also must be left for courts to consider individual qualities that may qualify a surface appearance of sameness or difference. Accordingly, in judging the reasonableness of reliance on a misrepresentation, personal qualities of the plaintiff and the relationship between the parties may also be important. The existing case law indicates that some courts have recognized these factors, taking into account differences of sexual experience or naivete, n430 age, n431 and social position, n432 as relevant in making liability determinations. If courts properly understand the reasonable victim standard and correctly instruct juries in its application, essentializing or stereotyping can be avoided.

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n425 The mores of a dominant group of women (middle-class, white, heterosexual women, for example) could be construed to represent the whole. See Ehrenreich, supra note 419, at 1218. See generally Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 Tex. J. Women & L. 95 (1992) (arguing for modified reasonable person standard that accounts for victims' gender and race while also recognizing diversity within these categories).

n426 Even among individual women of similar background, one hears both commonality and plurality in descriptions of sexual life. See generally Shere Hite, The Hite Report: Women and Love (1987) (excerpting and analyzing women's views on personal relationships).

n427 See, e.g., Rebecca E. Klatch, Women of the New Right 119-53 (1987) (defending socially conservative critiques of feminism by women as equally assertive and independent as more radical versions of feminism); Kristin Luker, Abortion and the Politics of Motherhood 158-91 (1984) (exploring attitudes of women on both sides of abortion debate). Division of sexual interests among women along lines of race and class was evident, for example, during the Anita Hill-Clarence Thomas hearings, during which African-American and working-class women were less sympathetic to Hill's position than were white and professional women. See Felicity Barringer, Hill's Case is Divisive to Women, N.Y. Times, Oct. 18, 1991, at A12; see also Kimberle Crenshaw, Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill, in Race-ing Justice and En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality 402, 419-21 (Toni Morrison ed., 1992) (arguing that black women have traditionally chosen racial over gender solidarity because white feminists have failed "to span the chasm between feminism and antiracism"). Women of color in particular have explored the ways in which race and culture contribute to the development of diverse sexualities and correspondingly distinct sexual interests among women. See Cherrie Moraga & Gloria Anzaldua, This Bridge Called My Back: Writings by Radical Women of Color 105-59 (1983).

n428 See Keeton et al., supra note 152, @ 108, at 751.

n429 "The appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member." Harris v. International Paper Co., 765 F. Supp. 1509, 1516 n.12 (D. Me. 1991), vacated in part and modified, 765 F. Supp. 1529 (D. Me. 1991).

n430 See, e.g., Parker v. Bruner, 686 S.W.2d 483, 485-86 (Mo. Ct. App. 1984) (noting that plaintiff was younger and sexually inexperienced, whereas defendant was older, formerly married and divorced, and sexually experienced), aff'd 683 S.W.2d 265 (Mo. 1985), cert. denied, 474 U.S. 827 (1985).

n431 See, e.g., Franklin v. Hill, 417 S.E.2d 721, 724 (Ga. Ct. App. 1992) (noting that sexual relationship between fifteen-year-old girl and her adult high-school teacher involved "disparity of power").

n432 See, e.g., Delia S. v. Torres, 184 Cal. Rptr. 787, 792 (Ct. App. 1982) (noting defendant's respected position as leader of plaintiff's community).

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CONCLUSION

DON GIOVANNI: Hush, hush, people are gathering around us. Be more discreet, or you will be criticized.

DONNA ELVIRA: Do not hope for so much, O scoundrel. I have lost the sense of prudence, I hope that everyone will learn of your offenses and the situation in which I bind myself. n433

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n433 Don Giovanni, supra note 1, act 1, sc. 3.

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This Article considers lies told in order to gain consent to sex. Since those with whom we are emotionally or sexually intimate make themselves vulnerable to us, it surprised me to learn in researching this Article that higher standards of honesty and fair dealing apply in commercial than in personal relationships. Perhaps this is not so surprising, however. The countervailing tug of personal liberty is strongest in the intimate context; just as the law refuses to bind us to personal service contracts, the law hesitates to govern our conduct in intimate settings.

One response to the dilemma of intimate responsibility has been to [*472] silence and devalue individuals who make stifling personal claims on the independence and mobility of those who possess privilege and power. Because of the gendered history of romantic and sexual relationships, it has tended to be men in our society who have sought relational freedom, and women whose interests have been compromised by reliance on intimate relationships. Although this male-female pattern of expectations no longer describes the experience of sexual betrayal and loss in modern society, the gendered marks of this age-old conflict between responsibility and freedom are still evident throughout the law that governs sexual fraud. Thus, a theme that runs through this Article is the devaluation of seduced women's experiences. Laws can be reformed and still have little power to remedy injury if lawyers, judges, and juries cannot appreciate the harm a victim says she has suffered, and remain stubbornly unwilling to dignify her experience with an effective and responsive legal remedy. To explore the sources of this reluctance, I have gone beyond strictly legal materials in this Article by tapping ideas from literature, opera, popular culture, history, philosophy, and political theory. For at its root, a discussion of seduction calls for an understanding of our cultural vision of men, women, and their relationship through sex to the society. If we can uncover the sources of our reluctance to dignify the voices of the sexually injured, we can begin to strip our culture's seduction narrative of its fatalism and hypocrisy, and thereby return the sexual choices made by men and women to a world where change and reform are imaginable.

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ARTICLE: LAW AMONG LIBERAL STATES: LIBERAL INTERNATIONALISM AND THE ACT OF STATE DOCTRINE.

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SUMMARY:

... International law, whether public or private, does not distinguish among sovereign states. ... Sabbatino asserted the illegality of the expropriation under international law; Banco Nacional countered with the act of state doctrine. ... Against this backdrop, the Sabbatino version of the act of state doctrine can be interpreted as a doctrine governing nonliberal acts of nonliberal states, acts that a liberal court can neither invalidate nor validate by application of a foreign law. ... -- Three cases may be used as prototypes of judicial handling of the act of state doctrine in cases involving an underlying conflict with a liberal state. ... -- A liberal internationalist revision of the act of state doctrine would also incorporate a coherent

philosophical rationale for why refusal to adjudicate the validity of nonliberal acts of nonliberal states does not represent abdication of the judicial function or blind deference to the Executive, but rather is consistent with the role of courts in a liberal democracy. ... In the first place, to the extent that such exceptions are motivated by an Executive-judicial desire to confront and oppose the nonliberal state, application of the act of state doctrine as a badge of alienage should serve this purpose without more. ...

TEXT:
[*1909] INTRODUCTION

International law, whether public or private, does not distinguish among sovereign states. Democracies, theocracies, and all manner of autocracies are deemed identical under the all-purpose label of sovereignty. Political, economic and social differences between these types of states evidently exist, but they cannot be acknowledged within the legal sphere. From the perspective of traditional international legal scholarship, it remains taboo to use distinctions between different categories of sovereign states as a basis for legal analysis.

This Article is an argument for breaking that taboo. I draw a distinction between "liberal" and "nonliberal" states and use that distinction to analyze transnational legal relations among private individuals and between individuals and state entities. "Liberal" states, for these purposes, are defined broadly as states with juridical equality, constitutional protections of individual rights, representative republican governments, and market economies based on private property rights. "Nonliberal" states, by contrast, are defined as those states lacking these characteristics.

This distinction between liberal and nonliberal states first emerged in empirical political science research demonstrating that liberal states have created "a separate peace." n1 Liberal states are not inherently pacific, as demonstrated by their record of conflict, even aggressive conflict, with nonliberal states. But they do not make war on one another.

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n1 See Michael W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, 12 Phil. & Pub. Aff. 205, 206 (1983) [hereinafter Doyle, Liberal Legacies]; Michael W. Doyle, Liberalism and World Politics, 80 Am. Pol. Sci. Rev. 1151, 1155-56 (1986).

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I contend that the distinctive nature of political-military relations among liberal states has an analog in the legal relations among liberal states. By applying and extending the Kantian theory of liberal internationalism, I construct a "liberal internationalist model" of transnational legal relations that specifies how such relations among liberal states might be expected to differ from those between liberal and nonliberal [*1910] states. In brief, I hypothesize that liberal states operate in a "zone of law," in which domestic courts regulate transnational relations under domestic law. Courts within this zone evaluate and apply the domestic law of foreign states in accordance with general pluralist principles of mutual respect and interest-balancing. Nonliberal states, by contrast, operate in a "zone of politics," in which

domestic courts either play no role in the resolution of transnational disputes or allow themselves to be guided by the political branches. The intersection of these two zones gives rise to an interesting paradox: in many circumstances the courts of liberal states are more likely to evaluate and sometimes reject or override the laws of other liberal states than the laws of nonliberal states.

The liberal internationalist model can be used interpretively, predictively, and normatively. To illustrate these various functions, I apply the model to the act of state doctrine, a well-known doctrine governing challenges to the validity of foreign laws. According to the Supreme Court's classic exposition of the doctrine, "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." n2 Deceptively simple to formulate, the act of state doctrine has nevertheless presented a perennial challenge for scholars and practitioners determined to unravel the mysteries of its evolution and application. From a liberal internationalist perspective, however, the doctrine appears to embody exactly the paradox predicted by the liberal internationalist model, which I will henceforth call the sovereignty paradox. On the one hand, at least until 1989, U.S. courts were willing to "respect the independence" of states such as Czechoslovakia, East Germany, Iran, Libya, Cuba and the former Soviet Union -- allowing challenged acts by these states to stand unreviewed even when they clearly contravened U.S. law. On the other hand, in cases involving challenged acts of states such as Australia, Canada, Great Britain, Israel, Japan, the Netherlands, New Zealand and Switzerland, U.S. courts have either evaluated the validity of the challenged act under U.S. or foreign law or chosen to override the foreign law based on superior U.S. interests.

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n2 Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

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This result cannot be explained in terms of either of the two prevailing interpretations of the act of state doctrine. One is a "legal" interpretation of the doctrine as a doctrine of conflicts of law that directs courts to apply the law of a foreign state in accordance with recognized exceptions for violations of fundamental public policy and international law. The other is a "political" interpretation of the doctrine as a doctrine of delimitation of judicial competence, directing courts to refrain from adjudication in politically charged cases to permit resolution of the dispute by the political branches. Neither one of these interpretations [*1911] can explain the way in which the doctrine has been applied to different states.

As an interpretive framework, the liberal internationalist model resolves and rationalizes the sovereignty paradox. According to the model, the legal interpretation of the act of state doctrine as a conflicts doctrine is most consistent with its application to liberal states, the political interpretation with its application to nonliberal states. Within the liberal zone of law, the price of a general rule of recognition and enforcement of foreign law is the submission of the specific law in question to some form of minimal review for consistency with fundamental public policy and congruence with the balance of competing national interests. In the zone of politics between liberal and nonliberal states, by contrast, political considerations are expected to

dominate the dispute resolution process. In a world of both liberal and nonliberal states, both versions of the doctrine will be required to explain the full range of cases in which the doctrine is applied.

This interpretive application of the liberal internationalist model is particularly successful in explaining both the result and the reasoning in the major Supreme Court act of state precedent, Banco Nacional de Cuba v. Sabbatino. n3 According to conventional wisdom, Sabbatino transformed the act of state doctrine from a conflicts doctrine to a doctrine of delimitation of competence based on separation of powers principles. From a liberal internationalist perspective, this transformation can be explained by a need to avoid adjudicating the act of a nonliberal state without in any way "applying" that law as "law" and thereby validating it according to liberal principles. This interpretation suggests that in recognizing the limits of its own competence respecting the political branches, the Sabbatino Court was simultaneously acknowledging that the assumptions underpinning ordinary conflicts-of-law rules could not be projected onto a state such as Cuba. Sabbatino can thus also be understood as standing for the more general proposition that conflicts-of-law principles rest on deeply embedded assumptions about what qualifies as "law." When the consensus on these assumptions no longer holds, legal conflicts give way to political conflicts.

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n3 376 U.S. 398 (1964).

-End Footnotes-

A liberal internationalist analysis of the act of state doctrine can also be used to explain a subsidiary tension that has fractured the Supreme Court since Sabbatino. According to the liberal internationalist model, the same perception that leads courts to conclude that act of state cases involving nonliberal states are beyond the sphere of normal judicial competence is likely to give rise to two contradictory impulses. On the one hand, the rule-of-law values said to animate liberal courts n4 [*1912] might lead such courts to resist direction from the political branches regarding the legal resolution of the case before them. Considerations of judicial autonomy would dictate a simple refusal to adjudicate. On the other hand, the underlying determination that the dispute in question is meet for political rather than legal resolution could also lead to increased receptivity to direction from the political branches in cases in which the political branches favor a judicial invalidation of the act of state in question as a foreign policy tool. The tension between these two positions is likely to lead to a split result in cases involving nonliberal states.

-Footnotes-

n4 I use the term "liberal courts" here and throughout the piece to refer to the courts of liberal states, as contrasted with the courts of nonliberal states. I am not concerned with the narrower domestic distinction between "liberal" and "conservative" courts.

-End Footnotes-

The ability to interpret a group of cases consistently with certain underlying principles does not necessarily pinpoint the actual factors that

led judges to decide those cases the way they did, nor does it generate specific predictions about future outcomes. n5 To test the predictive value of the liberal internationalist model, I examine approximately seventy lower court cases in which the act of state doctrine is raised and discussed. Analysis of these cases with attention to the liberal or nonliberal character of the states involved reveals, first, that the liberal-nonliberal distinction is only a proxy for a host of more specific differences that actually drive the results in individual cases, and second, that it is difficult to tie the differences in outcomes in these two classes of cases to the application or nonapplication of a particular doctrine. What emerges, however, are aggregate patterns of factors or considerations likely to inform judicial reasoning in deciding whether to reach a result consistent with the application of either United States law or the law of a particular foreign state. In cases involving nonliberal states, courts tend to focus primarily on two considerations: limitations on their competence to decide and the position of the Executive. In cases involving liberal states, courts are more likely to take into account two other considerations: the validity of the foreign act under foreign or U.S. law and the balance of interests between the United States and the foreign nation. These differing sets of considerations are consistent with the interpretive framework set forth above, but can also be used to predict or explain concrete outcomes based on the facts of a particular case.

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n5 For a lucid and concise explication of the differences between causal explanations, simple causal statements, storytelling, assertions about correlation, and predictions, see Jon Elster, Nuts and Bolts for the Social Sciences 4-9 (1989).

-End Footnotes-

In addition to its interpretive and predictive functions, the liberal internationalist model has a normative dimension that suggests how the act of state doctrine might be revised. As analyzed here, application of the act of state doctrine marks the divide between liberal and nonliberal states. Yet in an age in which states the world over are newly professing liberal ideals, it is worth asking whether the doctrine can be revised so as to help nudge nonliberal states toward the liberal side of the divide. Such a goal might be accomplished by making the assumptions [*1913] underlying the doctrine more explicit. For instance, one possible revision of the act of state doctrine along liberal internationalist lines would reinterpret "deference" to nonliberal sovereigns as the ostracism of an outlaw -- a state outside the conception of law shared by liberal states. Liberal states operating within this conception would have to accept the cost of potential rejection or overriding of their laws according to specified criteria. n6 The corresponding benefit, however, is participation in the liberal international economy and various international institutions limited primarily to liberal states.

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n6 This conception of the practical constraints on the legal sovereignty of liberal states is consistent with the far broader phenomenon of the limitation on the practical autonomy of liberal states resulting from increased economic and political interdependence. For a preliminary sketch of this connection, see Anne-Marie Burley, Toward an Age of Liberal Nations, 33 Harv. Int'l L.J. 393

(1992).

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The costs and benefits of this revision of the act of state doctrine reflect the sovereignty paradox. Nonliberal states publicly identified as operating outside the liberal zone of law would preserve their full sovereign rights. Liberal states would see their sovereignty diminished, in the sense of subjecting their laws to the appraisal of liberal states across the zone, but would benefit by confirmation of their participation in the liberal international economy and an emerging political consensus on basic rights under law. Further, a liberal internationalist revision of the act of state doctrine would build on this paradox as a tool of progressive change. States that openly prefer to follow a nonliberal path may be all too willing to keep their sovereignty at any price. But the many states that now seek to restructure their politics and economies in accordance with liberal precepts might be induced to welcome some forms of judicial review of the validity of their acts by foreign courts. Such review could be accomplished either under their own law, to the extent that it does in fact embody liberal principles, or under U.S. or international law.

Viewed in light of this broader normative agenda, the power and scope of the act of state doctrine is admittedly limited. The full potential of the liberal internationalist model ultimately lies in its application to an entire range of doctrines governing transnational legal relations. For these purposes the model itself will have to be refined. To begin with, the stark dichotomy between "liberal" and "nonliberal" states will have to be modified to take account of a subtler spectrum of liberal and nonliberal characteristics. Such refinement might pinpoint the actual factors that courts deem most important in deciding cases involving different types of states, such as the precise level of economic interdependence or the substantive nature of the foreign act in question. In undertaking this task, lawyers can draw on a growing body of political science literature seeking to specify the most important differences between liberal and nonliberal states in terms of constraints on their international behavior.

[*1914] Part I of this Article elaborates the liberal internationalist model, concluding with a discussion of the ways in which the model departs from the reigning paradigm of sovereign equality. Part II offers a brief introduction to the act of state doctrine. Part III sets forth a liberal internationalist interpretation of the evolution of the act of state doctrine in the Supreme Court. Part IV examines lower court act of state cases, distilling the different factors that inform adjudication of cases involving liberal and nonliberal states. Part V sketches a possible liberal internationalist revision of the act of state doctrine and outlines a research agenda for future refinement of the liberal internationalist model.

I. A LIBERAL INTERNATIONALIST THEORY OF TRANSNATIONAL LEGAL RELATIONS

A. An Introduction to Liberal Internationalism

In 1795 Immanuel Kant turned his attention to the bedrock question of international relations: the incidence of war and peace. The result was Perpetual Peace, n7 a theory of how states could overcome the Hobbesian chaos of the international system and banish war forever. n8 Kant argued that this seemingly utopian state of grace could be achieved upon the satisfaction of

three essential preconditions: a world of liberal republics characterized by representative governments and separation of powers; n9 a law of nations based on a "federalism of free nations"; n10 and a cosmopolitan law establishing the right of universal hospitality. n11 He further predicted that these three requirements would someday be met through the domestic political evolution of states toward liberal republicanism, the gradual emergence of principles of tolerance and mutual accommodation in response to differences of language and religion, and the spread of international commerce. n12

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n7 Kant's work is best known under this title, although a truer translation is *Eternal Peace*. See Immanuel Kant, *The Eternal Peace*, reprinted in *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings* 430-76 (Carl J. Friedrich ed., 1949).

n8 See id. at 436.

n9 See id. at 437.

n10 See id. at 441.

n11 See id. at 446.

n12 See id. at 452-55.

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The "liberal peace" that Kant predicted has in fact been established. Liberal states do not war with one another. War remains an international scourge, but virtually all the protagonists over the past two centuries have been either nonliberal states fighting among themselves, or liberal states fighting nonliberal states. n13 The pioneering study in this area, by Professor Michael Doyle, found only three possible exceptions to the liberal peace out of 416 wars (excluding civil wars and covert [*1915] interventions) between 1817 and 1980. n14 Doyle defined liberal states according to four principal attributes:

-- formal legal equality for all citizens and constitutional guarantees of civil and political rights such as freedom of religion and the press;

-- broadly representative legislatures exercising supreme sovereign authority based on the consent of the electorate and constrained only by a guarantee of basic civil rights;

-- legal protection of private property rights justified either by individual acquisition, common agreement or social utility; n15

-- market economies controlled primarily by the forces of supply and demand. n16

Subsequent studies documenting this phenomenon vary somewhat according to their precise definition of "war" or of "liberal states," but all agree on the central conclusion. n17

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n13 See Doyle, *Liberal Legacies*, supra note 1, at 213-15.

n14 See *id.* at 213 n.7.

n15 European social welfare states -- which often describe their system as "market socialism" -- are included, as are various forms of mixed economy; state socialism or state capitalism is not.

n16 See Doyle; *Liberal Legacies*, supra note 1, at 207-08.

Applying these criteria, Doyle classified all states, from the 18th century to the present, as liberal or nonliberal. The possible exceptions to the "liberal peace" he identified include the conflicts between Peru and Bolivia in 1841; Ecuador and Colombia in 1863 (each within three years of one of the states becoming a liberal state); and Lebanon and Israel at the beginning of the 1967 War (Lebanon sent a flight of jets into Israeli airspace at the beginning of the war).

The two counter-examples that typically come to mind are the War of 1812 and World War I. Doyle explains the War of 1812 on the ground that Britain cannot be classified as a liberal state until the Voting Reform Act of 1832. Imperial Germany does not fit the liberal model in World War I because although its internal governance was liberal, the Kaiser retained full and absolute control over the military in external relations.

n17 Empirical studies presaging and confirming Doyle's results include Steve Chan, *Mirror, Mirror on the Wall . . . : Are the Freer Countries More Pacific?*, 28 *J. Conflict Resol.* 617 (1984); Melvin Small & J. David Singer, *The War-Proneness of Democratic Regimes, 1816-1965*, 1 *Jerusalem J. Int'l Rel.* 50 (1976). The best statistical study is probably the most recent, Zeev Maoz & Nasrin Abdolali, *Regime Types and International Conflict, 1816-1976*, 33 *J. Conflict Resol.* 3 (1989). The empirical findings of these studies have recently been recognized by a prominent scholar in the field of international security, himself a confirmed Realist. See Stephen M. Walt, *The Renaissance of Security Studies*, 35 *Int'l Stud. Q.* 211, 224 (1991).

Skeptics typically challenge these findings on the ground that liberal states were so few and far between in the 19th century that the absence of war among them is not statistically significant. However, Maoz and Abdolali conclude that based on the number of democratic states in the system (they use a more precise definition, but one that generally accords with Doyle's) we would expect 146 disputes (a term that they define much more broadly than Doyle defines war) between democratic states, but in fact observe only 73. See *id.* at 24. Overall, they find that the proposition that democracies do not fight democracies has strong statistical support. See *id.* at 30-32.

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For political scientists, identification of this empirical phenomenon [*1916] is merely the first step in developing a causal explanation. What are the sources of this liberal peace? More precisely, by what exact mechanism or mechanisms do the specific characteristics of liberal states translate into a reluctance to go to war? n18 This debate over causal mechanism promises to

occupy international relations theorists for years to come. To the extent that they are successful in identifying the precise causes of the liberal peace and specifying the relation of those causes to one another, the answers will greatly assist those -- inside the academy and out -- who would construct a permanent international legal order. For present purposes, however, the revival and empirical verification of liberal internationalism can be summarized in two basic postulates:

-- The relations among liberal states differ from relations between liberal and nonliberal states.

-- This difference is not a random byproduct of the global power structure, but is rooted in the distinctive political and economic characteristics of liberal states.

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n18 Doyle resurrects Kant's original theory. First, representative republican government established on the basis of separation of powers allows the decision to go to war to be made by those who will bear its costs, producing a "constitutional guarantee of caution" in international affairs. Doyle, *Liberal Legacies*, supra note 1, at 228-30. Second, the development of international law and the moral integration of liberal polities adds a "guarantee of respect" for other liberal states. *Id.* at 230. Third, economic interdependence fostered by international commerce raises the cost of war. See *id.* at 231. No one of these factors, standing alone, would be sufficient to prevent war, but only the cumulative effect of all three together.

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Political scientists have derived these propositions largely from the study of international political-military relations between liberal and nonliberal states. I contend that they apply equally to international legal relations. The question thus becomes what the dichotomy between liberal and nonliberal states implies for the proper domain and definition of international legal relations.

B. Liberal Internationalism and Transnational Legal Relations

The full spectrum of international legal relations includes public international law (the traditional body of law understood to govern states in their relations with one another); private international law (the domestic legal rules governing jurisdictional and choice-of-law decisions in cases primarily involving private litigants from different nations); n19 and transnational law (Philip Jessup's elegant amalgam of the two). n20 I shall focus here on applying liberal internationalist theory to transnational legal relations, which I define to include relations among [*1917] individuals across borders and between individuals and foreign states. n21 Liberal internationalist theory locates the origins of differences in international behavior between liberal and nonliberal states in the actions of domestic political institutions. Transnational legal relations are the province of domestic courts. A straight projection of liberal internationalist theory would thus assume, at the most basic level, that courts of liberal states handle cases involving other liberal states differently from the way they handle cases involving nonliberal states.

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n19 Also known as "conflicts of law" or, according to scholarly taste, "conflict of laws."

n20 "[T]ransnational law" includes "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." Philip C. Jessup, *Transnational Law* 2 (1956) (citation omitted).

n21 My definition of transnational legal relations is thus broader than traditional definitions of private international law insofar as it includes individual-state relations, but narrower than the Jessup definition of transnational law insofar as it excludes traditional state-state public international law. For potential applications of liberal international relations theory to the state-state relations that lie at the core of traditional public international law, see Anne-Marie Burley, *International Law and International Relations Theory: A Dual Agenda* (forthcoming 1993) (copy on file with the Columbia Law Review).

-End Footnotes-

My aim in this part is to construct a hypothetical model of transnational legal relations among liberal states, on the one hand, and relations between liberal states and nonliberal states, on the other. n22 After discussing the principal factors likely to shape relations in each category, I summarize the model in five propositions and outline the most important ways in which this model departs from the fundamental tenets of modern international law as understood by both courts and scholars.

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n22 References to "legal relations" among liberal states or between liberal states and nonliberal states should henceforth be understood to refer to transnational legal relations.

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1. Transnational Relations Among Liberal States: The "Zone of Law." -- Kant himself provides the best starting point for an examination of how transnational legal relations might operate among liberal states. Kant had no illusions about the nature of men or states. He regarded the emerging code of customary international law as a vehicle for nations to justify illegal behavior -- above all war. n23 Far from placing any confidence in genuine supranational law or world government, he envisioned a peace based instead on a negative norm of mutual self-restraint strengthened by the bonds of trade and internal constitutional checks on aggression. n24

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n23 See Kant, *supra* note 7, at 442-43. Kant ridiculed the founding fathers of modern international law -- "Hugo, Grotius, Pufendorf, Vattel and others" as "miserable consolers." *Id.* The limitation of war was the primary task the great legal publicists had set for themselves. Yet for Kant, "[t]here is not a single case known in which a state has been persuaded by arguments reinforced by the

testimony of such weighty men to desist from its aggressive design." Id. at 443.

n24 See id.

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Peace does not equal harmony, however. Even among the liberal members of the pacific union, disputes are bound to arise. n25 Kant foresaw [*1918] the settlement of second-order conflicts under pluralist principles: general "agreement on principles for peace and understanding." n26 This happy state would result not from "the weakening of all other forces," as it would in a global empire, "but by balancing these forces in a lively competition." n27 But how can differences of language and religion themselves lead toward principles for peace and understanding? This causal relationship can only obtain if those ultimate principles are principles of pluralism. The continuing fact of difference co-exists with a desire to avoid the ill effects of difference -- above all war. It follows that the substance of these principles must be tolerance and mutual accommodation based on recognition of competing interests. n28

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n25 Kant emphasized that differences of language and religion, both relatively immune to the convergence of political and economic structure, would breed continual competition among states and their citizens. See id. at 454. It is not difficult to expand and update the list of factors that continue to create second-order conflict between liberal states: differences in governmental regulation, variations in the nature of representative institutions, distinctive traditions of social policy, and shifting patterns of comparative advantage.

n26 Id.

n27 Id.

n28 Evidence for this proposition comes from several sources. First, Kant recognizes that states do not have a moral obligation to leave their own state of nature to form a larger state. The absence of this moral obligation rests on the existence of life under law, and hence the maximization of individual freedom, within the state. Their citizens "have outgrown the coercion of others who might desire to put them under a broadened legal constitution conceived in terms of their own legal norms." Id. at 443. By definition, such a "broadened legal constitution" would also guarantee individual freedom. But the precise means, the specific legal norms, for organizing a life in freedom would differ. Each society is entitled to determine those means for itself.

A second source of evidence is Kant's explanation of the way in which eternal peace would be guaranteed by "a compulsion of nature" working against man's will. Id. at 452. He demonstrates the way in which nature will ensure the formation of a pacific union rather than an imposed world government -- the "complete merging of all [existing] states in one of them which overpowers them and is thereby in turn transformed into a universal monarchy." Id. at 454. A global peace by empire would be unacceptable on both moral and practical grounds -- it would represent the "graveyard of freedom" as a nonrepresentative despotism -- and would not succeed because "the laws lose more and more of their effectiveness as the government increases in size." Id. The result would

conditions under which the norm of respect holds.

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The second distinctive feature of the zone of liberal states flows from a common commitment to the rule of law. At a minimum, this commitment presupposes the existence of an independent and professional judiciary guided by a sufficiently autonomous conception of law to permit principled decisionmaking. The result aims, if not at justice, at least at predictability and the concomitant protection of private expectations. This is not to say that the courts of liberal states are not subject to a range of nonlegal influences, both political and personal. It is to claim, however, at least for the purposes of my hypothetical model, that the courts of liberal states operate in a sphere distinct from that of the political branches. The legislature may pass the laws and the executive may decide when and to what extent to enforce them, but their actual interpretation and application in a particular case is for the courts alone.

The third corollary of the basic liberal internationalist model is a [*1920] hypothetical dialogue among the courts of liberal states. The growing emphasis in domestic conflicts-of-law scholarship on the concept of strategic interaction between courts, whether analyzed in gametheoretic or more conventional terms, n30 assumes that courts engage in a form of reciprocal dialogue. Similarly, it is easier to develop pluralist principles operating across borders if a court of one state may assume that its foreign counterpart will respond to signals of accommodation or confrontation in an ongoing conversation. n31 The political branches may have input into this dialogue by communicating directly with their own or foreign courts.

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n30 See, e.g., Lea Brilmayer, Conflict of Laws: Foundations and Future Directions 155-67 (1991) (discussing game theoretical approaches in which actors have both common interests that they attain through cooperation and conflicting interests that they realize at each other's expense); Larry Kramer, Rethinking Choice of Law, 90 Colum. L. Rev. 277, 339-44 (1990) (discussing choice of law in terms of prisoner's dilemma hypothetical); see also Louise Weinberg, Against Comity, 80 Geo. L.J. 53 (1991) (asserting that game theory as applied to conflicts of law reincarnates traditional notions of comity and reciprocity).

n31 These principles may not be optimal from the point of view of maximization of common interests or cooperation among the participating states. For instance, the discretion inherent in a shared but very general notion of comity may be less satisfactory than a common statutory or treaty regime designed to produce specific outcomes across a range of cases. Nevertheless, even loose common principles may yield more predictable and orderly outcomes across borders than ad hoc decisions by courts heedless of the potential consequences of their decisions in terms of a reciprocal response.

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The hypothetical model of transnational legal relations among liberal states advanced here thus envisions the application of pluralist principles by independent courts operating on a principle of legitimate difference reinforced by the existence of a reciprocal dialogue with their foreign counterparts.

This model resembles one possible model of the interaction of law and politics within a generic liberal state. Competition among states, as among individuals within a state, is fierce but self-limiting. Domestic political processes generate legal rules interpreted and applied by domestic courts. Concrete economic, political and social interests often clash, but are mediated according to principles that have evolved over time as necessary to sustain peaceful relations among a group of repeat players. The pursuit of self-interest is tempered by recognition of the legitimate interests of other players and a desire to encourage reciprocal behavior.

2. Transnational Relations Among Liberal and Nonliberal States: The "Zone of Politics" Beyond Law. -- How then to characterize transnational legal relations between liberal and nonliberal states? First, the definitional distinction between liberal and nonliberal states makes it likely that in many cases the policy choices made by nonliberal states will fall outside the zone of legitimate difference. For purposes of the model, the classification of a state as nonliberal rests on evidence of adherence to fundamentally different values and institutions from those prevailing [*1921] in liberal states: nonrepresentative government, no separation of powers, a command economy, sharply restricted or nonexistent private property rights, or legally recognized castes. n32 The resulting likelihood of a clash of fundamental political, economic and social values in private disputes between citizens from liberal and nonliberal states would sharply decrease the possibilities for recognizing legitimate difference. The pluralist principles developed to govern interaction among citizens of liberal states would thus be difficult to apply to cases arising out of interactions between citizens from liberal states with citizens or governments of nonliberal states.

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n32 A state need not possess all of these characteristics to be nonliberal. Historians debate the extent to which fascist states such as Hitler's Germany or Mussolini's Italy had command economies. The question of which and how many of these characteristics are necessary to categorize a particular state as liberal or nonliberal must be studied much more closely to elaborate a full-fledged liberal theory of international law. See discussion infra part V.A.3.

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Second, courts in liberal states are more constrained in cases involving nonliberal states. Because war remains a possibility between liberal and nonliberal states, the potential for escalation casts any hostile dispute in a different light. The shadow of military conflict is likely to create a more pronounced distinction between the domestic and the international spheres, presenting domestic courts of liberal states with terrain that sometimes seems strange and dangerous. They are more likely to look to the executive for guidance.

Third, in many nonliberal states the theory and the reality of the judicial system hold out dim prospects for principled decisionmaking by independent judges. As the line between the political and the judicial branches fades, so too does the hope of predictability inherent in the liberal conception of the rule of law. The courts of liberal states are thus unlikely to find counterparts in nonliberal states with whom to conduct the figurative reciprocal dialogue hypothesized above.

The combination of fundamental ideological conflict, the shadow of actual military conflict, and the difficulty of judicial dialogue might reasonably push the courts of liberal states toward the conclusion that cases involving the laws of nonliberal states are literally "beyond law." Such cases should instead be referred to the political branches for resolution. This initial impulse can in turn give rise to a range of specific outcomes in individual cases, depending on the position of the political branches.

When the judiciary and the political branches concur in the need for political resolution, a liberal court is likely to decline to adjudicate. Where political decisionmakers perceive a political benefit from a judicial rejection of the law of a nonliberal state, and thus seek to manipulate a specific judicial response as a foreign policy tool, two quite different results may emerge. Some judges, having already made an initial determination that the case is outside the "zone of law," may be [*1922] inclined to take dictation from the political branches as to the actual resolution of the legal issues before them. Others, however, may feel that the same idealized commitment to the rule of law that I have posited as a liberal hallmark argues against deference to the political branches as to the actual outcome of the case before them. These judges would be loath to collaborate in a politically mandated "legal" result.
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n33 A third possibility flows from recognition that the principled and autonomous ideal of a liberal judge is just that. In a less than ideal world, it is evidently possible that many judges in liberal states will be subject to the same political perceptions and reactions as political officials. Faced with a case arising out of a dispute with a nonliberal state, such judges could respond on their own with a judicial version of political confrontation, such as invalidation of a nonliberal state's laws or a judgment against a nonliberal state's assets. See infra part IV.A.2.

-End Footnotes-

3. The Liberal Internationalist Model. -- For purposes of analysis, it is useful at this point to summarize the core hypotheses ventured above in a more paradigmatic form:

- a) Liberal states relate to other liberal states differently than they do to nonliberal states in their legal as well as their political-military relations.
- b) Transnational legal relations among liberal states are [*1923] founded upon a principle of legitimate difference, a common commitment to principled decisionmaking by an independent judiciary, and the possibility of transnational judicial dialogue.
- c) Where such relations exist, the courts of liberal states will be guided in the mutual application of each other's domestic law by general pluralist principles of tolerance and mutual accommodation.
- d) In contrast to relations among liberal states, the policy choices of nonliberal states are considerably more likely to fall outside the range of

legitimate difference. Further, liberal courts are more likely to be aware of the constraints on their own competence flowing from the possibility of war and the impossibility of gradual accommodation through judicial dialogue.

e) Liberal courts called upon to adjudicate transnational disputes involving nonliberal states will thus find it far more difficult to apply pluralist principles. The determining factor guiding the actual legal outcome in such cases will be the particular strategy adopted to mediate the tension between a preference for political rather than legal resolution and a desire to preserve judicial autonomy.

A final caveat. The above discussion has distinguished between liberal and nonliberal states as if they were mutually exclusive categories. In fact, of course, liberal and nonliberal characteristics mark two ends of a spectrum, with many states somewhere in between. The division between the characteristics of relations among liberal states and relations between liberal states and nonliberal states will be similarly untidy in practice. Where a state falls on this spectrum may also depend on the purpose for which classification is being made. In other words, it may ultimately be possible, and useful, to classify states as "economically liberal" or "politically liberal" depending on whether a particular case or set of rules involves economic or political issues.

C. The Straitjacket of Sovereignty

Before applying the liberal internationalist model to a specific legal doctrine, it is worth pausing for a moment to contrast its assumptions with the assumptions underlying the existing paradigm of sovereign identity and equality. This section briefly explores the origins and contours of that paradigm as a constraint on any effort to differentiate among different types of states. This theoretical handicap, I argue, prevents the identification and utilization of empirical differences that the liberal internationalist model brings to the fore.

1. The Existing Paradigm. -- "No principle of general law is more universally acknowledged, than the perfect equality of nations." n34 So [*1924] wrote John Marshall in 1825, finding that a sovereign state could not impose its domestic decision to outlaw slavery on its fellow sovereigns. In 1945 the Framers of the U.N. Charter proclaimed sovereign equality as one of the founding principles of the new international order. Article 2(1) sets forth "the principle of sovereign equality of all . . . Members." n35 International law treatises and casebooks typically begin with equally categorical statements of the principle as a fundamental postulate of the international legal system. n36

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n34 The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.).

n35 U.N. Charter art. 2, Pl. This principle has been subsequently reiterated in virtually every major United Nations instrument concluded since. See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter G.A. Res. 2625].

n36 See, e.g., 1 L. Oppenheim, *International Law*, @ 115aa (H. Lauterpacht ed., 6th ed. 1947); Arnold D. McNair, *Equality in International Law*, 26 Mich. L. Rev. 131, 131 (1927).

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In fact, the meaning of sovereign equality changed significantly between 1825 and 1945, generating heated debates among diplomats and international legal scholars along the way. Marshall framed the concept in accordance with the emerging positivist school in international law, which held that equality is a necessary corollary of sovereignty. As Johann Jacob Moser reasoned in 1779, "That state is called sovereign, which is independent, that means to whom no other state or lord has the right to command Independence entails equal rights." n37 By 1904 the formula was even more succinct. "[T]he equality of sovereign [*1925] states," explained a leading publicist of the era, "is merely their independence under a different name." n38

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n37 1 Johann J. Moser, *Versuch des Neuesten Europaischen Volkerrechts in Friedens-und Kriegszeiten* I, I, I, and I, I, 2, 2 (1777-1779), quoted and translated in P.H. Kooijmans, *The Doctrine of the Legal Equality of States* 90 (1964). Chief Justice Marshall was perhaps more likely to have been directly influenced by the reasoning of Emmerich de Vattel, whose *Droit de Gens*, published in 1758, was widely read among the Framers of the Constitution. See Daniel G. Lang, *Foreign Policy in the Early Republic* 11-12 (1985). Vattel began with the equality of men:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom. Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758), in 3 *The Classics of International Law* @ 18, at 7 (James B. Scott ed., 1916).

In what remains the most comprehensive and careful account of the theoretical and the historical evolution of the doctrine, Edwin Dickinson traces its earliest statement in a form recognizable to modern international lawyers back to Pufendorf. See Edwin DeW. Dickinson, *The Equality of States in International Law* 80-82 (1920). Goebel offers an extremely detailed historical account of the practical forces pushing for recognition of sovereign equality following the Peace of Westphalia. See Julius Goebel, Jr., *The Equality of States: A Study in the History of Law* 71 (1923). More recently, P.H. Kooijmans provides a similarly thorough but more critical account of earlier theorists in an effort to restore a natural law element to contemporary understandings of the doctrine. See Kooijmans, *supra*, at 43-93.

n38 1 John Westlake, *International Law* 308 (1904). Oppenheim's version of the principle is much the same: "The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their international personality." 1 Oppenheim, *supra* note 36, @ 115.

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In the twentieth century, however, the concept of sovereign equality was commandeered by two very different groups of states, each seeking its redefinition. On the one hand, the major powers of the international system -- the only nations recognized as fully sovereign and hence equal in the nineteenth century n39 -- sought to preserve their privileged status by arguing that sovereign equality meant only equality before the law, and that different legal rules could apply to different classes of nations. n40 Only such an understanding would allow for the construction of an effective international organization premised on the principle of Great Power leadership. Thus, notwithstanding the affirmation of sovereign equality in article 2(1) of the United Nations Charter, n41 article 27 granted the five permanent members of the Security Council privileged status in running the new international organization. n42

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n39 See Kooijmans, supra note 37, at 92.

n40 This effort began with the construction of the League of Nations, with its elaborate protectorate system. Various international legal scholars of the period were thus anxious to establish a firm distinction between equality of law and equality of rights. The most fiery and pungent writer on this point is P.J. Baker, *The Doctrine of Legal Equality of States*, 4 *Brit. Y.B. Int'l L.* 1 (1923). Dickinson also published his major work on sovereign equality during this period. See Dickinson, supra note 37.

n41 See U.N. Charter art. 2, P1 ("The Organization is based on the principle of sovereign equality of all its members.").

n42 See U.N. Charter art. 27 (decisions of Security Council on all nonprocedural matters requires concurring votes of all five permanent members).

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At the other end of the spectrum, newly emerging states have sought not only to reaffirm the concept of sovereign equality as a guarantee against intervention in their internal affairs, n43 but also to transform it into an affirmative egalitarian norm -- a guarantee of equal [*1926] participation in international organizations and of equal rights under international legal rules. n44 That a particular legal rule must apply equally to its subjects is inherent in the concept of law; that all legal rules cannot differentiate among their subjects is a far more controversial normative proposition.

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n43 Article 2(7) of the U.N. Charter provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter" U.N. Charter art. 2, P7. Further, as Prosper Weil observed in 1983, "the heterogeneity of the components of international society is no longer a mere fact: the right to differ is now proclaimed as one of the attributes inherent

in the very notion of sovereignty." Prosper Weil, Towards a Relative Normativity in International Law?, 77 Am. J. Int'l L. 413, 419 (1983). Weil was commenting on the provision in the 1970 Declaration on Principles of International Law, which provides: "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. . . . States are juridically equal." G.A. Res. 2625, supra note 35, at 124.

n44 For a discussion of efforts to enshrine this view in the U.N. Charter, see Herbert Weinschel, The Doctrine of the Equality of States and Its Recent Modifications, 45 Am. J. Int'l L. 417, 427-42 (1951); Raoul Padirac, L'egalite des Etats et l'organisation internationale 161-68 (1953).

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Overall, however, it remains the rule in the late twentieth century that a sovereign, having fulfilled the formal requirements of statehood, n45 is equal to any other sovereign. Departures from this norm obviously exist, n46 at least in the perception of many outside and some within the international legal community, but they have largely been rationalized away. n47 At the very least, rules that apply in terms to a sovereign state without further specification or qualification must apply equally to all sovereign states. This principle, which I refer to as the principle of sovereign identity, holds equally for domestic courts applying rules developed for the regulation of relations among sovereign states. Bodies of doctrine governing sovereign immunity, jurisdiction to prescribe, forum selection and treaty interpretation do not differentiate among different types of sovereigns.

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n45 The four essential requirements of statehood are an identifiable population, a defined territory, an organized government, and the capacity to enter into relations with other states. See 1 Oppenheim, supra note 36, @ 114; see also James L. Brierly, The Law of Nations 137 (Sir Humphrey Waldock ed., 6th ed. 1963) (listing "essential characteristics of a state" as "an organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations"); Ian Brownlie, Principles of Public International Law 74-88 (3d ed. 1979) (critically evaluating and supplementing formal characteristics of statehood as set out in Montevideo Convention on Rights and Duties of States).

n46 The best example of such a departure is the institution of permanent membership on the United Nations Security Council, privileging five states over all other members of the international community by virtue of their superior military and economic power as of 1945. See supra note 42 and accompanying text. Other examples include weighted voting systems in institutions like the World Bank and the International Monetary Fund.

n47 For an excellent discussion of this rationalizing process with respect to the tension between articles 2(1) and 27 in the U.N. Charter, see Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int'l L. 705, 749 (1988).

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The point of this necessarily brief history is that within the existing analytical and normative framework of international law, it is not possible to distinguish between "liberal" sovereigns and "nonliberal" sovereigns -- no matter how strongly such a distinction may be felt, intuited or perceived. Indeed, as the above discussion suggests, those deviations from the principle of sovereign equality that have been permitted have looked solely to differences of size, power and wealth. Internal differences of political and economic ideology have been regarded as irrelevant and unmentionable.

[*1927] 2. The Benefits of the Liberal Internationalist Model. -- The prevailing model of legal relations among states assumes that courts do not distinguish among different types of states. If courts do in fact draw such distinctions when interpreting and applying specific legal doctrines, those doctrines will appear internally inconsistent from the perspective of the prevailing model. And if indeed the actual distinctions courts draw are tied to differences between liberal and nonliberal states, then analysis of a particular doctrine within the alternative framework of the liberal internationalist model should reveal those different meanings.

It follows that the first function of the liberal internationalist model is interpretive. It should help us locate and clarify pockets of apparent incoherence in doctrines embracing both liberal and nonliberal states. In the remainder of this Article I propose to test this claim by using the liberal internationalist model as a framework for analyzing the act of state doctrine, a foreign relations doctrine that requires U.S. courts to give effect to the laws of foreign states. As it stands, the doctrine is a hodgepodge of contradictory rationales and results, fairly crying out for revision. I contend that analysis of the doctrine from a liberal internationalist perspective resolves several of the most difficult conceptual problems currently plaguing the doctrine, permits a defense of the leading Supreme Court precedent in the area, clarifies a long-standing debate over doctrinal classification, and offers a new basis for understanding the relationship of the act of state doctrine to associated doctrines such as jurisdiction to prescribe. n48

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n48 The exercise of applying the liberal internationalist model will also ultimately help flesh out the paradigm itself, generating new insights that may eventually contribute to ongoing political science and legal debates over the role of law in the international system.

-End Footnotes-

The second and third functions of the liberal internationalist model are predictive and normative. Moving beyond doctrinal analysis, the model should be able to predict differences in actual outcomes in cases involving liberal and nonliberal states. These differences should hold regardless of the specific doctrinal path followed to reach a specific result. Finally, the model can be used to generate a normative program to guide revision of the act of state doctrine.

In using the liberal internationalist model for these various purposes, however, let me be clear about the precise nature of my claim. I argue that the doctrinal interpretation and empirical results presented below are consistent with a conceptual distinction between liberal and nonliberal states. I do not

claim that judges base their decisions on an explicit or even an implicit distinction between liberal and nonliberal states per se. It seems more likely that the liberal-nonliberal distinction is a good proxy for a whole range of differences that judges do perceive and intuit. Signalling factors could include the public status of the foreign state as enemy or friend; the presence of highly charged ideological elements in a case that render it unusually "political"; the degree [*1928] and importance of economic interaction with the foreign state; general perceptions about the existence of the rule or meaning of law in the foreign state; or simply a set of intuitions about trust and commonality, on the one hand, and uncertainty and difference on the other. Identification of these more specific perceptions will ultimately be necessary to elaborate more precise causal propositions about what actually motivates courts and other government officials to treat nonliberal states differently from liberal states.

II. AN OVERVIEW OF THE ACT OF STATE DOCTRINE

In terms, the act of state doctrine requires U.S. courts to refrain from reviewing the acts of a foreign state -- on the assumption that "foreign state" is a generic and opaque entity. As discussed in the Introduction, application of the act of state doctrine has yielded doctrinally inconsistent and politically paradoxical results. The case law is so confused that articles on the doctrine routinely begin with a recital of all the various conflicting ways the doctrine has been understood and applied, and several have called outright for its abolition. n49 This Part will briefly sketch the principal cases in the evolution of the act of state doctrine and summarize the most prominent debates about sources and doctrinal classification. I emphasize in particular the development of two major conceptions of the doctrine -- as a conflicts-of-law rule and as a rule of judicial restraint or abstention -- as a prelude to a liberal internationalist analysis of how these twin dimensions can be understood in relation to cases involving liberal and nonliberal states.

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n49 See, e.g., Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 329 (1986).

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A. The Act of State Doctrine Before Sabbatino

The earliest act of state cases, first in Britain and then in the United States, all involved challenges to specific acts of foreign sovereigns or their agents and reflect a gradual merging of the concepts of sovereign immunity and absolute territorial sovereignty. n50 The Supreme Court [*1929] handed down the classic American formulation of the doctrine in *Underhill v. Hernandez*, n51 decided in 1897. A United States citizen filed a tort action against a Venezuelan government official for unlawful detention during a period in which that government was in the process of seizing power. n52 Although the Court could have found for the defendant on any number of grounds, such as *lex loci delicti commissi* or the personal immunity of the Venezuelan official, it chose to elaborate a broad principle:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the

acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. n53

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n50 The earliest reported case is *Blad v. Bamfield*, 36 Eng. Rep. 992 (Ch. 1674), an action by a British subject against a Danish subject in which the issue turned on the validity of letters patent issued by the Danish king. The British court refused to examine the validity of the letters in language referring to the personal immunity of the Danish sovereign. Two hundred years later, in a suit brought by the Duke of Brunswick versus the King of Hanover, the House of Lords imposed a territorial limit as a means of distinguishing between the King of Hanover's personal liability as a British subject and his immunity for "an act done in his sovereign character in his own country." *Duke of Brunswick v. King of Hanover*, 2 H.L. 1, 17 (1848). The King of Hanover was both a German sovereign and a British subject.

A similar progression is evident in United States case law. Some American scholars have traced the origins of the act of state doctrine back to the fountainhead of American sovereign immunity doctrine, Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See, e.g., Bazylar, *supra* note 49, at 330-31; Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. Int'l L. & Pol. 599, 601 n.15 (1980) [hereinafter Note, *Rehabilitation and Exoneration*]. Justice Rehnquist has also endorsed this view. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (Rehnquist, J.).

The *Schooner Exchange* line of cases merged with the British act of state cases in *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596 (App. Div. 1876), an action against the former President of San Domingo. The lower court relied on *Duke of Brunswick* for the proposition that "the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its territory," a principle said to be required "by the universal comity of nations and the established rules of international law." *Id.* at 599. The Appellate Division held that the continuing immunity of the former President "springs from the capacity in which the acts were done and protects the individual who did them," citing *Schooner Exchange* and subsequent cases. *Id.* at 600.

n51 168 U.S. 250 (1897).

n52 See *id.* at 250-51.

n53 *Id.* at 252. A student author labels this emphasis on diplomatic remedies "Fuller's Curse," attributing it to Justice Fuller's determination to enhance executive power in foreign relations. This desire had been thwarted in the celebrated cases *Paquete Habana*, 175 U.S. 677 (1900), and *Hilton v. Guyot*, 159 U.S. 113 (1895), in which Justice Gray had first elaborated on the principle that "international law is part of our law," 175 U.S. at 700, and then established the principle of comity. See 159 U.S. at 163-64. Fuller dissented in both those cases. See Note, *Rehabilitation and Exoneration*, *supra* note 50, at 604-05.

-End Footnotes-

Two more early cases built on this principle: *Oetjen v. Central Leather Co.* n54 and *Ricaud v. American Metal Co.* n55 These were companion cases involving property expropriated by the Mexican revolutionary forces of General Pancho Villa and later sold to private purchasers and taken to the United States. n56 Justice Clarke handed down both opinions, confirming both the rationale and the result of *Underhill*. n57 In passing, he also explained that the *Underhill* principle -- "the conduct of one independent government cannot be successfully questioned in the [*1930] courts of another" -- rests upon "the highest considerations of international comity and expediency." n58 In a third case, *American Banana Co. v. United Fruit Co.*, n59 an antitrust suit between two American corporations for actions taken in Costa Rica with the active complicity of the Costa Rican government, n60 Justice Holmes brought Austinian precepts to bear, proclaiming: "The very meaning of sovereignty is that the decree of the sovereign makes law." n61

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n54 246 U.S. 297 (1918).

n55 246 U.S. 304 (1918).

n56 See *Oetjen*, 246 U.S. at 299-301; *Ricaud*, 246 U.S. at 305-06.

n57 See *Oetjen*, 246 U.S. at 303 (Clarke, J.); *Ricaud*, 246 U.S. at 309 (Clarke, J.).

n58 *Oetjen*, 246 U.S. at 303-04 (Clarke, J.).

n59 213 U.S. 347 (1909).

n60 See *id.* at 349.

n61 *Id.* (Holmes, J.). As Larry Kramer has recently pointed out, however, Holmes ducked the difficult question of which sovereign's law should apply by retreating into territorial formalism. See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1992 *Sup. Ct. Rev.* 179, 186-98.

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Another line of cases grew out of challenges to the acts of the revolutionary Soviet government and the Nazi dictatorship. *United States v. Pink* n62 and *United States v. Belmont* n63 resulted from objections to the Litvinov Assignment, an executive agreement incident to the United States recognition of the Soviet Union. n64 The United States government agreed to swap claims of U.S. property holders against the Soviet government based on expropriated property in the Soviet Union for claims of the Soviet government against United States nationals based on debts owing to Soviet citizens prior to nationalization. n65 These cases involved no specific act by individual government officials, but rather a sweeping legislative program of expropriation at the heart of the new government's policy. Left to themselves, the New York state courts in both cases applied New York conflicts-of-law rules and refused to give effect to the Soviet expropriation as contrary to New York public policy. n66 Reversing these judgments, the Supreme Court proclaimed the primacy of United States foreign

policy concerns, particularly when coupled with the Executive's plenary power of recognition. n67 In the process, the Court was able to invoke the act of state doctrine by pointing to elements in Underhill, Ricaud and Oetjen that combined statements about the requirements of comity and the principles of territorial sovereignty with accompanying references to the exclusive province of the Executive in resolving such disputes. n68

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n62 315 U.S. 203 (1942).

n63 301 U.S. 324 (1937).

n64 See Pink, 315 U.S. at 206.

n65 See Pink, 315 U.S. at 211-13; Belmont, 301 U.S. at 326-27.

n66 See Pink, 315 U.S. at 214-15; Belmont, 301 U.S. at 327.

n67 Belmont was decided by Justice Sutherland, perhaps the greatest exponent of executive power in foreign affairs in Supreme Court history. See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-19 (1936) (Sutherland, J.) (regarding President as "Constitutional representative of the United States with regard to foreign relations").

n68 See Pink, 315 U.S. at 233; Belmont, 301 U.S. at 327-28.

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The Pink and Belmont approach continued in *Bernstein v. Van Heyghen* [*1931] *Freres, S.A.*, n69 a 1947 decision by Learned Hand applying the act of state doctrine to bar review of the validity of the Nazi expropriation and subsequent sale of plaintiff's property. n70 The court fully recognized that application of New York conflicts-of-law rules would mandate invalidation of such an act as "utterly odious to the accepted standards of justice of that state," n71 but claimed that this result conflicted with the act of state doctrine. n72 In upholding the application of the act of state doctrine to dismiss plaintiff's complaint, Judge Hand declared it a relevant question "whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the [act of state doctrine] does not apply." n73 Following this decision, the State Department issued a letter stating it to be the policy of the Executive "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." n74 In accordance with this letter, the Second Circuit subsequently reversed its position and directed the district court to try the case on the merits. n75 In all three of these cases, the result that would have been reached under normal principles of conflicts of law was overruled on the basis of a judicial doctrine of nonreview coupled with recognition of the Executive's primary role in foreign affairs.

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n69 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

n70 See id. at 248-51.

n71 Id. at 249.

n72 See id. at 249-50.

n73 Id.

n74 Dep't of State, Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers, 20 Dep't St. Bull. 592, 593 (1949).

n75 See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954).

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Plaintiffs unable to obtain a Bernstein letter, like plaintiffs in Pink and Belmont, saw themselves as private property owners whose interests had been sacrificed to the dictates of diplomacy. By the 1950s, the wave of decolonizations and the accompanying threat of nationalizations by newly independent governments n76 spurred an effort to ensure that the act of state doctrine would not be used to shield foreign expropriations from judicial scrutiny. The strategy was to recast the doctrine as a rule or principle of conflicts of laws. Instead of a negative doctrine forbidding review of the validity of a foreign act, the doctrine became an affirmative command directing a court to apply foreign law in a transnational dispute. From this perspective, the "act" itself is relatively immaterial; the question, as in any other dispute, is the law to be applied to determine the rights and obligations of the parties and the [*1932] limits on the forum court's ability to apply that law. n77

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n76 See Patrick M. Norton, A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation, 85 Am. J. Int'l L. 474, 478 (1991) (in late 1950s, dozens of newly decolonized states challenged customary law of expropriation in their efforts to nationalize).

n77 Another way to reach the same result was to expand the definition of "act" to include legislative acts (laws) as well as executive and administrative acts. The influential commentator F.A. Mann argued in 1943 that although "[t]he expression 'act of State' usually denotes 'an executive or administrative exercise of sovereign power,'" it "is not a term of art, and it obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment of a superior Court." F.A. Mann, The Sacrosanctity of the Foreign Act of State, 59 L.Q. Rev. 42, 42 (1943) (quoting 26 Halsbury's Laws of England 246 (Viscount Mailsham et al. eds., 1937)). Mann further urged that the validity of such "legislative acts" be reviewed to the extent permitted a foreign court under foreign law. See id. at 155-59; see also Michael Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826, 826 n.5 (1959) (following Mann in refusing to draw distinction between "acts" and "laws"); Richard A. Falk, Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino, 16 Rutgers L. Rev. 1, 30 (1961) (act of state doctrine requires deference to "foreign legislation or executive acts"); Roland A. Paul, The Act

of State Doctrine: Revived but Suspended, 113 U. Pa. L. Rev. 691, 693 (1965) (some courts interpret doctrine as precluding court in one country from judging validity of "local 'law'" in another); K.R. Simmonds, The Sabbatino Case and the Act of State Doctrine, 14 Int'l & Comp. L.Q. 452, 453 (1965) ("The act of the foreign State will usually take the form of 'a law determining or giving effect to the public interests' of that foreign state." (quoting Restatement of Foreign Relations Law of the United States @ 41(c) (Proposed Official Draft 1962))).

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As developed by Michael Zander in an influential article published in the American Journal of International Law in 1959, n78 this approach had two advantages. First, it revived the public policy exception, a time-honored conflicts principle allowing nations to refuse recognition and enforcement of a foreign law if contrary to the fundamental public policy of the forum state. n79 This was precisely the principle New York courts originally sought to apply in refusing to give effect to the foreign law in Pink, Belmont, and Bernstein. n80

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n78 See Zander, supra note 77. Technically, Zander argued not that the act of state doctrine was itself a conflicts-of-law rule, but that "the proper extent" of the act of state doctrine "should be limited by the rules of the conflict of laws." Id. at 837. Other proponents of this position, as discussed infra text accompanying notes 84-85, were not so careful.

n79 See Zander, supra note 77, at 848-50.

n80 See Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 252 (2d Cir.), cert. denied, 332 U.S. 772 (1947); United States v. Belmont, 85 F.2d 542, 543 (2d Cir. 1936), rev'd, 301 U.S. 324 (1937); United States v. Pink, 32 N.E.2d 552 (N.Y. 1940) (per curiam decision in accord with Moscow Fire Ins. Co. v. Bank of New York and Trust Co., 20 N.E.2d 758, 764 (N.Y. 1939), rev'd, 315 U.S. 203 (1942)).

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Second, a classification of the act of state doctrine as a conflicts rule permitted an additional exception for cases in which the act of the foreign state violated international law. This exception, according to Zander and others, was supported by both precedent and logic. n81 To the extent nations such as the United States recognized international law as part of their municipal law, it was argued, a municipal law rule [*1933] could not condone a violation of international law. n82 Thus, if a foreign expropriation violated the international law prohibition on expropriation without prompt, adequate and effective compensation, U.S. courts should be allowed to review the validity of the expropriation under international law. The application of international law would thus trump the application of foreign law otherwise required by the act of state doctrine.

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n81 See Zander, supra note 77, at 834, 840 (citing three English cases in support of an international law exception).

n82 See *id.* at 844. In fact, of course, this result would depend not only on acceptance of international law as part of a domestic legal system, but also on a hierarchical principle allowing international law to trump a conflicting domestic law -- a principle true in the United States only of treaties superseding previous statutes.

The conception of the act of state doctrine as a municipal law conflicts rule had the additional advantage of defeating the claim that the act of state doctrine was itself a rule of international law, and thus must be construed consistently with other international law rules. The most sophisticated counter to this position derived from a reconceptualization of all of conflicts of law as another branch of international law -- in the sense of a "horizontal" body of rules designed to preserve and promote order in the international system. Myres McDougal and Richard Falk shared this perspective as a point of departure for analysis of the act of state doctrine, but reached very different conclusions about the international law exception. See, e.g., Foreign Assistance Act of 1965: Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. 1033, 1035 (1965) (statement of Prof. Myres S. McDougal); Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 51 (1964).

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The corporate bar and the academy overwhelmingly favored this characterization of the act of state doctrine, since it promised to protect the foreign assets of corporate clients and encourage U.S. courts to interpret and apply international law in domestic cases. n83 Reflecting this support, the Restatement of American Foreign Relations Law described the doctrine as a conflicts rule in its draft revision of 1960. n84 Indeed, writing in anticipation of the Supreme Court's final word in *Sabbatino*, Richard Falk averred that "[t]his classification of the act of state doctrine [as a conflicts rule] has become almost standard now." n85

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n83 See, e.g., Robert Y. Jennings, Remarks, in *The Aftermath of Sabbatino: Background Papers and Proceedings of the Seventh Hammarskjold Forum* 87, 87-89 (Lyman M. Tondel, Jr. ed., 1965) [hereinafter *The Hammarskjold Forums*]; Richard B. Lillich, *The Protection of Foreign Investment: Six Procedural Studies* 46-48 (1965); John G. Laylin, Address, *Holding Invalid Acts Contrary to International Law -- A Force Toward Compliance*, 58 *Am. Soc'y Int'l L. Proc.* 33 (1964); F.A. Mann, *The Legal Examination of the Competence of National Courts to Prescribe and Apply International Law: The Sabbatino Case Revisited*, 1 *U.S.F. L. Rev.* 49, 68-70 (1966); Myres S. McDougal, Comments, 58 *Am. Soc'y Int'l L. Proc.* 48, 48-50 (1964).

n84 See Restatement (First) of the Foreign Relations Law of the United States @ 41 (Proposed Official Draft 1962).

n85 Falk, *supra* note 82, at 118. Although the book was published after *Sabbatino*, the chapter in which this quotation appears is the republished version of an earlier paper that begins with the assertion that the *Sabbatino* litigation "is still in process" and that a Supreme Court decision "is awaited with growing suspense." *Id.* at 115. It should be noted, as discussed further below, that Falk favored the conflicts classification for the opposite reason:

his conflicts approach was the linchpin of an argument that the Court should defer to the foreign law.

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[*1934] B. Redefining the Act of State Doctrine: Sabbatino

The litigation that produced Banco Nacional de Cuba v. Sabbatino n86 was part of the larger political struggle that spawned the Bay of Pigs and the Cuban Missile Crisis. As one of a lengthy sequence of measures and countermeasures that characterized the growing enmity between the Castro government and the United States, by September 1960 the Cuban government had nationalized by forced expropriation all property or enterprises in which American nationals had an interest. The U.S. State Department promptly denounced the expropriation as "discriminatory, arbitrary and confiscatory" and hence "manifestly in violation of . . . international law." n87 One of the expropriated property owners (C.A.V.) had contracted prior to the expropriation to sell a cargo of sugar through a New York broker (Farr, Whitlock). n88 After passage of the expropriation decree, Farr, Whitlock entered into an identical contract with an instrumentality of the Cuban government, which in turn assigned the bills of lading to petitioner, Banco Nacional de Cuba. n89 Upon a promise of indemnification from C.A.V., however, Farr, Whitlock subsequently refused payment on these documents when tendered by Banco Nacional. n90 The proceeds from the sugar were paid over to a receiver, Sabbatino, under a New York statute authorizing receiverships for New York assets of nationalized foreign corporations. n91 Banco Nacional then sued Sabbatino. Sabbatino asserted the illegality of the expropriation under international law; Banco Nacional countered with the act of state doctrine. n92

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n86 376 U.S. 398 (1964).

n87 Id. at 402-03.

n88 See id. at 401.

n89 See id. at 404-05.

n90 See id. at 405-06.

n91 See id. at 406.

n92 See id. at 412. This is an unusual posture for the act of state doctrine, which is more typically asserted as a defense either to jurisdiction or to justiciability. See, e.g., Ricaud v. American Metal Co., 246 U.S. 304, 307-08 (1918). The reversal of parties occurred due to Farr, Whitlock's breach of its renegotiated contract with the Cuban government, and the resulting transfer of proceeds under the New York statute. In the normal course of events, C.A.V. would have sued Banco Nacional after the Cuban government had received the proceeds from the sugar broker.

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Both the district court and the court of appeals found for Sabbatino, holding that the act of state doctrine did not bar review of the validity of the Cuban law under international law. n93 The Second Circuit explicitly characterized the act of state doctrine as "one of the conflict of laws rules applied by American courts," and thus "not itself a rule of international law." n94

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n93 See Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 381 (S.D.N.Y. 1961), aff'd, 307 F.2d 845, 857-58 (2d Cir. 1962), rev'd, 376 U.S. 398 (1964).

n94 307 F.2d at 855.

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The Supreme Court disagreed. In a landmark opinion by Justice [*1935] Harlan for an eight-to-one majority, the Court held that the act of state doctrine did bar review of the validity of the Cuban expropriation, but on the basis of a very different rationale from that elaborated in the earlier cases. After surveying Underhill, Central Leather and Ricaud, the opinion turned to the "foundations on which we deem the act of state doctrine to rest." n95 Justice Harlan asserted that the doctrine was "compelled [neither] by the inherent nature of sovereign authority," as implied by the earlier decisions, nor "by some principle of international law." n96 Nor by the Constitution. n97 In fact, the Court found that the doctrine was not compelled by anything. It did, however, "have 'constitutional' underpinnings." n98 The Court elaborated:

[The doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. n99

-Footnotes-

n95 376 U.S. at 421.

n96 Id. (Harlan, J.).

n97 See id. at 423.

n98 Id.

n99 Id. One of the Court's primary aims in this portion of the decision was to establish that notwithstanding the Erie doctrine, the doctrine was a rule of federal law binding on state courts.

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The Court explicitly refused to formulate an absolute rule as to when the act of a foreign state should be deemed an unreviewable act of state. On the contrary, the "continuing vitality" of the doctrine "depends on its capacity

to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." n100 On the specific facts of Sabbatino, the decisive factors against reviewing the validity of the Cuban law were the importance of expropriation issues for the conduct of U.S. foreign relations, what the Court perceived as the relative lack of an international legal consensus on the appropriate standard of compensation, and the strong sense that the political branches would be better placed to negotiate a bilateral or multilateral solution. n101

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n100 Id. at 427-28.

n101 See id. at 428-34.

-End Footnotes-

According to conventional wisdom, the act of state doctrine was thus transformed from a conflicts rule, directing a court to apply a foreign law under specified conditions, to a doctrine of judicial restraint or abstention, requiring a court confronting a foreign act of state to refrain [*1936] from adjudicating the validity of the act. n102 The only mention of the doctrine as a conflicts rule in Sabbatino is in Justice White's solo dissent. n103

-Footnotes-

n102 See, e.g., Restatement (Third) of the Foreign Relations Law of the United States @ 443 cmt. a (1987) [hereinafter Restatement (Third)] ("The doctrine was developed . . . as a principle of judicial restraint, essentially to avoid disrespect for foreign states."); Dale S. Collinson, Sabbatino: The Treatment of International Law in United States Courts, 3 Colum. J. Transnat'l L. 27, 29 (1964) ("[A]ct of state doctrine . . . preclude[s] examination of the validity of the expropriation under either the internal law of the taking state or the conflicts public policy of the forum state."); Robert Delson, The Act of State Doctrine -- Judicial Deference or Abstention?, 66 Am. J. Int'l L. 82, 83 (1972) (act of state doctrine one of "deference to an established theory of judicial abstention"); Stephen Jacobs et al., Comment, The Act of State Doctrine: A History of Judicial Limitations and Exceptions, 18 Harv. Int'l L.J. 677, 677 (1977) ("United States courts may not examine the validity of a taking of property by a recognized foreign sovereign within its own territory"); cf. Louis Henkin, Act of State Today: Recollections in Tranquility, 6 Colum. J. Transnat'l L. 175, 178 (1967) [hereinafter Henkin, Act of State] (characterizing act of state doctrine as "special rule modifying the ordinary rules of conflict of laws").

n103 Describing the act of state doctrine as a "judicially fashioned doctrine of nonreview," Justice White saw it as the flip side of the conflicts-of-law rule that title to property is governed by lex loci, a rule in turn derived from the jurisdictional principle permitting each sovereign "to prescribe the rules governing the title to property within its territorial sovereignty." 376 U.S. at 445 (White, J., dissenting). The bedrock of this principle was none other than the "deeply imbedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has been characterized as the touchstone of private and public international law." Id. at 445-46. Both the general structure and the specific examples used in White's argument closely parallel the Zander

article. See Zander, supra note 77.

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C. The Splintering of Sabbatino

The history of the act of state doctrine since Sabbatino has been largely a history of efforts to undo or narrow the Sabbatino result. The immediate reaction to Sabbatino from the academic-professional coalition that had supported the conflicts view of the doctrine was outrage -- fueled by claims that the Court had made the United States an accomplice of gross violations of international law. As John Stevenson fumed, "It has been our stated national policy to uphold and strengthen the role of international law. Yet the act of state doctrine cloaks even the most patently illegal international act in the protective veil of domestic legality." n104 These views carried sufficient weight to convince Congress to overturn the specific Sabbatino result. The Second Hickenlooper Amendment, n105 also known as the Sabbatino Amendment, specifically created an international law exception to the act of state doctrine in cases like Sabbatino itself, in which the confiscated property or traceable proceeds from such property was located in the [*1937] United States at the time of litigation. n106

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n104 John Stevenson, Remarks, in The Hammarskjold Forums, supra note 83, at 73, 74.

n105 See Foreign Assistance Act of 1964, Pub. L. No. 88-633, @ 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. @ 2370(e)(2) (1990)).

n106 See Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 399 -- 402 (2d Cir. 1970), vacated, 400 U.S. 1019 (1971).

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Probably due to widespread awareness of Executive opposition to its passage, n107 the Second Hickenlooper Amendment has been construed as narrowly as possible by the courts. n108 Opponents of Sabbatino thus focused anew on the Supreme Court. Two cases on facts very similar to Sabbatino reached the Court in the 1970s, both involving expropriation claims against the Cuban government by American citizens. In both cases the Court splintered badly. Unity was restored in the one act of state case that the Court decided between 1976 and 1992, but only by way of a mode of analysis that avoided grappling with the thorny issues at the heart of the doctrine. I will briefly describe the issues and the basic lines of argument in each of these decisions as a prelude to further discussion below.

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n107 The Executive branch expressed its opposition to the Second Hickenlooper Amendment through a Memorandum submitted to the Senate Foreign Relations Committee and congressional testimony by the Attorney General. The Executive position did not question the validity of the proposed amendment, but emphasized that its practical impact was likely to be detrimental to U.S. property holders abroad. For a detailed discussion of the Second Hickenlooper Amendment,